SUPREME COURT OF QUEENSLAND

CITATION:	*Moder v Commonwealth of Australia; Sochorova v Commonwealth of Australia* [2012] QCA 92
PARTIES:	**In Appeal No 5450 of 2011:** **JOSEPH MODER** (appellant) **v** **COMMONWEALTH OF AUSTRALIA** (respondent) **In Appeal No 5451 of 2011:** **TEREZIE SOCHOROVA** (appellant) **v** **COMMONWEALTH OF AUSTRALIA** (respondent)
FILE NO/S:	Appeal No 5450 of 2011 Appeal No 5451 of 2011 SC No 99 of 2011 SC No 659 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	13 April 2012
DELIVERED AT:	Brisbane
HEARING DATE:	17 October 2011
JUDGES:	Muir and Fraser JJA and Margaret Wilson AJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In Appeal No 5450 of 2011:** **1. Appeal dismissed with costs.** **In Appeal No 5451 of 2011:** **1. Appeal allowed.** **2. Set aside the order striking out the claim and statement of claim.** **3. Instead, order that the statement of claim be struck out.** **4. Order that the appellant have leave to file and serve an amended statement of claim in respect of her claim for damages for negligence, which amended statement of claim may not include a claim for damages for**

personal injuries or be based on acts, omissions or alleged breaches of the provisions of the *Migration Act* 1958 (Cth) by the Migration Review Tribunal, within six weeks.

5. **The parties are to provide written submissions as to costs in accordance with Practice Direction No 2 of 2010 paragraph 52.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where Moder brought an action in negligence claiming "secondary damages" for secondary economic loss and disruption to normal life by way of making good the loss and harm caused to Sochorova – where Moder's claim and statement of claim were struck out by the primary judge – whether a cause of action was disclosed on his pleading – whether the claim and statement of claim were properly struck out

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – STATEMENT OF CLAIM – where Sochorova brought an action based on negligence and misfeasance in public office – where her claim and statement of claim were struck out – whether Sochorova's claim for negligence ought to have been struck out by the primary judge – whether the primary judge was correct in striking out the claim for misfeasance in public office – whether Sochorova pleaded a viable cause of action – where leave was granted to file and serve an amended statement of claim in respect of her claim for damages in negligence, so far as it did not include a claim for damages for personal injuries

PROCEDURE – COURTS AND JUDGES GENERALLY – JUDGES – IMMUNITY FROM PROCEEDING – where Sochorova claimed that the conduct of members of the Migration Review Tribunal had demonstrated bad faith and misfeasance – whether members of the Tribunal have immunity from liability – where a judge's immunity is conferred by the common law – whether the Commonwealth is vicariously liable for torts committed by members of the Tribunal – whether the primary judge was correct in striking out the claim and statement of claim in so far as it was based on conduct of the Tribunal

CONSTITUTIONAL LAW – THE NON-JUDICIAL ORGANS OF GOVERNMENT – THE CROWN – LIABILITIES OF THE CROWN – IN TORT – FOR ACTS OF SERVANTS OR AGENTS – LIABILITY OF SERVANT OR AGENT – FOR MISFEASANCE IN PUBLIC OFFICE – where Sochorova claimed that the

department exercised its powers contrary to law and in bad faith – where the tort of misfeasance in public office is the tort of an individual public officer, for which he or she is personally liable – where the Commonwealth could not be vicariously liable for its officers' intentional conduct, unless it authorised that conduct – where Sochorova's pleading was premised on a fundamental misconception of the tort – where a case of misfeasance in public office cannot be built upon a foundation that is a composite of the conduct of a number of individual officers, let alone a department or statutory tribunal – whether the primary judge was correct in striking out the claim for misfeasance in public office

STATUTES – ACTS OF PARLIAMENT – STATUTORY POWERS AND DUTIES – EXERCISE – LIABILITY – NEGLIGENCE – PARTICULAR CASES – where Sochorova claimed that officers of the Department were negligent in not making decisions within a reasonable time – where Sochorova's claim was in essence a claim for damages for personal injuries and for economic loss – where the claim for damages for personal injuries could not succeed because of non-compliance with the pre-litigation requirements of *Personal Injuries Proceedings Act* 2002 (Qld) – whether Sochorova's claim for negligence ought to have been struck out by the primary judge – whether Sochorava ought to have leave to replead that claim – whether the possibility of establishing negligence is so remote that it can be discounted

Administrative Appeals Tribunal Act 1975 (Cth), s 60(1)
Civil Liability Act 2003 (Qld), s 52, Schedule 2 Dictionary
Limitation of Actions Act 1974 (Qld), s 10, s 11
Migration Act 1958 (Cth), s 353, s 373(1), s 394
Personal Injuries Proceedings Act 2002 (Qld), s 6(3)(a), s 7, s 9, s 18
Uniform Civil Procedure Rules 1999 (Qld), r 235, r 658

D'Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1; [2005] HCA 12, cited
Fingleton v The Queen (2005) 227 CLR 166; [2005] HCA 34, cited
Northern Territory v Mengel (1995) 185 CLR 307; [1995] HCA 65, considered
Jones v Department of Employment [1989] QB 1, cited
Mann v O'Neill (1997) 191 CLR 204; [1997] HCA 28, cited
Martens v Stokes [2012] QCA 36, cited
Meshlawn Pty Ltd v State of Queensland [2010] QCA 181, considered
Pickering v Centrelink [2008] FCA 561, cited
R v Skinner (1772) Lofft 54; (1772) 98 ER 529, cited
Scott v Pedler [2004] FCAFC 67, cited
Scott v Secretary, Department of Social Security [2000] FCA 1241, cited

Stuart v Kirkland-Veenstra (2009) 237 CLR 215; [2009] HCA 15, cited
Three Rivers District Council v Bank of England [2003] 2 AC 1; [2001] UKHL 16, cited

COUNSEL: The appellant appeared on his own behalf in Appeal No 5450 of 2011
J Moder appeared on behalf of the appellant in Appeal No 5451 of 2011
A L Wheatley for the respondent in both appeals

SOLICITORS: The appellant appeared on his own behalf in Appeal No 5450 of 2011
J Moder appeared on behalf of the appellant in Appeal No 5451 of 2011
Clayton Utz for the respondent in both appeals

[1] **MUIR JA:** I agree with the reasons of Margaret Wilson AJA and with the orders she proposes.

[2] **FRASER JA:** I agree with the reasons for judgment of Margaret Wilson AJA and the orders proposed by her Honour.

[3] **MARGARET WILSON AJA**: These two appeals were heard together. Mr Moder appeared on his own behalf and by leave on behalf of Ms Sochorova.

Background

[4] Mr Moder and Ms Sochorova are siblings. They were born in Europe and were still children when they were separated during World War II. Their father was killed in a concentration camp and their mother died in a communist detention camp after the war ended.

[5] Mr Moder was adopted by an aunt with whom he immigrated to Australia in 1950. He has held Australian citizenship since 1956.

[6] Ms Sochorova was left in the care of grandparents. She remained in Europe.

[7] There was no contact between brother and sister until 1989 when Mr Moder located Ms Sochorova through the Red Cross, and subsequently travelled to the Czech Republic where they were reunited.

[8] In 1999 Mr Moder brought his sister to Australia to live with him. In July that year she lodged an application with the Department of Immigration & Multicultural & Indigenous Affairs for a visa to allow her to reside permanently in this country. The application was not approved until 26 March 2006, almost seven years later. In the meantime, there had been protracted dealings with the Department, review proceedings in the Migration Review Tribunal ("MRT"), and proceedings in the Federal Court (including the Full Federal Court).

[9] Ms Sochorova is an elderly woman in poor health. Mr Moder is her only means of support. She will not be eligible for the aged pension or Medicare benefits until 10 years after the visa was granted – that is, on 23 March 2016. By then she will be aged 82.

[10] Mr Moder has exhausted his financial resources in the long pursuit of his sister's visa and in meeting her living expenses, including medical expenses. His only source of income to support them both is a single aged pension.

Ms Sochorova's proceeding

[11] On 22 December 2010 Ms Sochorova commenced a proceeding against the Minister for Immigration and Citizenship in the Cairns Registry of the Supreme Court of Queensland (Cairns 659/10).[1] Soon afterwards she filed an application for summary judgment.[2] The defendant filed a cross application for dismissal of her application and directions.[3]

[12] On 11 February 2011 Jones J made the following orders –

> "1. Leave is granted for Mr Moder to represent the Applicant.
>
> 2. Leave is granted to file a new Statement of Claim by 4:00pm on 11 April 2011.
>
> 3. Original Statement of Claim is struck out.
>
> 4. Leave is given to amend the title of the action.
>
> 5. Delete Minister for Immigration and Citizenship and substitute with Commonwealth of Australia."[4]

[13] Four days later Ms Sochorova filed an amended statement of claim.[5]

[14] On 16 March 2011 the respondent filed an application for judgment pursuant to *UCPR* r 658 on the basis the pleading disclosed no cause of action, or alternatively an order that the pleading be struck out without leave to replead.[6] Ms Sochorova then filed an application for dismissal of the respondent's application and for judgment.[7]

[15] The applications came before Jones J on 25 March 2011, at the same time as applications in a proceeding that had been commenced by Mr Moder. Mr Moder was self represented, and his Honour gave him leave to represent Ms Sochorova.

[16] On 26 May 2011 Jones J made these orders in the Sochorova proceeding –

> "1. Pursuant to R 135 of the *Uniform Civil Procedure Rules* 1999, the defendant be granted leave to file and to serve this application.
>
> 2. The plaintiff's Claim and Statement of Claim is struck out.
>
> 3. Judgment pursuant to R 658 of UCPR for the defendant against the plaintiff.
>
> 4. The plaintiff's application filed on 17 March 2011 is dismissed.

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1 Sochorova AR 79 – 87.
2 Sochorova AR 88 – 89.
3 Sochorova AR 90 – 91.
4 Sochorova AR 140.
5 Sochorova AR 104 – 109.
6 Sochorova AR 110 - 111.
7 Sochorova AR 112 – 113.

5. The plaintiff to pay the defendant's costs of and incidental to the proceedings including reserve costs to be assessed on the standard basis."[8]

Mr Moder's proceeding

[17] On 10 March 2011 Mr Moder commenced a proceeding against the Commonwealth of Australia in the Cairns Registry of the Supreme Court of Queensland (Cairns 99/11).[9] He claimed –

> "…secondary damages as 2nd party in the matter of Terezie Sochorova v Commonwealth of Australia No. 650/11 [sic] in the Supreme Court of Queensland."

[18] On 18 March 2011 the respondent filed an application for judgment pursuant to *UCPR* r 658 or alternatively that the statement of claim be struck out without leave to replead.[10] Mr Moder filed a cross-application for dismissal of the respondent's application and for judgment.[11]

[19] The applications were heard by Jones J on 25 March 2011. On 26 May 2011 his Honour made the following orders –

> "1. Pursuant to r 135 of the *Uniform Civil Procedure Rules* 1999 the defendant be granted leave to file and to serve this application.
>
> 2. The plaintiff's Claim and Statement of Claim is struck out.
>
> 3. Judgment pursuant to r 658 of the *Uniform Civil Procedure Rules* for the defendant against the plaintiff.
>
> 4. The plaintiff pay the defendant's costs of and incidental to the proceedings, if not agreed, to be assessed on the standard basis."[12]

Grounds of appeal

[20] These appeals are against the orders made in each proceeding on 26 May 2011. The grounds of appeal were similarly expressed in the two notices of appeal:[13]

(a) that the primary judge did not address key elements of the appellants' claims; and

(b) that statutes invoked against the respondents' claims were not applicable to the nature of their case.

Mr Moder has acknowledged that his claim cannot succeed if Ms Sochorova's fails.[14]

[21] On 6 October 2011 Ms Sochorova filed an application in the Court of Appeal Registry for orders –

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8 Sochorova AR 152; reasons Sochorova AR 141 – 151.
9 Moder AR 7 – 12.
10 Moder AR 13 – 14.
11 Moder AR 15 – 16.
12 Moder AR 25; reasons Moder AR 22 – 24.
13 Sochorova AR 153 – 154; Moder AR 26 – 27.
14 Primary judge's reasons: Moder AR 23 para [5].

(a) setting aside or staying the primary judge's decision "as being deficient in procedure and due process" and

(b) entering judgment for her on her claim of 22 December 2010 "as being self-evident …by reason of *res ipsa loquitur* and the Respondent's defence allegations being invalid."

Procedural irregularity

[22] On 10 March 2011 the respondent's solicitors caused a letter to be sent to her in which they explained at some length why her pleading was still defective and why her claims could not succeed. They asked her to consent to an order dismissing her proceeding, and foreshadowed making the application to the court which they later filed on 18 March and which was heard on 25 March 2011.[15]

[23] In an affidavit sworn on 4 October 2011 Ms Sochorova said –

> "26. I was not heard at the hearing on 25 March 2011. Instead, following some apparent discussions in Judge's chambers with Defendant's counsel, the Court disposed of the matter in short fashion by pronouncing orders in line with the defendant's Application of 16 March 2011, as follows:
>
> 1) Pursuant to r 135 of the Uniform Civil Procedure Rules 1999 the defendant be granted leave to file and serve this application.
>
> 2) The plaintiff's Claim and Statement of Claim is struck out.
>
> 3) Judgment pursuant to r 658 of the UCPR for the defendant against the plaintiff.
>
> 4) The plaintiff's application of 17 March 2011 be dismissed.
>
> 5) The plaintiff to pay the defendant's costs of and incidental to the proceedings including reserved costs to be assessed on the standard basis.
>
> This Court order also was not forwarded to me.
>
> **GROUNDS OF APPEAL**
>
> 27. At no stage during the hearing on 25 March 2011, nor at any other time, was I afforded any opportunity to present arguments to the Court in support of my Application of 17 March 2011, my Pleadings of 21 March 2011, and my Particulars of 23 March 2011.
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> 28. On 30 March 2011 I submitted a Reply, invalidating all allegations of the Defendant's Outline of Submissions of 25 March 2011, in preparation for the Court hearing of 11 April 2011. This Reply also was not filed by the Court for consideration.

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15 Affidavit of Joshua Anthony Carey sworn 21 March 2011 exhibit JAC – 10 – exhibit 1 on the appeal.

> 29. Not until after 26 May 2011 did I receive the Court's Reasons for Judgment for the Defendant.
>
> 30. Of the 8 submission [sic] that I submitted in support of my Claim, only 4 were filed for formal consideration by the Court."

[24] There was no procedural irregularity in the hearing of the application on 25 March 2011.

[25] The allegation that Jones J had some private discussion with the respondent's counsel is baseless.

[26] Both Ms Sochorova and Mr Moder were present at the hearing before his Honour.[16] His Honour allowed Mr Moder to represent his sister as well as to appear on his own behalf.[17] They did not seek an adjournment.

[27] Because the respondent had not filed a notice of intention to defend, it could not make its application without the court's leave.[18] It sought such leave in the application it filed on 16 March 2011,[19] and his Honour gave the necessary leave when he made his decision on the substantive application.[20]

[28] It is the practice of the Trial Division in its Applications jurisdiction to require the parties to provide written outlines of argument in accordance with Practice Direction No 6 of 2004.[21] Those outlines should be exchanged as early as practicable prior to the hearing of an application. Ms Sochorova filed two documents which were apparently intended as her written submissions on the applications to be heard on 25 March 2011 – the first, headed "Pleadings", was filed on 21 March 2011 and the other, headed "Particulars", was filed on 23 March 2011.[22] The respondent's counsel provided a copy of her outline of submissions to the appellants at court on 25 March 2011 prior to the hearing commencing,[23] and handed it to Jones J at the hearing.[24]

[29] At the commencement of the hearing his Honour ascertained the material on which the parties relied, and then received brief oral submissions from counsel for the respondent. Mr Moder then addressed his Honour, who told him he would re-read the "Particulars" and identify the legal issues,[25] and then reserved his decision.

[30] His Honour was bound to consider only those submissions (both written and oral) which the parties identified at the hearing on 25 March 2011 as those on which they relied. He was not obliged to consider any further submissions that may have been filed after the conclusion of the hearing on 25 March 2011.

[31] Mr Moder submitted to his Honour that the respondent had been premature in filing its application because Ms Sochorova had until 11 April 2011 in which to file her pleading. His Honour debunked the submission, saying –

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16 Appeal transcript pages 1-10 - 1-11.
17 Transcript of hearing on 25 March 2011 page 1-2.
18 *UCPR* r 135(1).
19 Sochorova AR 110.
20 Sochorova AR 152.
21 [2004] 1 Qd R 539.
22 Transcript of hearing on 25 March 2011 page 1-3.
23 Appeal transcript page 1-19.
24 Transcript of hearing on 25 March 2011 page 1-2.
25 Transcript of hearing on 25 March 2011 page 1-14.

"Well, you changed the time by filing the document."[26]

[32] Ms Sochorova repeated this submission before this Court, both in her written material and in the oral submissions Mr Moder made on her behalf. He told this court –

> "The initial amended claim was submitted very promptly, because that was done only to change the name of the respondent from Minister of Immigration to Commonwealth of Australia; that was the basic reason why we submitted that early. We did indicate in there that we would be filing addition [sic] submissions in relation to the matters raised by the respondent."[27]

In fact, there was nothing in the claim and statement of claim filed on 15 February 2011 to suggest that yet another pleading would be filed by 11 April 2011.

[33] Ms Sochorova's submission is without foundation. She did not take full advantage of the indulgence extended to her by Jones J on 11 February 2011. His Honour allowed her two months in which to file a fresh statement of claim, and suggested that she obtain legal advice before pursuing the matter further. Instead she filed a further statement of claim only four days later. The leave granted by his Honour was exhausted by her hastily filing the further statement of claim.

The scope of the applications

[34] Accepting for present purposes that Ms Sochorova sustained at least some of the losses she claims, the mere fact of her having done so does not afford a right of redress. She accepted that she has no right of redress under any Commonwealth statutory provision. She relied instead on the common law. However, she had to establish that her claim fulfilled the criteria of one or more recognised causes of action to have any prospect of obtaining the relief she sought.

[35] In the amended statement of claim filed on 15 February 2011 Ms Sochorova framed her claim in tort (the law of civil wrongs), in particular negligence and misfeasance in public office. The elements of each of these torts have been established in case law over many years. But the common law may restrict the scope of these torts and the availability of remedies for them having regard to principle and public policy considerations. Moreover, the common law may be modified or overridden by statute.

[36] The applications before the primary judge concerned her claim as pleaded. They did not provide an occasion for a broad-ranging analysis of any and every possible avenue of redress for the losses she claimed to have sustained. This appeal concerns only the correctness of his Honour's decision, which was properly made on the pleading before him.

Ms Sochorova's statement of claim 15 February 2011

[37] The statement of claim began –

> "This claim in this proceeding is made in reliance on the following facts:

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26 Transcript of hearing on 25 March 2011 page 1-12.

27 Transcript of Appeal page 1-12.

1. The plaintiff claims damages from the Commonwealth of Australia for economic loss and injury to health, caused directly by the Commonwealth Department of Immigration and Citizenship (DIAC) and the Migration Review Tribunal (MRT) by way of negligence and misfeasance in the 7-year defective administration of the plaintiff's lawful 1999 permanent residency visa application, and by way of a further 4 years of evasions of responsibility for the damages caused thereby.

Cause of action

2. Negligence.

   a) It is fundamental to the rule of law that all persons, including public officers, carry a primary duty of care to fully comply with all law, whether or not that duty is expressly specified by statute. Otherwise, the law could be ignored at will and become pointless.

   b) DIAC and the MRT have failed in this duty by consistently breaching specific provisions of the Migration Act 1958 for 7 years. This constitutes endemic negligence.

   c) These events are fully detailed in ANNEXURE A of the accompanying affidavit, on which the plaintiff relies.

3. Misfeasance.

   a) Following unlawful refusal of the plaintiff's visa on 25 October 1999, DIAC and the MRT committed a series of unlawful decisions, excessive delays and other unwarranted bureaucratic and legal acts over a period of 7 years against the plaintiff's Federal Court appeals, also clearly evidenced in ANNEXURE A.

   b) Upon overturning of the unlawful visa refusal and grant of the visa on 23 March 2006 under Federal Court direction, the Minister for Immigration and Citizenship (Minister) continued with the past culture of intransigence by evading responsibility and resisting all efforts by the plaintiff for just redress of the grievances caused, for a further 4 years.

   c) In 2010, counsel for the Minister offered that the plaintiff's grievances may be resolved through the scheme for Compensation for Detriment caused by Defective Administration (the CDDA scheme), which is administered by the Minister. Despite written commitment that such applications are normally processed within 3 months, the Minister has declined to act on the plaintiff's CDDA claim of

25 January 2010, thereby delaying redress of the plaintiff's grievances for yet another year.

d) Items a), b) and c) plainly demonstrate endemic bad faith and misfeasance in the processing of the plaintiff's case by immigration authorities for 11 years.

4. The negligence and misfeasance delayed the visa unlawfully for 7 years. It follows from this, that the 76-year-old plaintive [sic] has been unlawfully deprived of liberty to access lawful age pension and Medicare entitlements needed for her very existence for 7 years, thereby causing critical economic loss.

5. Additionally, the plaintiff has been caused serious stress-related injuries to health by the Minister's unwarranted resistance to grant of the lawful visa, by the consequent threat of incarceration or deportation, and by the continuing evasions of responsibility for the grievances caused thereby.

6. The injuries include breast cancer and mastectomy, irritable bowel syndrome (IBS), severe heart arrhythmia and untreatable skin eczema of the scalp and legs. None of the conditions existed prior to the visa application, all developed during the stressful visa process, none revealed any physical or disease causes upon exhaustive medical examinations, and all are recognised widely by health authorities as being attributable to prolonged, severe stress.

7. The plaintiff therefore submits that clear cause of action exists in support of her damages claims."

Then, -

Paragraphs 8 – 11, under the subheading "Right of action", consisted of submissions as to why Ms Sochorova is entitled to redress at common law;

Paragraphs 12 – 13, under the subheading "Defence", consisted of submissions in response to anticipated arguments of law on behalf of the respondent;

Paragraphs 14 – 18, under the subheading "Damages", consisted of a mix of factual assertions and argument.

The pleading concluded –

"**Summary**

In summary, the plaintiff submits that:

1. The Honourable Court has jurisdiction to hear the plaintiff's case at common law;

2. The plaintiff's cause of action is clear;

3. The plaintiff's right of action is clear;

4. The Plaintiff's entire 11-year case has been administered in bad faith and is not subject to statutory appeal limitations;

5. The plaintiff's grievances are severe and urgent.

Relief sought

The plaintiff claims the following relief:

1. general damages of $143,977 for unlawful derivation [sic] of 7 years' age pension, calculated at: $18,229 p.a. single age pension rate x 7 years @ 4% p.a. inflation = $143,977

2. general damages of $19,175 for unlawful deprivation of 7 years' reimbursable medical costs,

3. aggravated damages of $550,000 for serious stress-related injury to health, calculated at the minimal level of damages awards of this class, of $50,000 p.a. x 11 years = $550,000.

4. exemplary damages of $550,000, equal and additional to the aggravated damages."[28]

The decision of the primary judge[29]

[38] The primary judge began his discussion by observing –

"[10] By her substituted Statement of Claim the plaintiff identifies her cause of action as being based on –

(a) Negligence - by reason of a breach of duty on the part of the Migration Review Tribunal (MTR) and/or departmental officers failing to comply with specific provisions of the *Migration Act* 1958 (Cth); and

(b) Misfeasance - in the form of unlawful decisions, excessive delays and unwarranted bureaucratic and legal acts such matters having been done in bad faith.

[11] The damages alleged to have been sustained include –

(i) Monetary loss by being deprived of access to welfare benefits including health care in the total sum of $163,152 ($143,977 + $19,175).

(ii) General and aggravated damages for personal injuries

(iii) Exemplary damages."

[39] His Honour made these points –

Aggravated and exemplary damages are not available in respect of personal injuries by reason of s 52 of the *Civil Liability Act* 2003 (Qld);

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28 Sochorova AR 108 - 109.

29 Sochorova AR 141 – 151.

Any claim for damages for personal injury could not proceed because of non-compliance with the pre-litigation requirements of the *Personal Injuries Proceedings Act* 2002 (Qld) ("*PIPA*");

The limitation period prescribed by the *Limitation of Actions Act* 1974 (Qld) for commencing a proceeding for damages for personal injury had expired;

Ms Sochorova's difficulties in pursuing any claim for damages arose from the immunity against suit given to courts and tribunals and the protection given to public officers in the performance of their official duties.

[40] He then discussed false imprisonment, the claims against the MRT and the claims against departmental officers, before concluding –

> "[26] The present Statement of Claim does not identify facts upon which the plaintiff can succeed in a common law claim for damages; nor indeed, is any such cause of action discernible in the extensive other material produced before me. Much of that material remains uncontradicted. That might be because it was not necessary for the defendant to traverse most of the allegations. Nevertheless, it must be observed that the raw facts suggest a bureaucratic disregard of the rights and expectations of persons in the plaintiff s position. This is properly a matter for consideration by the CDDA scheme which I am informed is still to determine the plaintiff s claim under the scheme.
>
> [27] In the circumstances the plaintiff has not demonstrated a right to claim damages at common law. Consequently, I am left to conclude that the plaintiff 'has no real prospects of success' in the claim as presently framed such as would allow summary judgment pursuant to R 293 of UCPR if the defendant has filed a defence. *Deputy Commissioner of Taxation v Salcedo*.[30] In this instance the defendant seeks judgment pursuant to r 658 which provides a general power to determine a proceeding at any stage of that proceeding. The power to do so exists also in the Court's inherent jurisdiction to prevent an abuse of its process. *Von Risefor v Perinanent Trustee Co Pty Ltd*.[31] On either approach, I am satisfied that this claim should be determined by a final judgment of this Court. There is no basis for allowing the plaintiff to replead a case when there can not be shown any viable cause of action. There should be judgment for the defendant.
>
> [28] The defendant also seeks costs on an indemnity basis based on its having given notice to the plaintiff by letter dated 11 February 2011 that such would be sought having regard to the plaintiff being informed of its lack of prospects of success. It is inevitable that given the defendant's success in this matter it is entitled to costs but I decline to order that

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30 [2005] 2 Qd R 232.

31 [2005] 1 Qd R 681.

costs be payable on an indemnity basis. The standard order will apply."

Migration Review Tribunal

[41] The MRT is constituted by s 394 of the *Migration Act* 1958 (Cth). Its members are appointed by the Governor-General.[32] Its function is to review "MRT-reviewable decisions"[33] and for the purposes of such review it may exercise all the powers and discretions that are conferred by the act on the person who made the decision. It may affirm or vary a decision, set a decision aside and substitute another, or in some cases remit a matter for reconsideration in accordance with its directions or recommendations. It must not purport to make a decision that is not authorised by the act or regulations.[34] By s 353 –

> "**353 Tribunal's way of operating**
>
> (1) The Tribunal shall, in carrying out its functions under this Act, pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.
>
> (2) The Tribunal, in reviewing a decision:
>
> (a) is not bound by technicalities, legal forms or rules of evidence; and
>
> (b) shall act according to substantial justice and the merits of the case."

[42] Ms Sochorova pleaded –

(a) that the MRT breached "a primary duty of care to fully comply with all law" by consistently breaching specific provisions of the *Migration Act* for seven years; and

(b) that its conduct in relation to the visa and her quest for redress demonstrated bad faith and misfeasance over 11 years.

[43] The claim is against the Commonwealth as respondent, not against the members of the MRT. If, which is not clear, the underlying premise of the claim is that the respondent is vicariously liable for torts committed by members of the MRT, it is misconceived for at least a couple of reasons. First, as the members of the MRT have immunity from liability, there is no liability for which the respondent could be vicariously liable. Secondly, rather than there being any relationship between the respondent and the MRT or its members of the type necessary for vicarious liability,[35] the MRT is a tribunal independent of the respondent, constituted for the very purpose of reviewing decisions by the respondent's officers.

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32 *Migration Act* 1958 (Cth) s 396.

33 *Migration Act* 1958 (Cth) s 348.

34 *Migration Act* 1958 (Cth) s 349.

35 See Atiyah *Vicarious Liability in the Law of Torts* (1967) at 1 where the following appears: "Vicarious liability in the law of tort may be defined as a liability imposed by the law upon a person as a result of (1) a tortious act or omission by another, (2) some relationship between the actual tortfeasor and the defendant whom it is sought to make liable, and (3) some connection between the tortious act or omission and that relationship. In the modern law there are three and only three relationships which satisfy the second requirement of vicarious liability, namely that of master and servant, that of principal and agent, and that of employer and independent contractor."

[44] By s 373(1) of the *Migration Act* –

> "373 (1) A member [of the MRT] has, in the performance of his or her duties as a member, the same protection and immunity as a member of the Administrative Appeals Tribunal."

Section 60(1) of the *Administrative Appeals Tribunal Act* 1975 (Cth) provides –

> "60 (1) A member [of the AAT] has, in the performance of his or her duties as a member, the same protection and immunity as a Justice of the High Court."

[45] As the primary judge explained, a judge's immunity is conferred by the common law. In *R v Skinner*[36] Lord Mansfield said –

> "… neither party, witness, counsel, jury or Judge, can be put to answer, civilly or criminally, for words spoken in office."

In *Mann v O'Neill*[37] Gummow J described that immunity as responding to two related considerations, "to assist full and free access to independent courts for the impartial quelling of controversies, without fear of the consequences" and "the avoidance of the re-agitation by discontented parties of decided cases after the entry of final judgment" other than by the appellate processes. That was a case in which the immunity was asserted by a party to litigation. But his Honour went on the say[38] –

> "Where the reliance is by a judicial officer, the immunity also gives effect to the particular public interest in securing the utmost freedom to those who preside over judicial proceedings, subject only to the constitutional or other remedies for removal from office."

Observations to the same effect were made in *D'Orta-Ekenaike v Victoria Legal Aid*.[39]

[46] Ms Sochorova complains of egregious delays and procedural and legal errors on the part of the MRT which, she contends, are indicative of the exercise of its statutory powers in bad faith.[40] As I understand her pleading, she has alleged that the MRT exercised its powers contrary to law and with the intention of harming her. She has not pleaded that it acted beyond its powers. Even if an inference of bad faith could be drawn from one or more of the alleged transgressions (either severally on in combination), that would be insufficient to deny members of the MRT the immunity from suit they would otherwise have. In *Fingleton v The Queen*[41] Gleeson CJ said –

> "[37] An allegation of judicial misconduct by a dissatisfied litigant often, perhaps even typically, will be accompanied by an accusation of malice or want of good faith in the exercise of judicial authority. In *Re McC (A Minor)*,[42] Lord Bridge of Harwich said:

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36 (1772) Lofft 54 at 56; 98 ER 529 at 530.
37 (1997) 191 CLR 204 at 239; [1997] HCA 28.
38 At 239 – 240.
39 (2005) 223 CLR 1 at 18 -20; [2005] HCA 12.
40 Statement of claim paragraph 13: AR 107.
41 (2005) 227 CLR 166 at 185 – 186.
42 [1985] AC 528 at 540; [1984] 3 WLR 1227.

> 'It is, of course, clear that the holder of any judicial office who acts in bad faith, doing what he knows he has no power to do, is liable in damages. If the Lord Chief Justice himself, on the acquittal of a defendant charged before him with a criminal offence, were to say: 'That is a perverse verdict', and thereupon proceed to pass a sentence of imprisonment, he could be sued for trespass. But, as Lord Esher MR said in *Anderson v Gorrie*:[43] 'the question arises whether there can be an action against a judge of a court of record for doing something within his jurisdiction, but doing it maliciously and contrary to good faith. By the common law of England it is the law that no such action will lie.'

[38] This immunity from civil liability is conferred by the common law, not as a perquisite of judicial office for the private advantage of judges, but for the protection of judicial independence in the public interest. It is the right of citizens that there be available for the resolution of civil disputes between citizen and citizen, or between citizen and government, and for the administration of criminal justice, an independent judiciary whose members can be assumed with confidence to exercise authority without fear or favour. As O'Connor J, speaking for the Supreme Court of the United States, said in *Forrester v White*,[44] that court on a number of occasions has 'emphasised that the nature of the adjudicative function requires a judge frequently to disappoint some of the most intense and ungovernable desires that people can have'. She said that '[i]f judges were personally liable for erroneous decisions, the resulting avalanche of suits ... would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits'.

[39] This does not mean that judges are unaccountable. Judges are required, subject to closely confined exceptions, to work in public, and to give reasons for their decisions. Their decisions routinely are subject to appellate review, which also is conducted openly. The ultimate sanction for judicial misconduct is removal from office upon an address of Parliament. However, the public interest in maintaining the independence of the judiciary requires security, not only against the possibility of interference and influence by governments, but also against retaliation by persons or interests disappointed or displeased by judicial decisions."

[47] Ms Sochorova endeavoured to circumvent this immunity by arguing that individual members of the MRT had not been at fault. In her written submissions on appeal she said –

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43 [1895] 1 QB 668 at 670.

44 (1988) 484 US 219 at 226–227; [1998] USSC 3.

> "**J. MRT immunity against suit**
>
> 51. The respondent's claim that MRT officers have immunity against suit is not relevant to the appellant's claim, on the following grounds:
>
> a) The appellant's claim is not against individual MRT officers; it is against the Commonwealth.
>
> b) MRT officers were doing their job according to unauthorised internal departmental policy of denying the appellant's visa on mature age grounds: it is the policy that is at fault, not individual officers.
>
> c) Responsibility for the MRT's defective decisions lies with the Department's unauthorised policy.
>
> d) Ultimately, that responsibility passes to the Commonwealth, to which the appellant's claim is directed."

[48] She made a similar submission in her reply to the respondent's outline of submissions, where she said -

> "34. In its function the MRT is bound by the Migration Act, Migration Regulations and DIAC policies, provided the policies are *'not inconsistent'* with the Act.
>
> 35. As shown in 18-20, MRT officers were doing their job according to unauthorised DIAC policy of denying the appellant's visa on mature age grounds. Such a policy clearly is inconsistent with the Act. In short, it is the policy that is at fault, not individual MRT officers.
>
> 36. For this reason, responsibility for the damages caused by MRT's defective conduct passes to DIAC, against which the appellant's claim is actioned.
>
> 37. MRT officers' immunity against suit therefore is not relevant to the appellant's case."

[49] In short, she submitted that the fault lies with the respondent which (through its relevant department) formulated a policy inconsistent with the Act and regulations. However, that is not what she pleaded in her statement of claim. Further, if the tribunal decided issues in accordance with a departmental policy that was inconsistent with the act and regulations, that was a matter for correction by the Federal Court on appeal from the MRT. Ms Sochorova cannot seek redress for the consequences of such error in the guise of an action against the respondent for negligence or misfeasance in public office.

[50] The primary judge was correct to strike out Ms Sochorova's claim in so far as it was based on conduct of the MRT.

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[51] Having found that, in so far as they were based on the conduct of the MRT, Ms Sochorova's claims could not succeed because of statutory immunity from suit,

the primary judge turned his attention to the claims based on the conduct of departmental officers. Again, the causes of action on which Ms Sochorova relied were negligence and misfeasance in public office.

Negligence

[52] Ms Sochorova's claim in negligence is not well articulated, but seems to come down to this: that officers of the Department were negligent in not making decisions within a reasonable time.

[53] Counsel for the respondent submitted that the only delays for which the Department might be responsible were from 14 July to 25 October 1999, from 28 January to 11 April 2005, and from 3 to 23 March 2006, and that there was nothing unreasonable in those time frames in assessing Ms Sochorova's application.[45] Whether there was undue delay on the part of the Department is a question of fact, not for determination by the primary judge in the applications which were before him or by this court on appeal from his Honour's decision. For present purposes, it must be assumed that Ms Sochorova could establish that there were undue delays on its part.

[54] The primary judge said –

> "[23] As to the liability of departmental officers, the plaintiff, again anticipating the likely defence, raises the issue of good faith. The principles concerning liability of public officers are quite clear. The officers are required to work within a statutory framework. Their decisions are subject to a right of review – a right which the plaintiff herself exercised on a number of occasions. That being so, where the decision maker exercises the power in good faith, that exercise will not give rise to a common law duty of care."

In *Jones v Department of Employment*[46]a claimant for unemployment benefit was denied the benefit by a departmental officer. That decision was reversed on appeal, but in the meantime the claimant suffered loss by reason of the delay. He commenced proceedings claiming damages for loss caused by the negligence of the defendant and its employee the adjudication officer: he alleged that the adjudication officer was negligent in reaching his decision to disallow the benefit, and that the department was itself negligent in failing to review that decision once further evidence had been put before it by his solicitors. In allowing an appeal against the primary judge's decision refusing to strike out the claim, Glidewell LJ said -[47]

> "The question thus is whether, taking all these circumstances into account, it is just and reasonable that the adjudication officer should be under a duty of care at common law to the claimant to benefit. Having regard to the non-judicial nature of the adjudication officer's responsibilities, and in particular to the fact that the statutory framework provides a right of appeal which, if a point of law arises, can eventually bring the matter to this court, it is my view that the adjudication officer is not under any common law duty of care."

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45 Transcript of Appeal pages 1-23 – 1-25.

46 [1989] QB 1; [1988] 2 WLR 453.

47 [1989] QB 1 at 22.

In the present case the primary judge cited what Glidewell LJ said in *Jones* with approval, and referred to there being a number of Australian decisions in which that determination had been followed, in particular *Scott v Secretary, Department of Social Security*,[48] *Scott v Pedler*,[49] and *Pickering v Centrelink*.[50]

[55] In *Scott v Secretary, Department of Social Security* the Full Court of the Federal Court dismissed an appeal against a claim for (inter alia) damages for negligence and for misfeasance in public office arising out of decisions rejecting claims for a disability support pension and a wife pension. The primary judge had rejected the allegations of malicious, conspiratorial conduct, describing them as completely without foundation.

[56] In the Full Court Beaumont and French JJ held that there was no general common law duty of care to advise the appellants of benefits that might potentially be available for them. Of significance to the present case, their Honours went on to say –

> "For completeness, we should mention one matter raised by the appellants in the course of their argument. They suggested that they could claim damages in negligence for failure to process their claims for pension with due expedition. We see no basis for such a claim on the facts. But, in any event, our view is that such a claim, that is, for damages for alleged negligence of that kind, is not sustainable. It is true that mandamus or a similar form of judicial review will be ordered where a public duty has not been performed within a reasonable time, compelling the specific performance of that function forthwith (see *Re Federal Commissioner of Taxation: Ex parte Australena Investments Pty Ltd & Ors*[51] and *Thornton v Repatriation Commission*[52]). <u>But, absent a claim for misfeasance (see above), common law damages cannot be claimed merely for failure to act with due expedition</u>." [53] (Emphasis added)

[57] Finkelstein J did not dissent in the outcome of the appeal. Relevantly to the present case, his Honour referred obiter to a number of High Court decisions as suggesting –

> "…that a duty of care would exist in the present case, both as to the manner in which a claim for a benefit is processed and for the failure to process a claim with due expedition."

His Honour continued –

> "In this regard the following matters would be important. The respondent's functions are not inconsistent with the existence of a duty of care. The respondent is responsible for the general administration of the *Social Security Act*: s 1295. He must consider each application for a claim and if an applicant satisfies the

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48 [2000] FCA 1241.
49 [2004] FCAFC 67.
50 [2008] FCA 561.
51 (1983) 50 ALR 577.
52 (1981) 35 ALR 485.
53 [2000] FCA 1241 at [24].

> necessary criteria, he must ensure that the benefit is paid. Applicants who are entitled to benefits of the kind payable under the *Social Security Act* are generally in a vulnerable position. A duty to consider a claim for a benefit and the obligation to process the claim are not legislative in character. There is no reason in policy why a duty of care should not be owed. It is reasonably foreseeable that a person who is wrongly deprived of a benefit to which he or she is entitled, or who endures unreasonable delay in the receipt of a benefit, may suffer physical harm." [54]

[58] Ms Sochorova's claim is, in essence, for damages for personal injuries and for economic loss. As I shall explain, the claim for damages for personal injuries cannot succeed because of non-compliance with the pre-litigation requirements of *PIPA*. That leaves the claim for economic loss (age pension benefits and Medicare benefits).

[59] In *Meshlawn Pty Ltd v State of Queensland*[55] this court considered whether the respondents owed the appellants a common law duty of care in the chief executive of the Liquor Licensing Division (the second respondent)'s exercise of discretionary power under the *Liquor Act* 1992 (Qld) to renew or refuse to renew the appellants' extended hours permits. The appellants' loss was purely economic: the loss of profits from the sale of alcohol during the extended hours.

[60] After referring to the High Court's decision in *Stuart v Kirkland-Veenstra*,[56] Chesterman JA said –

> "[63] What is required then is an examination of the nature of the relationship, created by the statute in question, between the proponent of the duty who claims to have been damnified by its breach, and the exerciser of the power which is said to have been exercised, or not exercised, negligently. The relationship must be of a type which makes it appropriate to recognise the existence of a duty of care. The existence of the power to act is not by itself enough, even if it be recognised that without the exercise of the power damage will ensue. 'Control' by the exerciser of the power, and 'vulnerability' of the person damnified are indications of the requisite relationship. Probably more important is whether the propounded duty sits consistently with the statutory power. That in turn calls for an examination of the identity of those meant to be benefited by the power; the nature of the power, and the statutorily identified circumstances in which the power is to be exercised and the manner in which it is to be exercised."

Later his Honour said –

> "[92] Much the same analysis applies to the question of vulnerability. The trial judge thought the appellants were not vulnerable to the exercise of power by the chief

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54 [2000] FCA 1241 at [31] and [32].

55 [2010] QCA 181.

56 (2009) 237 CLR 215.

executive because of their right of appeal to the Tribunal. His Honour referred to *Jones v Department of Employment*[57] and *Coshott v Woollahra Municipal Council*[58] for that proposition.

[93] In *Jones* Glidewell LJ (with whom Slade LJ and Caulfield J agreed) said:[59]

> 'Having regard to the non-judicial nature of the adjudication officer's responsibilities, and in particular to the fact that the statutory framework provides a right of appeal which, if a point of law arises, can eventually bring the matter to this court, it is my view that the adjudication officer is not under any common law duty of care. …
>
> Indeed, in my view, it is a general principle that, if a government department or officer, charged with the making of decisions … is subject to a statutory right of appeal against his decisions, he owes no duty of care in private law. Misfeasance apart, he is only susceptible in public law to judicial review or to the right of appeal provided by the statute under which he makes his decision'.

[94] In *Coshott*, Wood J thought that the right of appeal against a local authority's deemed refusal of a development application was inconsistent with any general duty of care that the Council would process such applications promptly.

[95] I agree with Applegarth J [the trial judge] that those authorities indicate that the existence of a right of appeal against a bureaucratic decision is inconsistent with the existence of a duty of care in negligence and removes any vulnerability a citizen might have in relation to the decision maker. By legislating for a right of appeal, in this case on the merits and by way of a hearing *de novo*, the Act both specifies what remedy is available to an aggrieved party by reason of the erroneous exercise of power by the chief executive and indicates that the statutory remedy is sufficient for the purpose. The right of appeal obviates the need for a cause of action in negligence."

[61] The President considered that the existence of an appeal process from the decision of the chief executive in refusing or granting an application for an extended hours permit was not a factor weighing heavily against her owing a duty of care to the appellants.[60]

[62] Referring to Chesterman JA's reasons for judgment, Fryberg J said –

> "[131] With respect I disagree with his Honour's treatment of the decisions in *Jones v Department of Employment*[61] and

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57 [1989] QB 1.
58 (1988) 14 NSWLR 675.
59 [1989] QB 1 at 22.
60 [2010] QSC 181 at [19].
61 [1989] QB 1.

Coshott v Woollahra Municipal Council.[62] In my judgment those cases do not indicate that the existence of a right of appeal against a bureaucratic decision is inconsistent with the existence of a duty of care in negligence. *Jones* is distinguishable on at least two grounds:

- Section 117 of the *Social Security Act* under consideration in that case provided that 'the decision of any claim or question in accordance with this Act shall be final'. That section was held to prohibit a common law action because such an action would involve a challenge to the finality of the decision.
- The appeal tribunal in that case was empowered to award the plaintiff everything which he could have obtained by the bureaucratic decision. The plaintiff was only temporarily deprived of his money. In the present case the plaintiff suffered a substantial loss irrecoverable on appeal.

Quite apart from the question of duty, it is difficult to see how a plaintiff who had not exercised his right of appeal could prove causation in circumstances such as those in *Jones*.

[132] It is true that the dictum contained in the last paragraph quoted by Chesterman JA from the reasons for judgment of Glidewell LJ[63] is very widely expressed. I note that Slade LJ was not prepared to employ that language.[64] With the utmost respect, I do not think that paragraph represents the law in Australia.

[133] In *Coshott*, Wood J held that the existence of a duty in the terms alleged by the plaintiff was inconsistent with the relevant Act. The case is not in my judgment authority for any wider proposition."

[63] In my view, Ms Sochorova's claim for negligence ought not to have been struck out by the primary judge. Rather, his Honour ought to have allowed her to replead that claim, except in so far as it is a claim for damages for personal injuries.

[64] My reasons are as follows –

(a) Before this court counsel for the respondent referred to *Meshlawn*, but there was no in depth analysis of the statutory scheme under the *Migration Act*.

(b) Although Ms Sochorova's allegation of negligence is cast very widely and poorly articulated (very probably because it has been drawn by Mr Moder who is not legally qualified), the possibility of her establishing negligence is not so remote that it can be discounted for present purposes.

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62 (1988) 14 NSWLR 675.

63 Paragraph [93].

64 [1989] QB 1 at 23.

(c) Whether, on analysis of the statutory scheme and the facts, this court should follow Glidewell LJ's dictum if it is prima facie applicable was not fully argued.

Misfeasance in public office

[65] In *Northern Territory v Mengel*[65] Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ observed that the precise limits of the tort are still undefined. Their Honours continued –

> "However, the weight of authority here and in the United Kingdom is clearly to the effect that it is a deliberate tort in the sense that there is no liability unless either there is an intention to cause harm or the office concerned knowingly acts in excess of his or her power." (Citations omitted.)

[66] In *Three Rivers District Council v Governor and Company of the Bank of England*[66] Lord Steyn identified the elements of the tort of misfeasance in public office as –

(a) the defendant must have been a public officer;

(b) the impugned act must have involved the exercise of power as a public officer;

(c) the defendant must had had the requisite state of mind:

(i) targeted malice – a specific intention to injure a person or persons; or

(ii) knowledge that he had no power to do the act complained of and that it would probably injure the plaintiff. This was said to involve "bad faith" in as much as the public officer did not have an honest belief that the act was lawful.

[67] In *Mengel* the majority said - [67]

> "The cases do not establish that misfeasance in public office is constituted simply by an act of a public officer which he or she knows is beyond power and which results in damage. Nor is that required by policy or by principle. Policy and principle both suggest that liability should be more closely confined. So far as policy is concerned, it is to be borne in mind that, although the tort is the tort of a public officer, he or she is liable personally and, unless there is de facto authority, there will ordinarily only be personal liability. And principle suggests that misfeasance in public office is a counterpart to, and should be confined in the same way as, those torts which impose liability on private individuals for the intentional infliction of harm."

Where liability turns on the public officer being actuated by an intention to harm the plaintiff, it is not necessary to establish that the officer knew that he or she

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65 (1995) 185 CLR 307 at 345; [1995] HCA 65; See also *Sanders v Snell* (1998) 196 CLR 329 at 346; [1998] HCA 64.

66 [2003] 2 AC 1; [2001] UKHL 16; *Sanders v Snell (No 2)* (2003) 130 FCR 149 at [96]; [2003] FCAFC 150.

67 At 347.

lacked authority.[68] Where liability turns on the officer knowingly acting in excess of power, actual knowledge of the lack of power and a foreseeable risk of harm must be established.[69] The primary judge said –

> "[25] The present Statement of Claim does not identify any conduct upon which the plaintiff could rely to establish this tort. Nor in the lengthy document headed Annexure A to the affidavit of the plaintiff relied on in the Federal Magistrates Court proceedings, is there any specific allegation of misfeasance. There are allegations against identified officers failing to have regard to specified information which was the subject of the complaint to the MRT. The success in those referrals and in appeals to the Federal Court does not of itself support the contention that there was any misfeasance on the part of departmental officers. There are breaches of the most egregious delays [which] appear to have been the delay in the initial determination by MRT (22 November 1999-19 December 2001), the delay in relisting before the MRT after the Federal Court judgment (14 November 2003-23 November 2004) and the delay consequent upon the fee waiver refusal (26 April 2005-11 January 2006). However reprehensible the conduct of whichever departmental officers may have caused delays of this kind, there has not been shown that necessary element of an officer knowingly acting in excess of his or her power. In short, the plaintiff's Statement of Claim does not show a basis for this cause of action, and so the claim in respect of it ought to be struck out."[70]

[68] Ms Sochorova's complaint is about the way the department exercised its statutory powers. She has alleged that it exercised its powers contrary to law and in bad faith.

[69] In her written submissions on appeal Ms Sochorova said –

> "**E. The Department's breaches of law and bad faith**
>
> 24. Over the 7-year visa process the Department committed 9 breaches of immigration statutes, breaches of natural justice, 6 attempts to deny judicial appeals, 4 excessive delays and other acts in bad faith and malfeasance, all intended at denying the appellant a lawful visa. These events are itemised in ANNEXURE A of the appellant's Statement of Claim. Every event is evidenced by relevant decisions, letters, court rulings and other documented material, compiled in a Court Book submitted to the Court.
>
> 25. The appellant submits that:
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> a) It is fundamental to the rule of law that <u>all persons</u>, particularly public officers, carry a primary duty of

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68 *Mengel* at 348.

69 *Mengel* at 347 – 348. See also Davis "Misfeasance in Public Office, Exemplary Damages and Vicarious Liability" (2010) 64 AIAL Forum 59 at 60 and the cases cited there.

70 Sochorova AR 149, paragraph [25].

care to fully comply with all law, whether or not that duty is expressly specified by statute, otherwise the law could be ignored at will and become pointless.

b) It is simply not credible to hold that trained and experienced immigration officers would consistently commit prima facie breaches of immigration law 'by mistake'. Plainly, the officer knew, or should have known, they were breaking the law, thus demonstrating bad faith.

c) Taken individually, the various other defective acts could at first glance be seen merely as a series of unrelated innocent mistakes. Viewed in context of the entire 7-year visa process as a whole, however, these acts reveal a consistent pattern of adversarial conduct by the Department, intended to deny the appellant a lawful visa.

d) Since adversarial processing of visas is not authorised by any provision of the Migration Act, these acts again demonstrate bad faith.

e) Also, the defective acts cannot be seen as minor, or of no major significance, because any one of these misdeeds, if left unchallenged, would have resulted in the plaintiff incarcerated or deported.

f) Further, all the acts worked against the appellant. Had they been merely innocent errors, then, by the laws of chance, half would have been for the appellant, and half against.

g) Finally, internal departmental documents reveal that the Department refused the visa on mature age grounds, a criterion not authorised under Migration Act.

26. In light of the above, it is submitted that the appellant's entire 7-year visa process was administered in breach of law and bad faith." (Emphasis added.)

[70] As the High Court observed in *Mengel*, the tort of misfeasance in public office is the tort of an individual public officer, for which he or she is personally liable. It is not the tort of the public officer's employer. In the present context, the defendant (the Commonwealth) would not be vicariously liable for its officers' intentional conduct, unless it authorised that conduct.[71] That is not the case that has been pleaded.

[71] Ms Sochorova's pleading is premised on a fundamental misconception of the tort of misfeasance in public office.

[72] She has not pleaded that one or more officers knowingly acted in excess of their powers. Even if an inference of bad faith on the part of an individual officer could

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[71] See *Mengel* at 347; *Rogers v Legal Services Commission* (1995) 64 SASR 572 at 587; Davis "Misfeasance in Public Office, Exemplary Damages and Vicarious Liability" (2010) 64 AIAL Forum 59 at 64. See also *New South Wales v Lepore* (2003) 212 CLR 511.

be drawn from a multiplicity of errors by that officer over a period of time, that is not the case that has been pleaded.

[73] Paragraph 13(a) of the statement of claim seems to be an allegation that bad faith can be inferred from the multiplicity of errors by the department and the MRT over seven years. However, a case of misfeasance in public office cannot be built upon a foundation that is a composite of the conduct of a number of individual officers, let alone a department or a statutory tribunal.

[74] In short, I consider that the primary judge was correct to strike out the claim for misfeasance in public office.

Deprivation of liberty

[75] In paragraphs 8 – 11 of her statement of claim, Ms Sochorova argued that the delay in granting her visa, her being denied access to the age pension and Medicare benefits, and the "consequent threat of incarceration or deportation" constituted a form of deprivation of liberty. She seemed to characterise her claim as one for damages for unlawful deprivation of liberty, and said in paragraph 11 –

> "11. The plaintiff therefore submits that her damages claims are beyond the scope of statutory appeal limitations and must be determined at common law according to norms of natural justice."

[76] The primary judge was correct when he said that there is simply no factual basis for any allegation of wrongful imprisonment.[72]

***Personal Injuries Proceedings Act* 2002 (Qld)**

[77] The respondent is the Commonwealth of Australia, and so the Supreme Court of Queensland is exercising federal jurisdiction in this matter.[73] *PIPA* applies to the appellant's claim in so far as it is a claim for damages for personal injuries.[74]

[78] Ms Sochorova did not give the respondent a notice of claim pursuant to s 9 of *PIPA* before commencing this proceeding. Section 7 makes the requirement to give the notice pursuant to s 9 a provision of substantive law; it must therefore be complied with before valid proceedings can be instituted.[75] Further, s 18 provides that a claimant who fails to give a notice of claim complying with the legislative requirements, may not proceed further with the claim except in certain defined circumstances (none of which arose in the present case).

[79] Section 6(3)(a) of *PIPA* provides –

> "6(3) Also, this Act does not apply to—
>
> (a) personal injury in relation to which a proceeding was started in a court, including in a court outside Queensland or Australia, before 18 June 2002; or..."

[80] Ms Sochorova's submission that *PIPA* does not apply to her claim because her proceeding was commenced in the Federal Court in January 2002 is misconceived.

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72 Sochorova AR 146 para [18].

73 *Constitution* (Cth) s 75(iii); *Judiciary Act* 1903 (Cth) ss 39(2), 56(1)(b).

74 *Judiciary Act* (Cth) s 65; *Martens v Stokes* [2012] QCA 36.

75 *State of Queensland v Coffey* [2005] QSC 212 at [6]; *Holmes v Adnought Sheet Metal Fabrications Pty Ltd* [2004] 1 Qd R 378 at [22] – [26].

The Federal Court proceeding was an appeal against a decision of the MRT, not a proceeding in which she claimed damages for personal injuries.

[81] As Ms Sochorova did not comply with the pre-litigation requirements of *PIPA*, she was not entitled to commence this proceeding in so far as it is a claim for damages for personal injuries.

***Civil Liability Act* 2003 (Qld)**

[82] Section 52 of the *Civil Liability Act* 2003 (Qld) applies in relation to a breach of duty happening after 9 April 2003.[76] It provides –

> "**52 Exemplary, punitive or aggravated damages can not be awarded**
>
> (1) A court can not award exemplary, punitive or aggravated damages in relation to a claim for personal injury damages.
>
> (2) Subsection (1) does not apply to a claim for personal injury damages if the act that caused the personal injury was—
>
> (a) an unlawful intentional act done with intent to cause personal injury; or
> (b) an unlawful sexual assault or other unlawful sexual misconduct."

[83] The dictionary in schedule 2 to that act contains the following definitions –

> "***personal injury includes***—
> (a) fatal injury; and
> (b) pre-natal injury; and
> (c) psychological or psychiatric injury; and
> (d) disease."
>
> ***"personal injury damages"*** means damages that relate to the death of or injury to a person."

[84] In so far as Ms Sochorova's claim is for "stress-related injury to health", it is a claim for "personal injury damages" within the meaning of that act. As the primary judge said, there is no suggestion anywhere in the material that the illnesses of which she complains in general terms were caused in circumstances where subsection (2) of s 52 applies.[77]

[85] It follows that even if she were not faced with the insurmountable hurdle of not having complied with the pre-litigation requirements of *PIPA*, she could not recover aggravated or exemplary damages for personal injuries.

***Limitation of Actions Act* 1974 (Qld)**

[86] The limitation period for a claim for damages for personal injuries is three years from the accrual of the cause of action.[78] Otherwise, the limitation period for a claim in tort is generally six years from the accrual of the cause of action.[79]

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76 *Civil Liability Act* 2003 (Qld) s 4(4). The date of assent was 9 April 2003.
77 Sochorova AR 145 para [13].
78 *Limitation of Actions Act* 1974 (Qld) s 11.
79 *Limitation of Actions Act* 1974 (Qld) s 10.

[87] Whether Ms Sochorova's claim in negligence (except in so far as it relates to damages for personal injuries), is statute barred cannot be determined on the present state of her pleading.

Mr Moder's appeal

[88] In his statement of claim Mr Moder described his claim as one for –

> "secondary economic loss and disruption to normal life ... by way of ... having to remedy and make good the loss and harm caused Ms Sochorova."[80]

[89] Even if Ms Sochorova has a cause of action in negligence, it does not necessarily follow that Mr Moder has a right to "secondary damages". No cause of action is disclosed on his pleading.

[90] Mr Moder's claim and statement of claim were properly struck out.

Conclusion

[91] I respectfully agree with the primary judge's observation that the raw facts of this matter suggest a bureaucratic disregard of the rights and expectations of persons in Ms Sochorova's position.[81] However, such disregard does not per se sound in common law damages.

[92] Ms Sochorova has failed to plead a viable cause of action. In my view she should be given a further opportunity to plead a case in negligence, except in relation to a claim for damages for personal injuries and except in relation to a claim based on acts, omissions or alleged breaches of the *Migration Act* 1958 (Cth) by the Migration Review Tribunal. Otherwise, her appeal should be dismissed.

[93] The parties to Ms Sochorova's appeal should make written submissions as to the costs of the appeal, in accordance with Practice Direction No 2 of 2010 (paragraph 52).[82]

[94] Mr Moder's appeal should be dismissed with costs.

Orders

[95] I would make the following orders –

In CA 5451/11 (*Terezie Sochorova v Commonwealth of Australia)* –

1. Appeal allowed.
2. Set aside the order striking out the claim and statement of claim.
3. Instead, order that the statement of claim be struck out.
4. Order that the appellant have leave to file and serve an amended statement of claim in respect of her claim for damages for negligence, which amended statement of claim may not include a claim for damages for personal injuries or be based on acts, omissions or alleged breaches of the

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80 Moder AR 9 para 3.
81 Sochorova AR 150 para [26].
82 [2010] 1 Qd R 462.

provisions of the *Migration Act* 1958 (Cth) by the Migration Review Tribunal, within six weeks.

5. The parties are to provide written submissions as to costs in accordance with Practice Direction No 2 of 2010 paragraph 52.

In CA 5450/11 *(Joseph Moder v Commonwealth of Australia)*-

Appeal dismissed with costs.