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IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Melbourne

No 70 of 1980

B e t w e e n -

PETER DURACK (AS ATTORNEY-GENERAL FOR THE COMMONWEALTH)

Applicant

and

WIESLAWA GASSIOR and OTHERS

Respondents

Application to strike out statement of claim

AICKIN J

(In Chambers)

TRANSCRIPT OF PROCEEDINGS

AT MELBOURNE ON MONDAY, 13 APRIL 1981, AT 10.52 AM

MR N. MOSHINSKY: May it please Your Honour, I appear on behalf of the defendant and the applicant in the summons. (instructed by the Commonwealth Crown Solicitor)

HIS HONOUR: You appear in person, do you, Mrs Gassior?

MRS W. GASSIOR: Yes, Your Honour. I tried to obtain some representation of solicitors but they refused.

HIS HONOUR: Have you sought legal aid in this matter?

MRS GASSIOR: No, I cannot talk to legal aid because I obtain some settlement, it was settlement, so I got some cash so I did not - but I went to see Galbally, O'Donohue, and they said they are not interested in my case.

HIS HONOUR: Very well. Mr Moshinsky, this is your summons.

MR MOSHINSKY: Yes, it is, Your Honour.

HIS HONOUR: There are a large number of documents which have been filed in the registry today, I understand. I do not know whether they have been served on your instructing solicitor.

MR MOSHINSKY: They have not been served on us. We have not filed any documents other than the summons. Your Honour, it is a pleading summons under Order 26, Rule 18.

HIS HONOUR: You are not then in any way familiar with what is, I take to be, a cross-application by the plaintiffs.

MR MOSHINSKY: I did not know there was such an application.

HIS HONOUR: Perhaps before we deal with your application, I should ascertain from the plaintiff what the position is about the cross-application.

MRS GASSIOR: Yes. I am sorry, Your Honour, it was so late but it took me so long to do it. I got only 12 days because Attorney-General - Crown-Solicitor send me summons and to my agent after 12 days which left me with 12 days.

HIS HONOUR: The papers, I understand, have not been served on the Commonwealth Crown Solicitor.

MRS GASSIOR: Which papers?

HIS HONOUR: This new application, the cross-summons.

MRS GASSIOR: This cross-petition was not, because I filed today.

HIS HONOUR: It has not been served?

MRS GASSIOR: No.

HIS HONOUR: Then you cannot expect it to be dealt with today.

MRS GASSIOR: I have got copies here if they want to read through it or something and serve later again photocopies and just leave, let us say, and serve officially photocopies and this, let us say,give today.

HIS HONOUR: But that gives the Crown Solicitor and his counsel no opportunity whatever to read the documents before the proceedings get under way. Do you wish to have the proceedings adjourned?

MRS GASSIOR: Yes, for the purpose of reading and also of me filing, delivering and serving some extra documents.

HIS HONOUR: In addition to these that have been filed today?

MRS GASSIOR: Filed, yes.

HIS HONOUR: If you would just sit down for a moment. Mr Moshinsky, you see the problem. You have not seen these documents, your instructing solicitor has not seen them. They consist of a cross-summons as it is described, an affidavit and a large number of exhibits. The cross-summons seeks a variety of different kinds of relief. Perhaps if you would like to take time to read the unserved summons - I do not press you to do it, you may like to - - -

MR MOSHINSKY: I would like to see it, Your Honour. I really have no idea what it is about.

HIS HONOUR: There is no time to look at anything other than the summons because the material is extensive but it may assist in a decision as to what we should do this morning, if you look at the nature of the relief sought.

MR MOSHINSKY: Your Honour, my instructions are that we are not anxious to have the matter adjourned and if it is at all possible to proceed today with both matters, we would be prepared to accept short service.

HIS HONOUR: I think that there should not be real difficulty in proceeding because the first three items in the new summons, as I understand them, relate really exclusively to the matter which arises on your summons and the question would be, if you were successful in your summons, whether there should be leave to re-plead.

MR MOSHINSKY: Yes, that is a normal matter that arises in these sorts of cases anyhow.

HIS HONOUR: So that the first three matters do not give rise to anything new and the fourth matter appears to be premature, the fifth really to be consequential on 1, 2 and 3 and six, likewise.

MR MOSHINSKY: Yes, Your Honour, and then there is the question of costs.

HIS HONOUR: It does not seem to me that anyone will suffer any prejudice by proceeding with your summons.

MR MOSHINSKY: We would like to do that today.

HIS HONOUR: I think perhaps I had better explain this to the plaintiff in person. Mrs Gassior, having read this summons of yours, it seems to me to be clear that it overlaps to a considerable extent the same matters as arise on the summons taken out by the Commonwealth to strike out your statement of claim. What you want to do is to obtain leave to amend in some respects. In the ordinary way, if the Court strikes out an existing statement of claim, you do get an opportunity to re-plead without the action coming to an end. That is not always done but it is always open to you to say, if you lose - since you want to amend anyway, it may give you some guidance in your amendment if - assuming that your present statement of claim is struck out, you would still have an opportunity to re-plead.

MRS GASSIOR: To the same Court, Your Honour, to the High Court, because I heard on 12 February this year at the registry that my case will be referred to supreme court for the result of costs and proper jurisdiction, but it was not mentioned, but I oppose strongly to such reference of my case to supreme court because the supreme court does not have jurisdiction, Your Honour.

HIS HONOUR: Mrs Gassior, we are not now dealing with that question. You are in the High Court now. The Commonwealth's application is that your writ that you have issued and the statement of claim which is endorsed on the writ do not disclose a cause of action. Now, that is for the High Court to decide. Supposing that the matter reaches the point where the pleadings are completed and the issues are decided, then it will be for this Court to decide whether the case should be heard in the High Court or remitted to a supreme court. All that is premature at this stage, so you are not in any way prejudiced in putting forward your views about that, just that the point does not arise yet.

MRS GASSIOR: Because I got with me I was not able, of course, to file, issue at the registry pleadings in new

statement of claim-because of the reason that the rule says that I have to pay sort of first costs to the defendant before I be allowed, if I wanted to before today's hearing in chambers. It is a working sheet but, I mean - I believe today which discloses there is a cause of claim - - -

HIS HONOUR: But you see I have not yet heard what counsel for the Commonwealth has to say about that. Their application is to strike out this statement of claim because it does not disclose a reasonable cause of action and they must be heard on that summons.

MRS GASSIOR: Your Honour, do you wish to strike out by reason of default or - - -

HIS HONOUR: We have not heard the reasons which the Commonwealth brings forward other than those that are set out in the summons, so I do not know what the argument will be and I think that we would both be better served and get on with the matter quicker if we heard what the Commonwealth has to say about your existing statement of claim. Yes, Mr Moshinsky.

MR MOSHINSKY: In this case the plaintiff has brought an action against the Attorney-General by reason of alleged actions committed by Mr Justice Emery of the Family Court. The application made today under Order 26, Rule 18, is on three bases: Firstly, that it is submitted as a matter of law a judge of the Family Court is not liable personally for the acts performed by him bona fide in his judicial capacity. Secondly, it is submitted, Your Honour, that the Attorney-General is not to be vicariously liable, even if this were not the case, because a judge of the Family Court is not a servant or agent of the Crown.

And, thirdly, even if a judge were a servant or agent of the Crown, it is submitted that the performance of the acts in this particular case involved the exercise of an independent discretion in respect of which no right of action against the Attorney-General arises. Your Honour, because the statement of claim has been drafted by the plaintiff in person, perhaps I ought inform Your Honour about the background of this particular case, and broadly what are the matters that brought her to take this course of action.

The course of litigation between herself and her husband had been extremely complex and has occurred in the Family Court, but in substance it seems that the nub of the complaint is that, as a result of a hearing before Mr Justice Emery, His Honour made an order that the plaintiff vacate

the matrimonial home by a certain date. That order was not complied with and an appeal was lodged against that order. Subsequently, proceedings were brought by the husband for contempt and His Honour Mr Justice Emery heard these proceedings and ordered that the plaintiff spend a month in gaol. She did in fact spend five days in prison at Fairlea before she purged her contempt. She then appealed against this order to the Full Court of the Family Court, the order which - - -

HIS HONOUR: The original order?

MR MOSHINSKY: The order that placed her into Fairlea, the contempt order, and her appeal was successful.

HIS HONOUR: Her appeal against the contempt order?

MR MOSHINSKY: Her appeal against the contempt order was successful, and the reason that it was successful was because the Full Court said Mr Justice Emery was in error in making a contempt order on the assumption that a section 79A application by the plaintiff had already been dealt with by the Full Court. Section 79A of the Family Court Act provides that:

> Where, on application by a person affected by an order made by a court under section 79 -

and that is the section which deals with alteration of property interests -

> the court is satisfied that there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance, the court may, in its discretion, set aside the order and if it thinks fit, but subject to 79(2) and (4), make another order under section 79 in substitution for the order so set aside.

It seems that when the original hearing on the property matters took place and the order was that the wife's interest be purchased by the husband and that she leave the matrimonial home, she was to get the custody of the children, but she appealed against that order and also took out a separate application under section 79A. When the contempt proceedings came on, the judge who heard it, Mr Justice Emery, was under the impression that the appeal against the original order dealing with the property dealt with the section 79A matters and therefore there was nothing on foot, so to speak, and he was entitled to make the contempt order. But in fact he was in error in that respect and that

has been shown by the judgment of the Full Court on 14 March 1979.

I make this application on the basis that the judge did make a mistake of law in this particular case resulting in the imprisonment of the plaintiff for five days. Your Honour, it is submitted that even though the judge made a mistake of law, as a matter of legal principle it is clearly established by ancient authority that a judge is not liable personally for the acts performed by him bona fide in his judicial capacity. If I could refer Your Honour to a number of authorities on this point.

HIS HONOUR: Yes.

MR MOSHINSKY: There are of course many ancient authorities - in fact, in Halsbury there is some suggestion that this principle goes back to the 14th century - but a number of examples will suffice to illustrate this particular principle. If I could refer Your Honour to Scott v Stansfield (1868) 3 LR Ex. That was a case, Your Honour, where:

> The plaintiff carried on the business of an accountant and scrivener, and the defendant falsely and maliciously -

it was alleged -

> and without reasonable or justifiable cause, and not on any justifiable occasion, spoke and published of the plaintiff, of and concerning him in relation to his said business and the carrying on and conducting thereof, the words following -

and this apparently took place in court, the defendant being a county court judge, he said:

> "You", meaning the plaintiff, "are a harpy, preying on the vitals of the poor."

The judge was the defendant in this particular action. Page 223, Baron Kelly stated that:

> It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions without independence and without fear

> of consequences. How could a judge so exercise his office if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him?

Your Honour, another case also illustrates the principle and in this particular decision, perhaps the allegations were even more extreme than the case of Scott v Stansfield. That is the decision of Anderson v Gorrie, (1895) 1 QB 668. That was an action brought against three judges who were judges of the Supreme Court of Trinidad and Tobago. It was alleged that by their acts, they, so to speak, perverted the course of justice in a number of ways. One of the allegations was that the plaintiff attended before one of the judges to be examined as to his means of satisfying certain judgments.

> The examination was adjourned, and the plaintiff, under certain rules of Court enacted by the local Judicature Ordinance of 1879, was ordered to find bail, which was fixed at the sum of 500 pounds, with one surety for the like amount. In default of finding bail the plaintiff was committed to prison, and an application for a habeas corpus to determine the validity of the committal was refused by the defendant Cook.

The matter in fact came before a jury and the jury found that the particular judge, Cook,

> had overstrained his judicial powers, and had acted in the administration of justice oppressively and maliciously, to the prejudice of the plaintiff and to the perversion of justice, and they assessed the damages at 500 pounds.

But in that particular case, Your Honour, the decision was that no action would lie against the judge of the supreme court of a colony in respect of any acts done by him in his judicial capacity, even though he had acted oppressively and maliciously, to the prejudice of the plaintiff and to the perversion of justice.

The principle has been recently considered by the Court of Appeal, Your Honour, in the case of Sirros v Moore, (1975) 1 QB 118. That was a case concerning an alien on a visit to the United Kingdom who alleged that he was imprisoned wrongly as a result of an order of a magistrate who had no power to make that order. The principle relating

to the judicial immunity was examined by the court and at page 136, Lord Denning stated that:

> In this new age I would take my stand on this: as a matter of principle the judges of superior courts have no greater claim to immunity than the judges of the lower courts. Every judge of the courts of this land - from the highest to the lowest - should be protected to the same degree, and liable to the same degree.....So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in law. What he does may be outside his jurisdiction - in fact or in law - but so long as he honestly believes it to be within his jurisdiction, he should not be liable.

Your Honour, if I could turn now to the statement of claim in this action, it is submitted that an examination of the pleadings reveals that there is no allegation that Mr Justice Emery did not act bona fide. The statement of claim is drawn by the plaintiff herself and - does Your Honour wish me to read it or to summarize it.

HIS HONOUR: I have read it myself so perhaps if you summarize it.

MR MOSHINSKY: Your Honour, it seems that the cause of action pleaded is neither negligence, default or wilful default. The particulars allege a number of different matters: Firstly, it is alleged that she was wrongly sentenced to gaol for one month for contempt and taken to Fairlea Prison for nearly seven days; that Mr Justice Emery negligently did not adjourn contempt proceedings until the determination of a section 79A matter; that Mr Justice Emery should have adjourned contempt proceedings until the plaintiff received maintenance; until she had a roof over her head. In other words, I think the allegation here is that she should not have been subjected to contempt proceedings until she was well provided for by her husband who apparently had not paid his maintenance.

HIS HONOUR: You referred to this allegation as being that he had negligently failed to adjourn. Which paragraph is that?

MR MOSHINSKY: It is on the second page, Your Honour. It is paragraph 4(d).

HIS HONOUR: Yes, I see, thank you.

MR MOSHINSKY: That Mr Justice Emery was in error as to the procedure involved in section 79A; that Mr Justice

Emery failed to exercise his powers properly because he should have fined the plaintiff first rather than sent her to gaol; that Mr Justice Emery should have put the plaintiff on probation rather than made an order for imprisonment and that he used the contempt proceedings for improper purpose of evicting the children and mother from their home and that Mr Justice Emery should have asked her to return to court earlier to give her a chance of purging her contempt.

There were other mistakes and acts of negligence complained of. There was unfairness alleged and the unfairness was that the contempt order was made even though the husband was in default regarding his maintenance, that Mr Justice Emery accepted an incorrect valuation of the matrimonial home at a figure of $34,000 instead of $65,000 which she alleged was correct, but which subsequently the Full Court settled on a figure of $49,000. Mr Justice Emery should not have ordered costs to be deducted from her share and should not have dismissed the application to set aside property orders before hearing the claim about the husband's frauds. I think that is related to the section 79A matter.

Mr Justice Emery ordered that no maintenance was to be paid until the wife moved out of the house. She said that this period was artifically prolonged because there was such a long time until the appeal was heard and so she was living without maintenance for a long time. In general terms, it is an allegation that the judge did not properly apply the law and perhaps the most substantial allegation is that he did make a mistake with respect to section 79A. It is submitted, Your Honour, that taking the claim at its strongest and giving full weight to the allegations made about the judge's mistake of law, as the principles stand, there is no cause of action against the judge himself.

But, in any event, Your Honour, it is submitted that on the principle of Enever v R, a judge of the Family Court could not be sued in such a case in the manner that has been done in this case. That case, which is reported in (1905) 3 CLR 969 is relied on by me for the proposition that any officer of the Crown who exercises an independent discretion is placed in a special category as far as actions against the Crown are concerned. But I do make the more fundamental submission, Your Honour, that in fact a judge of the Family Court is not a Crown servant or agent.

HIS HONOUR: Just give me a moment to refresh my recollection as to Enever v R.

MR MOSHINSKY: The report is at page 969.

HIS HONOUR: It is a long time since I had occasion to look at it.

MR MOSHINSKY: That was a case where the appellant was wrongly arrested in a public street in Hobart by a police constable purporting to act in the discharge of his duty who detained him upon a false charge that he had committed a breach of the peace. The appeallant brought an action for damages against the Government of Tasmania, received a verdict of 25 pounds from the jury, and ultimately he failed in the High Court because it was held that the police officer exercised an independent discretion.

HIS HONOUR: Yes, I recall the nature of the proceedings.

MR MOSHINSKY: Your Honour, in order for the applicant in the summons to succeed, he has, of course, a heavy onus and must persuade Your Honour that the claim is not maintainable and various language has been used to support an application under this particular rule. Your Honour, quoting from the decision of General Steel Industries Inc v the Commissioner of Railways, 112 CLR 125, 129, Sir Garfield Barwick, dealing with the particular rule, Order 26, Rule 16, at page 129 states that:

> There is no need for me to discuss in any detail the various decisions, some of which were given in cases in which the inherent jurisdiction of a court was invoked and others in cases in which counterpart rules to Order 26, r.18, were the suggested source of authority to deal summarily with the claim in question. It is sufficient for me to say that these cases uniformly adhere to the view that the plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he brings, unless his lack of a cause of action - if that be the ground on which the court is invited, as in this case, to exercise its powers of summary dismissal - is clearly demonstrated. The test to be applied has been variously expressed; "so obviously untenable that it cannot possibly succeed"; "manifestly groundless"; "so manifestly faulty that it does not admit of argument"; "discloses a case which the Court is satisfied cannot succeed";

and so on, Your Honour. It is submitted that any of these phrases must apply to this particular case and on any view, whether one repleads the matter in any way whatsoever, if the substance of the complaint

is the error of the judge, assuming that section 79A had been dealt with by the Full Court, it is submitted that cannot be the basis of an action in this court.

HIS HONOUR: Thank you. Mrs Gassior, is there anything you would like to say in reply to what has been said on behalf of the defendant?

MRS GASSIOR: Your Honour, I am taken by surprise with all this discoveries. For this reason, I do not believe I could make any very valid statement but, Your Honour, it strikes me that if even Judge Emery is a 100 per cent immune - and I believe he could be - then the Crown is not immune and other defendants.

HIS HONOUR: What is put against you is that the Attorney-General or the Commonwealth - you sue the Attorney-General as representing the Commonwealth - is not liable for the actions taken by a judge who makes a mistake of fact or a mistake of law because the judge is not an officer of the Commonwealth and does not represent the Commonwealth when he is carrying out his judicial functions; that a judge is independent of the Government and acts in a capacity in which he does not represent the Commonwealth as an employee of the Commonwealth would in some other kind of action, for example, if a Commonwealth car,driven by a Commonwealth driver,is involved in an accident and that the person injured may sue the Commonwealth because the driver is an employee of the Commonwealth.

But the argument put against you is that a judge is not in that position. He exercises an independent function not under the control of the Commonwealth Government in any way at all. That is the argument that is put against you and it is clearly enough indicated that in the summons which was taken out by the Commonwealth, that the application was on the basis that the statement of claim did not disclose any reasonable or probable cause of action.

MRS GASSIOR: Your Honour, how about exercising some independent discretion of Attorney-General?

HIS HONOUR: The Attorney-General was not exercising any function or any discretion. You sue him as representing the Commonwealth, as I understand it, according to the heading of your action, but it is really the judge, Mr Justice Emery, was exercising an independent function, one over which the Attorney-General had no powers of control and a function over which the Commonwealth as a whole had no powers of control. That is the argument that is being put.

MRS GASSIOR: Your Honour, unfortunately for my case I do not know at the moment. I cannot say much more unfortunately.

HIS HONOUR: Do you think that you would be in a better position to deal with it if you were able to obtain some legal advice?

MRS GASSIOR: I tried, Your Honour, honestly, and I - because in the Family Court proceedings I very often resigned from solicitors but this time I tried and I mean to because I am tired of appearing myself, but, no luck.

HIS HONOUR: Did you receive any advice at all? Did you receive any advice of any kind from the people to whom you applied? I do not want you to tell me what they advised you, but I merely want to know whether they gave you advice. I do not want you to tell me what it was.

MRS GASSIOR: I will say that substantially two of them say one thing and the other solicitor said something else, but I also talked to some other ones - yes, basically two say the same thing and one, I will say, something different which strikes me.

HIS HONOUR: Yes, I see. If the matter were to be adjourned do you think you would be able to get representation?

MRS GASSIOR: I can knock again on the door but - - -

HIS HONOUR: There is nothing further you think you can add yourself, is that right?

MRS GASSIOR: I can try some other solicitors but I got always bad experiences with solicitors and I do not know. I was put off after this - at least three trials, because of the other experiences but also in Family Court but also - - -

HIS HONOUR: That is in the Family Court, yes.

MRS GASSIOR: I can try, Your Honour. I mean I can knock on the doors again and ask, but I do not know.

HIS HONOUR: There is nothing else that you wish to add? Thank you, Mrs Gassior.

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HIS HONOUR: In this matter, I do not think that any useful purpose would be served by reserving my decision on the application by the defendant to have the statement of claim struck out on the ground that it discloses no reasonable cause of action.

The proceedings arise out of proceedings in the Family Court in which an unfortunate error, made by a judge of that Court, led to the committal of the first plaintiff for contempt of that Court. The order was set aside on appeal by the Full Court of the Family Court but, in the meantime, the first plaintiff had spent some days in custody on the basis of the order committing her for contempt of the Family Court. That order was, of course, set aside in the Full Court but not before the expiration of some five days or thereabouts.

I am not concerned with the proceedings in the Family Court or the results arrived at in those proceedings after the appeal to the Full Court of that court in relation to the matrimonial dispute and the property dispute. The plaintiff's action is brought against the Attorney-General, described as being in a representative capacity for the Commonwealth, and/or the Family Court and/or the Attorney-General's Department. It is necessary to say that the Family Court of Australia is not a person corporate or unincorporate and it is not possible to sue the Family Court under that name.

In the same way, it is not possible to sue the Attorney-General's Department for that, too, is not a legal person. But in the end, it makes no difference to the present proceedings which are also brought against the Attorney-General as representing the Commonwealth and in so far as there may be any liability, it would be the liability of the Commonwealth. I do not need to pursue that procedural question.

The cause of action may be stated very briefly as being one brought against the Commonwealth for wrongful acts committed by Emery J in the Family Court. It is not alleged that he did not act bona fide in what he did but it is very properly conceded by counsel for the defendants that Emery J did make a mistake of law which had serious consequences for the first plaintiff. It is alleged in the statement of claim that Emery J acted negligently in a number of respects; in refusing to adjourn the contempt proceedings and did not follow the appropriate procedure, both in failing to adjourn and in making the orders that he did make, in the sense that it is said that if he had rightly taken the view that there was a contempt, there were other steps which he should have taken before taking the

extreme step of committing for contempt and causing the first plaintiff to be imprisoned. I do not think that I need detail further the various complaints that are made about Mr Justice Emery's conduct of the proceedings.

It is, however, clearly established by the authorities to which I have been referred that no action may be brought under our legal system against judges for acts done in the course of hearing or deciding cases which come before them. I do not need to discuss the authorities. The first in the series to which I was referred was the well known case of Scott v Stansfield, (1868) 3 L.R. Ex 220 and, omitting an intervening case, I would also add a reference to the third case which was cited, the recent decision in the Court of Appeal in England of Sirros v Moore (1975) 1 Q.B. 118, and particularly the passage in the reasons of Lord Denning M.R. at 136.

Although those are cases decided in England, they are decided in respect of the common law which is the basis of the law in this country including all the States. I do not entertain any doubt that that rule is applicable in the original jurisdiction of the High Court as it is in the jurisdiction of the supreme courts of the States. In my opinion, that rule makes it clear that no action could have been brought against Emery J.himself.

The second step in the reasoning of the argument presented to me is that it is not possible to sue either the Attorney-General or the Commonwealth itself by reason of acts done by a judge of a federal court in the course of exercising the jurisdiction of that court, whatever the nature of the error which may have been made by the judge. It is again a well established rule that the Crown cannot be sued for acts done by persons who are not servants, agents or employees of the Crown, but who exercise an independent discretion by reason of their holding some statutory office or some common law office. The authority for that proposition is Enever v The King, (1906) 3 C.L.R. 969, and it is a rule which has a long history. The actual case concerned a police officerwho, at that time and under the establishment of the police forces as they then were, exercised a completely independent discretion, not subject to any direction or instruction by the Crown itself. The judge, of course, is in exactly the same position, although he holds an office higher than that of a police officer.

I think that on that ground also there is no cause of action disclosed.

The third point, although in a sense it follows from the first, concerns the position of the Attorney-General and it may be that it is more accurately described as an application of the first and second points with which I have already dealt. That is the proposition that neither the Attorney-General nor the Commonwealth is vicariously liable for anything which a judge may do in the exercise of his jurisdiction. There is underlying that proposition two aspects: In the first place, it is difficult to see how an alleged principal can be vicariously liable for something done by a person who is not in truth a servant or agent and who cannot himself be sued by reason of the office that he holds.

But even if that were not so, the relationship between the Commonwealth and the Attorney-General on the one hand and a judge of the Family Court on the other is that neither the Commonwealth nor the Attorney-General has power to control the activities of a judge or to direct what he should do or what he should not do. It is, in my opinion, quite clear that no action could be maintained against the Commonwealth or the Attorney-General on the basis of the allegations in this statement of claim.

For those reasons, I think that the statement of claim should be struck out.

A separate question arises whether the plaintiff should be given an opportunity to reconsider the matter and, in particular, to endeavour to obtain legal advice as to her position. If the circumstances had been otherwise than they are, in light of the summons taken out seeking amendments to the statement of claim, I would have been disposed to think that this was a case in the same category as the case dealt with by Barwick C.J. in the General Steel Case, (1964) 112 C.L.R. 125, that is that the allegations are such as to demonstrate that there is no possibility of effective amendment of the statement of claim.

In the circumstances, however, I think that I should not make such an order but give the first plaintiff an opportunity to reconsider the matter and, as I said, to obtain, if she can, some legal advice before proceeding with the summons to amend the statement of claim.

As the first plaintiff appeared in person before me, it might perhaps be helpful if I were to summarize very briefly what I have said above. The first

proposition is that it is established by law that a judge cannot be sued in respect of anything that he does in court.

The second proposition is that the Commonwealth or the Attorney-General have no control over what a judge does in the exercise of his jurisdiction. They cannot order him to do X or not to do X; he must do his best, whether in the end he is right or wrong and the Commonwealth is not responsible for the decision he makes. If he makes a wrong decision, you cannot recover from the Commonwealth any damage that you may have suffered or any loss you may have suffered because a judge went wrong.

The third reason is really no more than an exposition of the same two fundamental propositions, namely that the judge has an independent function to perform, an independent discretion for which no other person can be made answerable. The Commonwealth itself is not answerable for mistakes of discretion or of law which a judge may make.

The other matter with which I dealt was this: In proceedings of this kind, a judge has power to dismiss the action completely. I have said that I will not do that but will give them an opportunity to seek legal advice as to what should be done and whether this litigation should be pursued. There is, of course, a summons which the plaintiffs have taken out relating to amendment of the statement of claim. That summons dated 13 April does not specify a return date. What I propose to do is to strike out the present statement of claim but to give the plaintiffs an opportunity to reframe their statement of claim so as to allege some cause of action.

I think that the plaintiffs ought to try and obtain some legal advice as to what they ought to do in the light of the decision that I have made. Their summons is not properly before me because it does not have a return date and it has not been seen by the Crown, except very briefly at the beginning of today's hearing. What I will do is give leave to re-plead, that is to say to produce a new statement of claim, and I think that they should do
T2 that within a reasonable time.

Counsel for the defendants requested that I should reserve the costs of this hearing.

I will order that the statement of claim be struck out with liberty to the plaintiffs to re-plead. I reserve the costs and certify for counsel. The cross-summons is not properly before me but in so far as it may be I adjourn it to a date to be fixed, within one month from today.

The plaintiffs are to be at liberty to bring it on for hearing on two week's notice.

Is that satisfactory to you, Mr Moshinsky?

MR MOSHINSKY: Yes, Your Honour.

AT 12.01 PM THE MATTER WAS ADJOURNED
TO A DATE TO BE FIXED