Monck v The Commonwealth of Australia
[2017] NTSC 49

PARTIES:	BRENDAN PAUL MONCK v THE COMMONWEALTH OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	131 of 2015 (21560966)
DELIVERED:	27 June 2017
HEARING DATES:	15 March 2017
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

Practice and Procedure – Summary judgment – Principles to be applied in summary judgment applications.

Torts – Negligence – Existence of a duty of care – Claimed duty of care owed by public official when administering child support laws – Inconsistency of obligations negates the existence of a duty of care.

Constitutional Law – Whether Commonwealth has the power to enact child support laws – Whether enforcement of a child support liability by compulsory deduction from a payer's bank account is an acquisition to which section 51(xxxi) of the Constitution applies.

Supreme Court Rules rr 22.02, 23.01, 23.02
Child Support (Registration and Collection) Act 1988 (Cth), s 5, 24
Child Support (Assessment) Act 1989 (Cth), s 72A
Constitution, s 51(xxxi)

Nibbs v Australian Broadcasting Corporation [2010] NTSC 52.
RTA Pty Ltd & Ors v Brinko Pty Ltd & Ors [2019] NTSC 103.
Outback Civil Pty Ltd v Francis [2011] NTCA 3.
NT Pubco Pty Ltd & Anor v Strazdins & Ors; Strazdins & Anor v Cowell Clarke & Ors [2014] NTSC 8.
Sullivan v Moody (2001) 207 CLR 562.
Tame v New South Wales (2002) 211 CLR 317.
Hunter and New England Local Health District v McKenna (2014) 253 CLR 270.
GL v The Child Support Registrar [2010] HCA Trans 102.
Laurie & Child Support Registrar [2009] FamCAFC 183.
Davis v Insolvency and Trustee Service Australia [2010] FCAFC 141.
Attorney-General (Cth) v Schmidt (1961) 105 CLR 361.
Mutual Pools & Staff Pty Ltd v Commonwealth (1994) 179 CLR 155.

REPRESENTATION:

Counsel:

Plaintiff:	In person
Defendant:	Mr Anderson

Solicitors:

Plaintiff:	In person
Defendant:	Australian Government Solicitor

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Monck v The Commonwealth of Australia
[2017] NTSC 49

No. 131 of 2015 (21560966)

BETWEEN:

Brendan Paul Monck
Plaintiff

AND:

The Commonwealth of Australia
Defendant

CORAM: MASTER LUPPINO

REASONS

(Delivered 27 June 2017)

[1] These reasons deal with applications by both parties seeking summary judgment. The Plaintiff's application, by Summons filed 31 January 2017, is made pursuant to Rule 22.02(1) of the *Supreme Court Rules* ("the *SCR*") on the basis that the Defendant has no defence to the claim. The Defendant's Summons was filed 9 December 2016 and that application is pursuant to Rule 23.01(1) of the *SCR* on the basis that the Plaintiff's claim does not disclose a cause of action. The Defendant also seeks, in the alternative, an order for strike out of the Plaintiff's current Statement of Claim pursuant to Rule 23.02 of the *SCR* on the same basis.

[2] The applicable provisions of the *SCR* are Rules 22 and 23 and the relevant parts are:

> **22.02 Application for judgment**
>
> (1) Where the defendant has filed an appearance, the plaintiff may at any time apply to the Court for judgment against the defendant on the ground that the defendant has no defence to the whole or part of a claim included in the writ or statement of claim, or no defence except as to the amount of a claim.
>
> (2)-(4) Omitted.
>
> **23.01 Stay or judgment in proceeding**
>
> (1) Where a proceeding generally or a claim in a proceeding:
>
> (a) does not disclose a cause of action;
>
> (b) is scandalous, frivolous or vexatious; or
>
> (c) is an abuse of the process of the Court,
>
> the Court may stay the proceeding generally or in relation to a claim or give judgment in the proceeding generally or in relation to a claim.
>
> (2) Where the defence to a claim in a proceeding:
>
> (a) does not disclose an answer;
>
> (b) is scandalous, frivolous or vexatious; or
>
> (c) is an abuse of the process of the Court,
>
> the Court may give judgment in the proceeding generally or in relation to the claim.
>
> (3) Omitted.
>
> **23.02 Striking out pleading**
>
> Where an endorsement of claim on a writ or originating motion or a pleading or a part of an endorsement of claim or pleading:
>
> (a) does not disclose a cause of action or defence;
>
> (b) is scandalous, frivolous or vexatious;
>
> (c) may prejudice, embarrass or delay the fair trial of the proceeding; or

(d) is otherwise an abuse of the process of the Court,

the Court may order that the whole or part of the endorsement or pleading be struck out or amended.

[3] The Plaintiff's Amended Statement of Claim filed 3 October 2016 ("ASOC") is not entirely clear as to the basis of the relief sought. Many facts are pleaded and particulars provided but they appear to be mostly matters of evidence rather than material facts and proper particulars. Nonetheless I proceed with the applications on the basis of the Plaintiff's current ASOC as, with respect to the Plaintiff, this is his second Statement of Claim and I do not expect any measureable improvement were I to first order that he re-pleads. Provided that I and the Defendant have correctly or sufficiently assessed the nature of the Plaintiff's claims, and I believe that to be the case, then the ASOC will suffice for current purposes notwithstanding the defects. It is also appropriate to proceed as the Defendant in any case seeks a strike out of the ASOC.

[4] The Plaintiff's first Statement of Claim also included a claim for misfeasance in public office. Although the Defendant addressed that cause of action in its submissions, I will disregard that as the Plaintiff has not repeated that claim in the ASOC and he also confirmed that he was not pursuing that cause of action during the hearing.

[5] Subject to the comments above, the Plaintiff's claims are in negligence/breach of duty and breach of the *Constitution*.

[6] As to the former, the Plaintiff alleges that the Defendant's negligence and/or the unlawful acquisition of his property by the Defendant has caused him to suffer "psychological shock" resulting in loss of employment, loss of earning capacity and other consequential losses. The damages claimed in the ASOC are in the amount of $2,578,380.40.

[7] The relevant paragraphs of the ASOC are paragraphs 4, 4.5, 8, 8.1 and 9 and they are now reproduced below for reference:

> 4 The plaintiff alleges the Child Support agency (CSA) in its statutory authority and treatment of him, of Negligence causing psychological shock on 4th of March 2009, and that it was reasonably foreseeable and of which caused damages, resulting in economic loss, loss of employment, loss of earnings and capacity;
>
> Particulars;
>
> 4.5 further to this, the plaintiff states that the above was in breach of section 24 of the Child Support Assessment act 1989;
>
> 24 Children in relation to whom applications may be made;
>
> (1) Application may be made to the Registrar for administrative assessment of child support for a child only if:
>
> (a) the child is:
>
> (iii) not a member of a couple;
>
> 8 on 4th of March 2009, the CSA deducted $7,825.52 from the plaintiff's 3 NAB bank accounts. Plaintiff claims psychological shock manifested from this event. Plaintiff ceased counselling sessions as a direct result of this.
>
> 8.1 further to this, plaintiff claims this event to be a breach of the Australian Constitution, section 51;

> 51 The Parliament shall, subject to this Constitution, have power to make laws for peace, order, and good government of the Commonwealth with respect to:
>
> xxxi - the acquisition of property on just terms from any State or person for any person in respect of which the Parliament has power to make laws;
>
> The Commonwealth may only acquire property on just terms for a "purpose in respect of which the Parliament has power to make laws. This means that every law supported by s 51(xxxi) must also be supported by at least one additional legislative power.
>
> 9 the plaintiff seeks restitution, by way of compensation, for damages rendered through loss of wages and superannuation and various life costs including projected earnings, and costs to psychological shock, due to the negligence of the defendant in the legal obligations to the plaintiff as a customer of the agency, supported in the material facts above…

[8] The constitutional cause of action relates to a claimed contravention of section 51(xxxi) of the *Constitution*. This is pleaded in paragraph 8 of the ASOC, where the Plaintiff pleads that the compulsory deduction of money from the Plaintiff's bank account by the CSA is an acquisition of property by the Commonwealth and is in contravention of section 51(xxxi) of the *Constitution* as it is not on just terms. On its wording, the constitutional challenge also appears to include a challenge to the validity of the *Child Support (Registration and Collection) Act 1988* (Cth) ("the *CS Act*") and the *Child Support (Assessment) Act 1989* (Cth) ("the *Assessment Act*") as being beyond the power of the Commonwealth.

[9] The evidence on the application reveals that the genesis of the Plaintiff's claims are the assessment made by the Child Support Agency ("CSA") of the

Plaintiff's liability for child support, (an assessment which the Plaintiff strongly disagrees with for various reasons), and the subsequent actions of the CSA, mostly in respect of the CSA's handling of the Plaintiff's complaints and, more relevantly, the action taken by the CSA to enforce that assessment. Specifically the main pleaded allegation relates to a compulsory deduction from the Plaintiff's bank account in the sum of slightly in excess of $7,800.

[10] Apart from a bare statement alleging negligence and foreseeability, the ASOC does not demonstrate how the relevant duty of care is said to arise or how the Plaintiff's alleged injuries were reasonably foreseeable. The Defendant challenges the existence of the claimed duty and that foreseeability can be made out in law.

[11] The ASOC does plead the necessary causal connection, also by bare allegation, between the compulsory deduction of the said sum and the Plaintiff's injury and consequently the loss the Plaintiff claims. Specifically paragraph 8 of the ASOC pleads that in making that deduction from the Plaintiff's account, "*psychological shock manifested from this event*". The particulars of loss in the *ASOC* allege that all subsequent actions of the Plaintiff, including withdrawing to lead a reclusive lifestyle, withdrawing from full-time work and the like, which caused his loss consequentially followed from that injury.

[12] The law in respect of summary judgment applications, and specifically in respect of its application in the Northern Territory, has been the subject of a number of decisions in recent times. I discussed the authorites in detail in *Nibbs v Australian Broadcasting Corporation*[1] and *RTA Pty Ltd & Ors v Brinko Pty Ltd & Ors.*[2] The Court of Appeal in *Outback Civil Pty Ltd v Francis*[3] ("*Outback Civil*") held that Rule 23.03 will only be enlivened where the plaintiff's case is "*so clearly untenable that it could not possibly succeed*". [4] That principle will apply equally, with appropriate modification, to an application by a plaintiff for summary judgment pursuant to Rule 22.01. Most recently *Outback Civil* has been followed *NT Pubco Pty Ltd & Anor v Strazdins & Ors; Strazdins & Anor v Cowell Clarke & Ors.*[5]

[13] Applying the law in respect of summary judgment applications to the current case, and dealing first with the claim in negligence, I agree with the submissions of the Defendant that, to succeed, the Plaintiff must first establish that the Defendant had a duty to take reasonable care in the administration of the *CS Act* so as to ensure that the Plaintiff did not suffer psychological injury. Likewise I agree that the Plaintiff must establish that it was reasonably foreseeable that a breach of that duty could result in the occurrence of the kind of injury which the Plaintiff alleges that he has suffered.

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1 [2010] NTSC 52.
2 [2019] NTSC 103.
3 [2011] NTCA 3.
4 [2011] NTCA 3 at para 10.
5 [2014] NTSC 8 at paras 15 to 18.

[14] The Defendant argues both that there is no duty and in any case that foreseeability cannot be made out as it has not been demonstrated, either on the basis of any facts alleged in the ASOC, or by evidence on the current application.

[15] Concerning the existence of a duty of care, the Plaintiff faces a significant obstacle in the case law concerning inconsistency of obligations and how that negates the existence of a duty of care. Mr Anderson took me to a line of cases commencing with *Sullivan v Moody*[6] ("*Sullivan*"). That case dealt with the investigation of the abuse of children under child protection legislation in South Australia. In that case the High Court said that it would ordinarily be a reason for denying the existence of a claimed duty if that duty gave rise to inconsistent obligations. The Court said:

> But if a suggested duty of care would give rise to inconsistent obligations, that would ordinarily be a reason for denying that the duty exists. Similarly, when public authorities, or their officers, are charged with the responsibility of conducting investigations, or exercising powers, in the public interest, or in the interests of a specified class of persons, the law would not ordinarily subject them to a duty to have regard to the interests of another class of persons where that would impose upon them conflicting claims or obligations.[7]

[16] Relevantly, the Court also said:

> The statutory scheme that formed the background to the activities of the present respondents was, relevantly, a scheme for the protection of children. It required the respondents to treat the interests of the children as paramount. Their professional statutory responsibilities involved investigating and reporting upon, allegations that the children had suffered, and were under threat of, serious harm. It would be inconsistent with the proper and effective discharge of

6 (2001) 207 CLR 562.
7 (2001) 207 CLR 562 at para 60.

> those responsibilities that they should be subjected to a legal duty, breach of which would sound in damages, to take care to protect persons who were suspected of being the sources of that harm.[8]

[17] In *Tame v New South Wales*[9] ("*Tame*"), the plurality found that an alleged duty did not exist on the same basis. *Tame* involved a claim for damages for a psychiatric injury resulting from an error made by a police officer when completing a report in respect of a motor vehicle accident. The error was that the police officer recorded that the plaintiff in that case, who was one of the persons involved in that particular accident, had a high blood alcohol level whereas in fact the plaintiff had a nil blood alcohol level. That plaintiff alleged that she was owed a duty of care by the police officer who completed the report and that there was a breach of that duty which caused her psychiatric injury. The High Court applied *Sullivan* and held that no such duty of care existed as such a duty was inconsistent with the obligation on the police officer to complete the relevant report.

[18] More recently *Sullivan* was unanimously applied by the High Court in *Hunter and New England Local Health District v McKenna*[10] ("*Hunter*"). In that case, a local health authority with the responsibility to determine whether a mentally ill person should be involuntarily detained for treatment decided that involuntary detention was not necessary and discharged the patient to the care of a friend. The patient then killed that friend and the deceased's relatives sued the authority for damages. They alleged that the

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8 (2001) 207 CLR 562 at para 62.
9 (2002) 211 CLR 317.
10 (2014) 253 CLR 270.

authority owed a duty of care. The Court said that the local health authority had an obligation pursuant to the relevant legislation not to detain, or continue to detain, a patient unless the authority's doctors were of the opinion that no other care of a less restrictive kind was appropriate and reasonably available. The Court held that the claimed duty of care was inconsistent with the obligations on the authority's doctors and, applying *Sullivan*, confirmed that would ordinarily be a reason for denying the existence of the claimed duty.

[19] In the application of the principle to the present case, the Defendant submits that the circumstances are indistinguishable from those three cases. The only possible basis that I can see to distinguish *Sullivan* is that in that case it was noted that the relevant legislation made the interests of the child paramount. As far as I have been able to determine, there is no similar statement in either the *CS Act* or the *Assessment Act*. However, I do not read the reference to paramountcy in *Sullivan* as a precondition for the application of the principle or as a basis for distinguishing *Sullivan*. Moreover, in *Tame* and *Hunter* the principle was applied and there was no suggestion that paramountcy of the obligation was required.

[20] The Defendant's case is that the existence of the duty of care claimed by the Plaintiff is entirely inconsistent with the scheme of the child support legislation as the object of that legislative scheme is to ensure that children

receive a proper level of financial support from their parents[11] and not to protect the psychological wellbeing of parents. It was submitted that if the CSA had a duty to avoid decisions which could have an adverse psychological effect on a parent, leaving aside foreseeability, this would be fundamentally inconsistent with the objects of the legislative scheme. Therefore the statutory obligation to collect support for the benefit of the children could not be properly and effectively discharged if the CSA were subjected to a duty to take care to protect the psychological health, again leaving aside foreseeability, of the very person who is obliged to pay child support. That is a powerful submission on the authorities and on the facts of the current case. I entirely agree and I am therefore of the view that the Plaintiff has no cause of action in law based in negligence as no duty of care is owed to him.

[21] Although that renders it unnecessary to deal with the foreseeability issue, I will nonetheless make some general observations. In my view it is most unlikely that Plaintiff could establish that it was reasonably foreseeable that the breach of duty he alleges, assuming such a duty existed, would result in the type of injury which the Plaintiff claims he suffered. Foreseeability is a pre-requisite for a successful claim in negligence. Moreover, although findings in respect of foreseeability in comparative cases is not necessarily of precedential value, in *Tame* Gummow and Kirby JJ held that the psychiatric injuries claimed by the plaintiff in that case were not reasonably

[11] See s 4(2) of the *Assessment Act*.

foreseeable.[12] I think that inevitably a similar finding would result in the current case.

[22] As to the constitutional challenges, I deal firstly, and quickly with any suggestion that the Commonwealth lacks the power to enact the *CS Act* and the *Assessment Act*. The High Court has ruled that both are within the Commonwealth's power, see *Luton v Lessels*[13] and that finally disposes of that suggestion.

[23] As to the challenge to the validity of the compulsory deduction by the CSA of a sum of money from the Plaintiff's bank accounts, that deduction was made by the Child Support Registrar pursuant to section 72A of the *CS Act*. That section empowers the Child Support Registrar to require a person (the Plaintiff's bank in this case) who holds money of a person liable to pay child support, to pay an amount to the Registrar.

[24] The Plaintiff challenges the validity on two bases. First, the Plaintiff alleges that the Child Support Registrar was not entitled to require the Plaintiff's bank to deduct and pay any amount in any event by reason of section 24 of the *Assessment Act*.[14] Secondly the Plaintiff alleges that the deduction amounts to an acquisition of property other than on just terms in contravention of section 51(xxxi) of the *Constitution*.

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12 (2002) 211 CLR 317 at paras 232-233.
13 (2002) 210 CLR 333
14 See para 4.5 of the ASOC.

[25] In respect of the former the Plaintiff's case is that a necessary precondition to the making of the assessment of his liability for child support was not satisfied. Subsection 24(1) of the *Assessment Act* is the relevant part and that is now reproduced.

> **Children in relation to whom applications may be made**
>
> (1) Application may be made to the Registrar for administrative assessment of child support for a child only if:
>
> (a) the child is:
>
> (i) an eligible child; and
>
> (ii) under 18 years of age; and
>
> (iii) not a member of a couple; and
>
> (b) except in a circumstance referred to in subsection (2), either or both of the following subparagraphs applies or apply in relation to the child:
>
> (i) the child is present in Australia on the day on which the application is made;
>
> (ii) the child is an Australian citizen, or ordinarily resident in Australia, on that day.

[26] The Plaintiff's evidence is that he and the mother of the child were living together at the relevant time, i.e., they were a "couple". The Plaintiff argues that the child was therefore "*a member of couple*", hence section 24 is not applicable by reason of section 24(1)(a)(iii) of the *Assessment Act*.

[27] The term "*member of a couple*" has a specific meaning for the purposes of section 24. The term is defined in section 5 as follows:

> ***"member of a couple"*** means:
>
> (a) a person who is legally married to another person and is not living separately and apart from the other person on a permanent or indefinite basis; or

(b) a person who is living with another person as the partner of the other person on a genuine domestic basis although not legally married to the other person; or

(c) a person whose relationship with another person (whether of the same sex or a different sex) is registered under a law of a State or Territory prescribed for the purposes of section 2E of the *Acts Interpretation Act 1901* as a kind of relationship prescribed for the purposes of that section, and is not living separately and apart from the other person on a permanent or indefinite basis.

[28] I think it is clear that the exception turns on the status of the child as one of the two persons who are a couple, i.e., where the child is married or in a marriage like relationship. It does not mean the status of the child's parents as a couple, or the status of the child as the child of a "*couple*". That argument has no merit.

[29] In terms of the acquisition of property on just terms, the High Court has not considered the constitutional validity of section 72A of the *CS Act* but it has refused leave to appeal.[15] That related to an appeal from a decision of the Full Court of the Family Court[16] which held that section 72A of the *Assessment Act* was not invalid as a breach of section 51(xxxi) of the *Constitution*.

[30] The Full Court of the Federal Court has also dealt with the question of the validity of section 72A of the *Assessment Act* in the context of section 51(xxxi) of the *Constitution* in *Davis v Insolvency and Trustee Service Australia.*[17] Following *Attorney-General (Cth) v Schmidt*[18] and *Mutual Pools*

15 See *GL v The Child Support Registrar* [2010] HCA Trans 102.
16 *Laurie & Child Support Registrar* [2009] FamCAFC 183.
17 [2010] FCAFC 141.
18 (1961) 105 CLR 361.

& Staff Pty Ltd v Commonwealth,[19] the Court there swiftly dealt with the argument saying that the "*proposition that the enforcement and execution provisions of statutes governing the civil process of courts as an acquisition of property to which the language of s51(xxxi) is directed is without merit*".[20]

[31] The authorities on this point are clear and settled and relying on those authorities, in my view that the Plaintiff's constitutional claims clearly also cannot be maintained in law.

[32] That necessarily would see an order at least for strike out of the ASOC. If I was of the view that an amendment of the ASOC would rectify that, I think it would be appropriate to only order strike out and not summary judgment and to allow the Plaintiff to have an opportunity to re-plead, especially as the Plaintiff is unrepresented. However, being aware of the essential allegations that the Plaintiff makes, the more fundamental issue is that the Plaintiff cannot maintain the causes of action relied on and this cannot be cured by amendment. An opportunity to re-plead could not change that on that basis.

[33] Accordingly I dismiss the Plaintiff's application for summary judgment. I find for the Defendant on its Summons and enter judgment pursuant to order 23.01(1) of the SCR in favour of the Defendant.

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19 (1994) 179 CLR 155.
20 [2010] FCAFC 141 at para 20.

[34] I will hear the parties as to costs.