

CITATION: *Michael Court v Paula Nadas* [2024] NTLC 9

PARTIES: Michael Court (NT Police)  
v  
Paula Nadas

TITLE OF COURT: LOCAL COURT

JURISDICTION: CRIMINAL

FILE NO(s): 22116347

DELIVERED ON: 21 March 2024

DELIVERED AT: Alice Springs

HEARING DATE(s): 23 February 2024 & 1 March 2024

DECISION OF: Judge Woodroffe

**CATCHWORDS:**

CRIMINAL LAW – Local Government Act – Claim of Immunity – when to determine claim – s.111(1) Local Government Act – statutory construction - honest act or omission – possibility of human error - failure to observe established procedures – ruling on immunity

*Criminal Code Act*  
*Local Government Act 1978*  
*Police Administration Act 1978*  
*Fox v Coates* (2010) 27 NTLR 220.  
*Board of Fire Commissioners (NSW) v Androuin* (1961) 109 CLR  
*Australian National Airlines Commission v Newman* (1987) 162 CLR 466  
*DPP v Scibilia* [2023] SASC 87  
*DPP (NSW) v Weinstein* (2010) 78 NSWLR 666  
*Queen v Rolfe* (2021) 273 CLR 413  
*Electro Optic Systems P/L v The State of New South Wales* [2012] ACTSC 184

**REPRESENTATION:**

*Counsel:*

Complainant: Mr Dalrymple & Mr Gooley

Defendant: Ms Chalmers SC

*Solicitors:*

Complainant: ODPP

Defendant: Illes Seley Lawyers

Decision category classification: B

Decision ID number: [2024] NTLC 9

Number of paragraphs: 29

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

No. 22116347

BETWEEN:

MICHAEL COURT  
Applicant

AND:

PAULA NADAS  
Defendant

REASONS FOR DECISION  
(Delivered 21 March 2024)

**Ruling as to application of immunity**

1. The defendant, Paula Nadas is charged on Information dated 31 August 2022 and 14 November 2023, both jointly and separately for recklessly or negligently causing the death of a child JW on 2 December 2020 contrary to s 160 of the Criminal Code Act 1983.
2. Given the strictly indictable nature of the charges for negligent manslaughter the matter commenced and continued by way of preliminary examination under the Local Court (Criminal Procedures) Act over a substantial period.
3. On the 23 February 2024 there was heard an application by the defendant the following two issues;
  - i. The defendant has a claim of immunity concerning the continuation of the criminal prosecution against her;
  - ii. That the charges on Information should be dismissed; and
  - iii. The prosecution also indicates that there should be a case stated on the question of law of the immunity. Based on these reasons for decision I do not consider it necessary.
4. There is an agreed substratum of facts that are contained in exhibit D1 of the hearing of the application. I have set out a summary of the facts to be considered.

## Facts

5. The non-contentious facts are that at the material time of 2 December 2020 the defendant was an employee of the MacDonnell Shire Council as an Acting Team Leader of the Kintore Early Learning Centre on a temporary basis with a substantive position in Alice Springs as the coordinator children's services.
6. The defendant was the team leader supervising two staff. At 10 am 6 children including the infant JW went on a swimming excursion to the Kintore Swimming Pool with the defendant and 2 staff supervising them playing in a small round pool. After 30 minutes the staff and children finished and were leaving the pool and the infant was unnoticed and separated from the group and the defendant did not conduct a head count of the children and the infant remained unaccounted. On returning to the early learning centre the absence of the infant was noticed by his Aunt. The defendant ran to the MacDonnell Shire Office to inform that a child was missing. On returning to the swimming pool the entrance gate was locked and unable to be opened due to an additional padlock for which the key was the co-accused Rigney. A community resident scaled the fence and the infant was found unconscious floating in a pool and tragically couldn't be resuscitated and was later declared deceased.
7. The prosecution has particularised that the defendant's omission in the supervision of the infant and headcount that is set out in paragraph 11 of exhibit D1 and exhibit D2 paragraph 9(a)-(h) of the DPP particulars of the negligent manslaughter.

## Immunity from criminal prosecution

8. The defendant raises that as a staff member of the MacDonnell Shire Council she has an immunity from these current criminal proceedings. For the then section 111 of the Local Government Act 2008 (NT) ('LGA') provides,
  - (1) *No civil or criminal liability attaches to a staff member for an honest act or omission in the performance, or purported performance, of official functions under this or another Act.*
  - (2) *A civil liability that would, but for this section, attach to a staff member, attaches instead to the council.*
9. The question for determination is whether the immunity provision applies to the defendant as a staff employee of the Council. Firstly the McDonnell Regional Council is a 'Council' as defined under the LGA. Part 2.3 sets out the 'Roles, functions and objectives of the Councils' and section 26(1)(a) the council acts through local boards, council committees, officers, **staff** and agents to whom the council has delegated powers or authorised to act on its behalf. (my emphasis).
10. It is necessary to set out the entire functions and duties of the defendant contained in exhibit D3. The defendant has been a contracted employee of the McDonnell Regional Council since 19 August 2019 as the 'Coordinator Children's Services'. The position description dated 1 July 2019 provides the position objectives and duties including providing relief support during periods of absence. The term 'official functions' are not defined for the purposes of s. 111(1) LGA, however the definition of 'function' is to include

a duty see s. 17 of the Interpretation Act 1978 (NT). The defendant was acting as a relieving Acting Team Leader at Kintore Learning Centre as a Council staff employee carrying out her duties that are in performance of the objectives and functions of the Council.

### **When should the question of immunity be determined?**

11. That the determination of the claim of immunity should be determined at the outset or on a continuing basis to avoid contravention of the immunity provision in *Fox v Coates* (2010) 27 NTLR 220.
12. *H/HBlokland J* at [49] ruled that the magistrate was without jurisdiction and that the issue of an immunity must be on its own terms and at the outset. I am bound by this precedent I do agree and find that I am seized of the matter of the application for claim of an immunity and that it should be determined by this Court at the present time and before any preliminary examination.

### **Statutory Construction relating to immunity protections**

13. Counsel for the prosecution contends that the statutory immunity should be strictly construed as in *Board of Fire Commissioners (NSW) v Androuin* (1961) 109 CLR 105 that the immunity does not attach to acts merely incidental to, or done in the way in the course of, the exercise of a power. Also that *Australian National Airlines Commission v Newman* (1987) 162 CLR 466 'to positive acts done in the performance of functions and the exercise of powers of such a nature that they *involve a special risk of interference with persons or property*'. That there should be a narrow construction and not to go beyond what a jealous interpretation would allow.
14. Counsel for the defendant contrasts the narrow civil immunity construction in *Androuin* and *Newman* with the immunity in respect of a criminal prosecution in *DPP v Scibilia* [2023] SASC 87 consideration of s 65(1) of the Police Act 1998 (SA) 'A member of SA police or a police security officer does not incur any civil or criminal liability for an honest act or omission in the exercise or discharge, or the purported exercise of a power, function or duty ..... Where Justice McDonald of the Supreme Court of South Australia held at [88];  
*'...The phrases 'honest act or omission' is not defined by the Police Act. It must therefore be given its plain and ordinary meaning having regard to the context in which it appears and should be construed in a manner that best achieves the purposes of the Act. The purpose of the Police Act provides no reason to depart from the ordinary and natural meaning of the words'*.
15. Further the decision of *DPP (NSW) v Weinstein* (2010) 78 NSWLR 666 at 676, that the statutory defence under the Firearms Act 1996 (NSW) where 'the phrase acting in the ordinary course of a person's duties must be understood as encompassing the possibility of human error in performing a duty in the ordinary course'.

16. Counsel for the prosecution contends that the tension between the differing judgments in respect of the protection of the right of immunity in civil or criminal proceedings has ultimately been resolved by the High Court of Australia in *The Queen v Rolfe* (2021) 273 CLR 413 at 424 in adopting the authority of Androuin (see footnote 32).
17. Counsel for the defendant contends that *The Queen v Rolfe* is distinguishable on the basis of a different examination of the wording of the immunity under the Police Administration Act and its context relates to a different situation to the present question of law concerning the present matter.
18. I agree with this submission, given the examination by the High Court dealt with the 'performance of a function' as a matter of construction did not include 'core functions of the Police Force' provided in s. 5(2) of the Police Administration Act. The judgment did not provide any reasons or precedent as to the application of Androuin in respect of criminal prosecutions and I do not consider it to be persuasive and is distinguishable to the present question of law for determination by this Court.
19. Concerning the immunity in s. 111(1) of the LGA in respect of criminal liability, I do not consider that a Androuin narrow or jealous construction is required as the right of action of a citizen is still protected within subsection (2) as it applies to the civil immunity provides 'A civil liability that would, but for this section, attach to a staff member, attaches instead to the council.
20. It is necessary to set out the immunity section of s.111 in its entirety;
  - (1) *No civil or criminal liability attaches to a staff member for an honest act or omission in the performance, or purported performance, of official functions under this or another Act*'.
  - (2) *A civil liability that would, but for this section, attach to a staff member, attaches instead to the council.*
21. The immunity provision is contained within Part 9 of the Act, and headed 'Chapter 9 Council Staff'. With ordinary rules of construction, the fair meaning of the words is that the protection of the immunity applies to staff of the Council from criminal liability as well as civil. That it is the legislature intent that it would apply to staff of a council. This is contrasted with s 35.
22. The term 'official functions' is not defined for the purposes of s. 111(1) LGA, however having regard to the definition of 'function' in s 17 of the Interpretation Act 1978 (NT) a function is to include a duty. The defendant's duties as set out in the position description in providing relief support as the relieving Team Leader at the Kintore Learning Centre as a staff employee in the supervision of staff and children at the swimming centre as a function of the McDonnell Shire Council.
23. Prosecuting counsel contends that *DPP v Scibillia* does not accord with the line of authorities. I find that is a persuasive authority that I can follow as being in part a similarly phrased immunity provision in respect of criminal and civil liability 'for a honest act or

omission'. I do agree that the same phrase 'honest act or omission' in s 111 LGA should be given its plain and ordinary meaning in the context that it appears and best achieves the purpose of the Act.

24. Before proceeding with that examination I refer to the decision of *Electro Optic Systems P/L v The State of New South Wales* [2012] ACTSC 184 that concerned the Canberra Bushfires of 2003 and an action for negligence or breach of statutory duty concerning individual managers of the NSW Rural Fire Services with the establishment of a fire strategy containment line some distance from the fire edge. It was this omission of a tighter containment line in the prevention of the bushfire and a failure to follow established procedures that resulted in the loss of life, injury and damage to property concerning an action for negligence and damages.
25. In *Electro Optic* the defendants relied on s. 128(1) of the Rural Fires Act (NSW) of protection of liability, where;  
*'A matter or thing done or omitted to be done by a protected persons or body does not, if the matter or thing was done in good faith for the purpose of executing any provision (other than section 33) of this or any other Act, subject such person personally, or the Crown, to any action, liability, claim or demand.'*
26. Chief Justice Higgins at [359] that the failure to observe established procedures does not equate with a lack of good faith and at [361] ...I would note the mere fact that established procedures are by-passed does not, conversely, establish per se that good faith cannot be found.
27. This decision is of greater assistance to the present question of an immunity for consideration given its more factually relevant circumstances. It is conceded that there is no evidence in the substratum of facts of any malafides, dishonesty or bad faith in the acts or omission of the defendant.
28. In consideration of an honest act or omission I do follow the authorities of *Weinsten* and *Electro Optic* encompassing 'the possibility of human error' and the 'failure to observe established procedures' does not equate with dishonesty or bad faith.
29. The omission by the defendant to adequately supervise the infant at the swimming pool and the failure to conduct a head count on exiting the swimming complex as procedure does not mean there has not been a 'honest act or omission'.
30. As a matter of standard statutory interpretation the immunity provision is contained in Chapter 9 of the LGA headed 'Council Staff' and further at Part 9.5 Rights and Immunities of Staff that also includes the immunity provision. I find as a matter of plain meaning of the words that the immunity from criminal liability would apply to staff in the performance of their official functions. I do not consider that there should be a reading down of the immunity to those activities of authorised persons in Part 9.6. The legislature has intended that the immunity provision to staff such as the defendant Paula Nadas and that no criminal

liability would attach to her official functions and the honest act or omission as a member of the staff of the McDonnell Shire Council.

I make the following orders.

1. That the defendant Paula Nadas has an immunity under s 111(1) of the Local Government Act 2008 (NT) for the commencement and continuation of the criminal prosecution on criminal file 22116343.
  2. Given the immunity under s. 111(1) of the Local Government Act 2008 (NT) the charges of count 1 and count 2 on criminal file 22116343 are dismissed.
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