

IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
CIVIL DIVISION
DAMAGES

Revised

Case No. CI-05-01722

LIAM NEALE MAGILL

Plaintiff

v

COMMONWEALTH OF AUSTRALIA

Defendant

JUDGE: HIS HONOUR JUDGE ANDERSON
WHERE HELD: Melbourne
DATE OF HEARING: 26 & 27 September, 13 & 16 October 2006
DATE OF JUDGMENT: 31 October 2006
CASE MAY BE CITED AS: Magill v. Commonwealth of Australia
MEDIUM NEUTRAL CITATION: [2006] VCC 1395

REASONS FOR JUDGMENT

Catchwords: Child support – Alleged delay in processing application by payer following submission of estimate of income – Whether Child Support Agency officers breached a duty of care owed to the plaintiff – Whether other actions by the Agency constituted an actionable abuse of statutory power – Child Support (Assessment) Act 1989.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Ms C. King as the holder of the Plaintiff's enduring Power of Attorney	
For the Defendant	Mr L. Maher	Australian Government Solicitor

HIS HONOUR:

- 1 Liam Magill commenced making payments of maintenance through the Child Support Agency in 1992. His former wife claimed maintenance in respect of three children she said were the children of the marriage. In March 2000, DNA testing ordered by the Family Court established that the plaintiff was the father of only one of the three children. On 27 September 2000, orders made by the Magistrates' Court at Dandenong terminated the entitlement for maintenance payments from the plaintiff in respect of the two younger children.
- 2 Issues have arisen in relation to the conduct of officers of the Child Support Agency which the plaintiff alleges gave rise to psychological injury entitling him to damages from the defendant.
- 3 The proceeding has been conducted by Ms Cheryl King, who holds an enduring Power of Attorney from the plaintiff. Ms King, on behalf of the plaintiff, had difficulty pleading the claim against the defendant. Initially I thought that the problem may have been in part due to the fact that a Freedom of Information application by the plaintiff had not then been finalised. Leave was given to amend the plaintiff's Statement of Claim but the resultant pleading, even with the benefit of access to the Child Support Agency files, was still unsatisfactory. The defendant made application by summons dated 27 April 2006 to strike out the proceeding as "*not disclosing a cause of action*", as being "*scandalous, frivolous or vexatious*" and as "*an abuse of the process of the Court*". That application was adjourned to the trial of the action and orders were made in an attempt to have the "liability" issues in the action articulated with sufficient precision for the trial to proceed relatively quickly.
- 4 This course of action involved a considerable degree of cooperation on the part of the defendant. Although the defendant did not abandon its argument that the plaintiff's claim as pleaded should be dismissed, it nevertheless consulted with Ms King to assist in the preparation of a Statement of Issues. The Commonwealth also assisted in the preparation of a Court Book of relevant documents to ensure that the matter

was brought to trial on the issues formulated by Ms King. These included one matter which had arisen after the issue of the Writ. During the course of the hearing, the defendant has generally facilitated the presentation of the case so that Ms King was not disadvantaged because of her inexperience with Court procedures.

5 On 14 August 2006, I ordered that, "*The trial initially be limited to a preliminary issue being whether the defendant is liable to the plaintiff in respect of the events generally described in the Amended Statement of Claim dated 27 February 2006 as refined in the list of issues prepared by the parties today limiting the claim to three specific events*". Ms King agreed that the list of issues raised the matters the plaintiff wished to prove in the proceeding as having given rise to the plaintiff's psychological injury.

6 The events described in the List of Issues prepared on 14 August 2006 were as follows:

- (1) *Delay in actioning request to correct over-deductions (CSA having assessed liability on the basis of actual income and Mr Magill having lodged estimates of income). Magill says CSA should have told him in June 1999 when he filed an estimate that it only covered until 30/6/99 rather than the upcoming financial year.*
- (2) *CSA's failure to make a greater alteration to Child Support Register upon the Child Support Review decided on 9/2/01 (refer LSF17 in affidavit of Lauren Fahey), such review application having been based on the fact that Mr Magill said the superannuation draw-downs should not have been assessed as income for child support purposes. Magill says adjustment should have been greater than \$2,931 (which was the amount required to discharge the arrears only) and should have taken into account the full amount of the super draw-downs, even if that had the effect of putting the account in credit/refund.*
- (3) *The interception in November 2005 of portion of Magill's tax refund based on an assessment of his entitlement payouts received by him in October 2004, those payouts having been declared in 2004/05 tax return and the new assessment*

arising from the lodging of such returns being in the approximate sum of \$1,100 per month. Magill says the intercepted funds should not have been passed onto the payee until the nature of his 2004/05 taxable income had been determined as part of his objection/review of the new assessment.

- 7 The basis of each of these claims and the causes of action relied upon were not clearly detailed in the Amended Statement of Claim. In the List of Issues, the plaintiff relied upon breach of duty of care (negligence) in respect of the first matter and abuse of statutory power in relation to the second and third matters.

Issue 1 - Delay amending assessment to reflect plaintiff's actual income for the financial year 1999/2000

- 8 On 11 June 1999, the plaintiff was told by his employer's pay officer that the child support deductions from his pay would increase from \$138 to \$553 per fortnight from 24 June 1999.
- 9 The increased deduction arose because the plaintiff's taxation assessment had become available and it contained taxable income which included a "one-off" advance payment of superannuation. The plaintiff was to pay part of the superannuation to his former wife by way of property settlement in accordance with consent orders made in Family Court proceedings.
- 10 The Child Support Agency increased the deductions to \$553.79 per week and later to \$578.17 per week until the assessment was changed by the Agency to take effect from 13 August 1999. At that stage, the fortnightly deductions were reduced from a deduction of \$578.17 up to the pay period to 18 August 1999, to a deduction of \$223.77 for each pay after 2 September 1999. It is necessary to examine what happened in this period from mid June to mid August 1999 as the plaintiff says it was the actions of the Child Support Agency officers during this period which caused him to suffer severe psychological injury. He alleges the actions of the Child Support Agency officers breached the duty of care that was owed to him.

- 11 There is a dispute on the evidence as to whether certain documents the Child Support Agency said they sent to Mr Magill were in fact received by him and whether during this period Mr Magill sent correspondence and made personal contact with Child Support Agency officers. Mr Magill disputes that he received a copy of a letter from the Deputy Child Support Registrar dated 10 March 1998, a copy of a letter from the Deputy Child Support Registrar dated 5 July 1998 enclosing a copy of the Child Support Handbook 1998-99, a Child Support Assessment dated 5 July 1998 for the period 1 July 1998 to 30 June 1999 issued by the Child Support Registrar, a letter from the Deputy Child Support Registrar dated 18 April 1999 containing a Child Support Assessment for the period 1 July 1999 to 30 September 2000, a letter from the Deputy Child Support Registrar dated 28 May 1999 enclosing a copy of a schedule of maintenance deductions (said to have been sent to the plaintiff's employer) and a letter from the Deputy Child Support Registrar to the plaintiff dated 16 August 1999 attaching certain documents.
- 12 For his part, the plaintiff said he sent by facsimile and then by mail a copy of a letter to the Child Support Agency's Box Hill office on 11 June 1999, and a further letter on 15 June 1999. Letters dated 8 July 1999 and 5 August 1999 were said to have been prepared by Ms King, signed by Mr Magill and faxed and then posted to the Child Support Agency at Box Hill. Mr Magill also said that he telephoned and visited the Child Support Agency office at Box Hill during this period. Although the office procedures of the Child Support Agency require it to log received mail, incoming calls and telephone and personal contacts with payers, there is no record of this correspondence or the contacts alleged, in the Child Support Agency files.
- 13 If I were required to do so, it would be difficult to decide this factual dispute. One problem has been the way in which evidence was adduced by Ms King. She had only limited familiarity with Court procedure and it was necessary to try and anticipate the matters she may wish to rely on by way of evidence and to ensure that the relevant witnesses gave evidence of those matters.
- 14 Mr Magill and Ms King gave evidence that particular correspondence was sent to the

Child Support Agency and personal contacts made with the Box Hill office. Evidence was given that certain correspondence was not received by Mr Magill. Although it seems surprising that other correspondence both before and after this period was received by the Child Support Agency, and dealt with in accordance with the Agency's procedures, it is always possible that correspondence might go astray or contacts not be recorded.

- 15 Ms King referred to the fact that the email from the pay officer of the plaintiff's employer's on 11 June 1999 refers to having "*received a call from the Child Support Agency*". It does not refer to the written Schedule of Maintenance Deductions dated 28 May 1999 addressed to the employer, which was one of the documents Mr Magill was supposed to have been sent but which he said he did not receive. Nevertheless, I do not consider that this is a sound basis upon which to make a decision as to whether other relevant correspondence was received by Mr Magill or whether correspondence to the Child Support Agency was sent, or personal contacts were made, by the plaintiff.
- 16 The plaintiff's complaint about the conduct of the Child Support Agency officers is that:-
- (a) it took from mid June until mid August before the deduction level from his pay was reduced to an appropriate figure. For a period of two months he was told that the deduction rate from his pay would be at a level leaving him with what he alleges was a totally inadequate sum for him to live on;
 - (b) this situation arose because a change of legislation had meant that the procedures for submitting an estimate of income for use in a Child Support assessment had altered. Prior to 30 June 1999, if an estimate were accepted, it had retrospective operation. After 1 July 1999, the lodging of an estimate by a payer no longer had retrospective operation and, until an estimate was lodged for the new financial year, deductions would be calculated on the basis of the plaintiff's taxable income as revealed in his tax returns;

- (c) Child Support Agency officers were specifically trained during this period in the detail of the amended provisions of the Child Support legislation and were instructed in the way in which these changes might be explained to interested parties, including payers;
 - (d) during the relevant period, the Child Support Agency officers failed to inform Mr Magill, or Ms King as his authorised agent, that certain steps would need to be taken by Mr Magill to ensure that his rights were properly protected.
- 17 Ms King submitted that the deduction of substantial sums from the plaintiff's salary for Child Support payments during this period should not have occurred and it was reasonably foreseeable that, if such deductions did occur as a result of the Child Support Agency officers failure to properly advise the plaintiff, this would be likely to give rise to psychological injury for the plaintiff.
- 18 It is relevant to highlight certain dealings between Mr Magill and the Child Support Agency:
- (a) Mr Magill had had dealings with the Child Support Agency from 1992. He had followed the procedure of submitting estimates of income which usually meant that the amount of deductions from his pay would be adjusted. Mr Magill had followed this procedure on a number of occasions before June 1999.
 - (b) One of the documents Mr Magill said he did not receive was a letter dated 18 April 1999, which referred to the fact that "*recent changes to Child Support law affect how long your assessment lasts*". It included the calculation of Child Support from 1 July 1999 and noted that, "*This assessment will last until you lodge a 1998/99 tax return or until 30 September 2000*". Information with the letter included notes of "*important changes to Child Support law effective from 1 July 1999*". It also referred to the fact that estimates would be treated differently - "*Estimates are not backdated, they apply from the date lodged until a new assessment is made*".

- (c) The letter dated 18 April 1999 enclosed an assessment for the period 1 July 1999 to 30 September 2000, which noted Mr Magill's Child Support income as "\$57,356". Mr Magill would not, however, have been aware of the level of deductions until he received a copy letter from the Child Support Agency dated 28 May 1999. This is one of the letters he says he did not receive.
- (d) Mr Magill says he became aware of the increased deduction from an email from his employer's pay officer on 11 June 1999. He said he immediately contacted the Child Support Agency office and followed up on 15 June 1999. The Agency denies receiving these letters or that Mr Magill contacted the Box Hill office.
- (e) On 16 June 1999, Mr Magill submitted a form headed, "*Estimate of income for use in a Child Support Assessment*". He had submitted similar forms previously. He completed point 7 of the form, which asked the question, "*For what Child Support year is this estimate?*", with the response, "*1 July 1998 to 30 June 1999*". Mr Magill complains that he was not informed that this estimate of income would not be used for the following year commencing 1 June 1999.
- (f) On 22 June 1999, Mr Magill sent a letter to the Child Support Agency noting that on 11 June 1999 his employer told him "*that \$553.79 would be deducted from my pay each fortnight, leaving me \$264.71 per fortnight on which to survive*". In this letter, Mr Magill informed the Agency for the first time that he believed he was not the biological father of two of the three children in respect of which he was paying Child Support and foreshadowed that he would take action to clarify their parentage.
- (g) On 22 July 1999, the Child Support Agency informed Mr Magill that the income amount upon which his Child Support would be calculated for the previous year to 30 June 1999 had been adjusted in accordance with the estimate he had lodged on 16 June.
- (h) On 31 July 1999, the Deputy Child Support Registrar responded to the plaintiff's letter dated 22 June 1999. It noted the re-assessment for the previous year, but

stated that for the year 1999/2000, Mr Magill had been "*assessed on your taxable income of \$55,150 for the year ended 30 June 1998*". There followed communication between Ms King and the Child Support Agency office, and apparently the submission, on 13 August 1999, of a further estimate.

- (i) The new estimate for the year 1999/2000 was accepted by the Child Support Agency and Mr Magill was notified by letter dated 16 August 1999 that the change to the assessment would take effect from 13 August 1999. The change of assessment had no retrospective operation because of the changes in the legislation. Mr Magill was informed that, for the pay periods after 19 August 1999, his maintenance deduction would be reduced to \$223.77.
- 19 The plaintiff relies upon a cause of action in negligence. He claims that a duty of care was owed by the officers of the Child Support Agency and that it was reasonably foreseeable that if the duty of care was breached, that he would suffer psychological injury.
- 20 The determination of this issue depends upon an examination of the law of negligence insofar as it applies to -
- (a) the liability of a statutory authority;
 - (b) the foreseeability of risk of psychological injury;
 - (c) liability for a failure to provide appropriate advice.
- 21 Ms King, in her written submissions, had difficulty articulating the duty of care she said was owed to the plaintiff. She submitted that the Child Support Agency "*owes the payer a duty of care to administer the child support scheme in a just and equitable manner and to deal with errors and omissions expediently and fairly*", and that the powers of the Agency "*should be exercised in accordance with natural justice and their duty of care*". Ms King submitted that the increase in the child support deductions from mid-June 1999 which the plaintiff "*subsequently endured for eight weeks before the gross error was corrected ... crippled the plaintiff financially and emotionally*".

22 In my view, the evidence does not establish that -

- (a) there was any failure by the Child Support Agency officers to follow the procedures set down in the legislation. In particular, the assessment of the appropriate deductions appear to have been made in accordance with those procedures. During the relevant period the plaintiff's pay was not subject to deductions beyond the "protected earnings amount" provided for in the legislation;
- (b) there was necessarily a failure by Child Support Agency officers to properly advise the plaintiff of the changed procedures relating to the lodging of estimates and whether they would result in retrospective application. There is no support on the evidence for Ms King's submission that "*long delays, abrupt staff, rude personal contact at Box Hill office made the situation impossible, frustrating and a hindrance. This was coupled with conflicting advice and a total lack of empathy and interest by everyone the plaintiff came in contact with*".
- (c) the readjustment of the deduction from the plaintiff's pay, although not notified until the letter dated 16 August 1999, should be regarded as evidence of an unreasonable and unjustifiable delay.

23 I consider that, even if the plaintiff were able to establish that there was a "*failure to correct the over-deductions in an accurate and timely manner*", the plaintiff would not be able to establish that the law of negligence provides a remedy in the circumstances. In summary, the reasons for this conclusion are as follows:

- (a) The child support legislation provides a comprehensive statutory scheme of the processes to be followed by the Child Support Agency and its officers. The Courts have generally been loathe to impose a common law duty of care in circumstances where it would superimpose further or different obligations to a statutory scheme.
- (b) The plaintiff suggests that in the circumstances of his case there was an

obligation to positively advise him that he would be required to file a further estimate for the new financial year and that the estimate would not have retrospective operation as had been the case under the previous legislation. I do not consider that the circumstances of the dealings of the Child Support Agency officers with Mr Magill would render them liable in negligence for any failure to provide this type of advice and assistance.

- (c) The risk of the plaintiff suffering psychological injury would not reasonably have been in the contemplation of Child Support Agency officers dealing with the plaintiff and paying appropriate regard to what might be the consequences of their failure to advise him appropriately or to deal with his matter in a timely manner.

Issue 2 - Review application decision made 9 February 2001

24 On 27 September 2000, orders were made in the Dandenong Magistrates' Court declaring that the plaintiff's former wife was not entitled to child support for two of the three children for whom she had previously received payments from the plaintiff. On 18 October 2000, the plaintiff completed an application form for "*changing your child support assessment in special circumstances*". The basis of the application was stated as follows:

"Taxable incomes for 1996/97 and 1997/98 were inflated due to court order to draw down moneys from super fund as final settlement of spousal maintenance and child support. DNA tests reveal I am not the biological partner of the two youngest children ... Albury office has asked for this form to be completed as the assessment has to be adjusted back to November 1992 to reflect the true earnings at the rate in which child support was being deducted".

25 Subsequently, the child support payable by the plaintiff was amended to take account of the fact that the plaintiff was not liable to pay child support for two of the children. A letter from the Child Support Agency to the plaintiff dated 20 October 2000 advised that, after the adjustments were made, the "*total child support outstanding as at 30/09/2000*" was \$3,189.72.

26 On 6 February 2001 a conference was held between Mr Peter Murphy, a Child

Support Agency officer, the plaintiff and Ms King. During the course of the conference, the plaintiff's former wife was contacted by telephone. The purpose of the conference was for Mr Murphy to consider an application by the plaintiff for a departure from the administrative assessment, pursuant to Part 6A of the *Child Support (Assessment) Act*.

27 On 9 February 2001, Mr Murphy's decision was published. Mr Murphy stated that he was "*satisfied that the existing assessment for 1997/98 resulted in an overstatement of [the plaintiff's] financial situation that year and results in an unjust and inequitable level of support being required of him*". Mr Murphy, as he was required to do under the legislation, then went on to consider whether a change of assessment would be just and equitable having regard to other interested parties, including the children, both parents and to the community.

28 Mr Murphy's conclusion was that, although it was appropriate to "*entirely eliminate the existing arrears of \$2,931*", he was not prepared to make any further order which would require the plaintiff's former wife to repay money to the plaintiff. The reason for this decision was that -

"The money was collected by the Agency and passed to her a considerable time ago, and there was no issue raised about the adequacy of the income base on which assessment was based. To now require her to now repay that money creates a general inequity than not allowing the applicant to be refunded money which, had he raised the issue at the time of the initial re-assessment, might not have been paid or which might have been able to be recovered at a more appropriate time".

29 Mr Murphy described his decision as "*essentially a matter of trying to balance competing interests*" and that, "*Given the timing of this application, the period under consideration, and the practical impact that creation of a substantial debt would have for the other parent, I consider it appropriate to limit change to what is necessary to remove the existing arrears*".

30 Ms King described Mr Murphy's decision as "*deceptive and misleading*". She said that Mr Murphy had allowed the plaintiff and her to walk away from the conference on 6 February 2001 "*feeling good about it*". Mr Murphy's decision "*rewarded the*

deceptive mother" and the biological father, who was capable of supporting his children and had resulted in the plaintiff being further pursued.

31 In her written submissions, Ms King said that the Child Support Agency "*failed yet again in their duty of care, this time to ensure that the biological father was made financially responsible for his own two children*" and that therefore, inappropriate weight was given to what was just and equitable from the point of view of the plaintiff's former wife.

32 Pursuant to the legislative processes -

(a) before making his decision, Mr Murphy was obliged to consider what was "*just and equitable*" for the relevant parties (s.98C of the Assessment Act).

(b) he might, but was not obliged to, make any "*inquiry or investigation into the matter*" (s.98H).

33 It was not suggested in the present proceeding that Mr Murphy's decision was not open to him at law or resulted from misapplication of the relevant principles in the legislation or demonstrated inappropriate conduct on the part of the Child Support Agency. Pursuant to the legislation, the plaintiff could have had the decision of Mr Murphy reviewed by the Family Court or the Federal Magistrates' Court pursuant to s.116 of the Assessment Act. He chose not to do so. Ms King informed me that this decision was made because the plaintiff "*wanted to keep the matter out of court*" and that there had been conflicting advice given to Mr Magill and Ms King about the appropriate procedures.

34 The High Court in *Lutin v. Lessels* (2002) 210 C.L.R. 333 held that the child support legislation was constitutionally valid. At paragraphs 67-73, Gaudron and Hayne JJ discussed the statutory provisions relating to a "*departure determination*", of the nature made by Mr Murphy. At paragraph 67 they said that, "*The assessment creates and quantifies the debt. It does not determine a question about the existence of any right or obligation*". At paragraph 73 they noted that the statutory provisions

governing departure determinations "*with their reference to what would be 'unjust and inequitable' require the making of a judgment about which opinions may differ in a particular case*". At paragraph 76 they noted that the departure determination "*is the factum by reference to which the statute creates rights for the future which then are to be enforced by resort to the Courts; the assessment does not adjudge existing rights*". It was also noted that, "*A departure determination is not final. It is open to the processes of objection and then 'appeal' to a Court*".

35 It was not clear from the plaintiff's Statement of Claim what cause of action he relied upon as the basis for his claim in relation to this issue. There is no evidentiary basis to found a claim for abuse of statutory power or, it seems, any other claim. Mr Murphy made a decision which was within his statutory powers and there is no suggestion that the procedures he followed were inappropriate.

36 The plaintiff had the right to have the decision reviewed by a court in accordance with the procedures laid down in the statute. He has failed to demonstrate any basis upon which the decision of Mr Murphy might be reviewed or set aside in this proceeding, or how it might form the basis for complaint in respect of his psychological injuries.

Issue 3 - Appropriation of tax refunds

37 Mr Magill left the public service in October 2004, apparently as a result of his medical condition. On 7 July 2005, the Child Support Agency informed the plaintiff that from 1 October 2005 to 31 December 2006 his new child support amount would be \$21.67 per month.

38 On 29 October 2005, the child support was recalculated for this period using what was described as a recently obtained "*more accurate income figure*" for 2005. The child support amount was re-assessed as \$1,176 per month. This was based on a "*child support income amount*" of \$91,864 described as "*04/05 taxable income plus any supplementary amounts*". The income figure included "*a final payment of leave and other entitlements amounting to \$17,432.71*", and a "*gross payment from the Commonwealth Superannuation Scheme of \$74,772.36*".

- 39 The personnel consultant and group manager of the plaintiff's former employer has stated that she contacted the Child Support Agency before processing the plaintiff's final payments. She said that she was "*informed that Mr Magill's account was closed with the agency and that no further action was required*".
- 40 On 4 November 2005, the Regional Registrar of the Child Support Agency wrote to the plaintiff informing him that there was \$209.39 in child support arrears and that the Agency was "*able to use your tax refund towards this outstanding debt*". The tax refund was \$171.36 and the plaintiff was asked to arrange payment of the "remaining debt".
- 41 On 9 November 2005, the Regional Registrar Child Support acknowledged receipt of an estimate of the plaintiff's income for the period 3 November 2005 to 2 November 2006. The estimate was accepted and was to be used from 3 November 2005 to calculate the child support payable. The assessment of \$1,176 per month was reduced to \$21.67 per month.
- 42 On about 17 November 2005, a Child Support Agency officer "*intercepted \$1,194.03 from the tax refund of \$18,778.39 that was made available on 15/11*". On 22 November 2005, the Regional Registrar of the Agency wrote to the plaintiff advising him that the plaintiff owed \$1,194.03 in child support arrears and \$12.66 in late payment penalties, and that the whole of the refund of \$1,194.03 was to be applied to payment of the debt. The plaintiff was requested to arrange payment of the remaining balance.
- 43 The plaintiff was apparently advised by a Child Support Agency officer that he should apply to the Family Court for a stay order to prevent the Agency disbursing the amounts deducted from his tax refund to his former wife. No stay order was sought and the Agency disbursed the intercepted amount to the plaintiff's former wife on 7 December 2005.
- 44 On 16 December 2005, the plaintiff's former wife made application for a change of assessment to review the child support amount. She submitted that the current

assessment did not reflect the plaintiff's income and financial resources because it relied on the estimated income of \$5,903, rather than 2004/2005 taxable income of \$91,864. That application was later refused by the Child Support Agency in a decision dated 18 July 2006.

45 In a letter dated 19 December 2005, the General Manager of the Child Support Agency notified the plaintiff that as a result of the increase in the child support amount from \$21.67 per month to \$1,176 notified in the letter dated 29 October 2005, although reversed by the letter dated 9 November 2005, the child support for the period 1 October to 2 November 2005 was payable at the higher rate and, as a result, the Child Support Agency was entitled to intercept the 2004/2005 tax return.

46 In a letter dated 6 January 2006 from Ms King to the Minister for Family and Community Services, she described the Child Support Agency's actions as part of its "*unrelenting harassment*" of the plaintiff.

47 It appears that the tax refund was intercepted, largely because an estimate was made on the basis of the plaintiff's income shown in his 2004/2005 tax return, which was inflated by his termination benefits. Although this matter was rectified within days, after application by the plaintiff, the decision did not have retrospective operation and an amount was technically owing at the time the tax refund was intercepted.

48 The question of whether the personnel officer of the plaintiff's employer was misinformed as to the plaintiff's liability for child support remains unclear. Apart from this fact, no particular allegation was made that the legislative processes had not been followed or that any action taken or decisions made were not otherwise than in accordance with the statutory procedures. Ms King, in her submissions, referred to the plaintiff's outstanding child support arrears as a "*phantom debt*". It appears, however, that at the relevant time there was an indebtedness by the plaintiff to the Agency which had not been satisfied by the plaintiff and the debt had not been written off or otherwise forgiven by the Agency.

49 Ms King further submitted that the Agency had "a statutory duty of care". She referred to a passage in the judgment of Kirby J in *Hot Holdings Pty Ltd v. Creasy* (2002) 210 CLR 438 at 468, paragraph 95 where he stated that, "It is implicit in the conferral of legislative power that it will be exercised in accordance with the terms of the grant, for the benefit of the people generally". The judgment, however, was concerned with the issue of bias and the exercise of statutory power "in a way that personally benefits directly or indirectly those who exercise the power or those who influence such exercise".

50 In those circumstances, it was said, the exercise of power "will ordinarily be outside the grant" and therefore ultra vires as "the legality of the exercise of power is lost not only when actual bias is shown on the part of the repository but also when there is reasonable appearance or apprehension of bias". Those principles would appear to have little application in the present case as it is not suggested that the statutory powers of the Child Support Agency had been "exercised for the benefit of particular people or interests".

Conclusion

51. As a result of the conclusions I have reached in relation to each of the issues raised by the plaintiff, there is no basis for the defendant being liable to the plaintiff for his psychological injuries as he has alleged. Accordingly, the plaintiff's claim will be dismissed.

Certificate

I certify that these 16 pages are a true copy of the reasons for decision of His Honour Judge Anderson delivered on 31 October 2006.

Dated: 31 October 2006.

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Clare Ashby
Associate to His Honour Judge Anderson