

Judgment call: Judicial immunity ruling prompts need for commission

By [Jennifer Cowley](#) - Sep 08, 2023 11:00 am AEST

A recent landmark ruling holding a judge personally liable for a man's false imprisonment has sent ripples through the legal fraternity, prompting the question whether a federal mechanism should be established to regulate judicial misconduct.

In late 2018, a Queensland father of two went before court over what should have been a routine property settlement dispute. He instead found himself behind bars for alleged contempt of court. Almost five years later, the judge who handed down that questionable sentence has himself wound up on the wrong side of the law.

Earlier this month, Federal Court Justice Michael Wigney denied Federal Circuit and Family Court Judge Salvatore Vasta the protection of judicial immunity, instead finding him personally liable for falsely imprisoning the man in what was deemed "a thoroughly unacceptable abuse of judicial power".

Wigney's momentous ruling has tongues wagging throughout the legal profession, such is the rarity of a case in which a judge has so utterly overstepped judicial boundaries. It has also added fuel to the fire of debate over the urgency of legislative reform.

An affront to justice

Vasta, at the time a Federal Circuit Court Judge, sentenced Stradford (a pseudonym) to 12 months' jail for contempt of court, citing failure to provide financial details during a property dispute. Stradford spent seven days in prison – during which he claims he was beaten and abused – before the order was stayed pending an appeal.

The sentence was overturned in early 2019 by the Family Court, which was scathing in its judgment, saying that to uphold the charge and subsequent sentence would be "an affront to justice".

Stradford took the unusual step of suing Judge Vasta personally, claiming to have been so traumatised by the experience of prison he was unable to work more than 20 hours a week.

In awarding more than \$300,000 in damages, Justice Wigney last week made history by deeming Vasta personally liable, saying he had acted "without or in excess of jurisdiction" and would therefore lose the "protection afforded inferior court judges at common law".

Vasta, he said, was "guilty of gross and obvious irregularity of procedure and denied the applicant any modicum of procedural fairness or natural justice". Wigney also held the Commonwealth and the state of Queensland liable, and ordered Vasta to personally pay exemplary damages over the deprivation of Stradford's liberty.

As a result of Justice Wigney's ruling, Vasta is now facing a second accusation of false imprisonment, with the same lawyers who acted for Stradford saying they will now proceed in suing the Judge personally.

While the mechanics of the case itself are a curiosity, it's the implications of Judge Wigney's ruling for the legal fraternity in general and the judiciary specifically that have piqued particular interest.

The Law Council of Australia (LCA) offered its observations on the personal liability of judicial officers in the execution of their function, pointing to the importance of "an independent, impartial, honest and competent judiciary" if the public is to have confidence in the legal system working as it should.

To that end, it said, "judicial immunity serves an important role in ensuring a judge can exercise his or her functions based on an application of the law" without being influenced by a fear of being held personally liable after the fact.

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There are, the LCA noted, robust limits to this immunity, particularly where a judicial officer knowingly steps over those established lines.

It's these lines in the judicial sand, according to media law specialist Jake Blundell, that have been underscored by Judge

Wigney's landmark ruling, and will serve as a reminder to the entire legal profession that it is vital to follow the proper processes.

A partner at Banki Haddock Fiora, Blundell agrees members of society are justified in their belief that judicial officials should be held to the highest possible standards and exercise exemplary judgment, and says rather than undermining the public confidence in the decisions made by judicial officials, the Stradford vs Vasta case will in fact strengthen that assurance.

"That the rest of the judiciary, the full Family Court, stepped in, invalidated that order and released Mr Stradford – and the comprehensive reasons for this judgment by Justice Wigney – show the judicial system working," he says.

Further to the reassurance of witnessing someone actually judging the judge, Blundell believes having such a finding on the record "forever more" will be an enduring reminder of what happens when judicial officials "run roughshod over the top of their obligations".

Blundell says the conversation arising from the case affords an opportunity to remind ourselves of the principle of open justice.

"It's a great example of why that principle is important – justice shouldn't just be done, it should be seen to be done. And there should be publicity – as (English philosopher Jeremy) Bentham said, 'Publicity is the very soul of justice'.

"Sunlight is the best disinfectant. It's important for these things to go on the record because it gives people confidence that the judicial system is working. This case shows that on the face of it seemed unjust has in fact now been found to be so, and there are consequences for that, not just for ordinary people who have to appear before the courts, but for the judicial officers themselves when they step so far outside their authority to act in that important role."

Potential to damage public perception

For her part, Dr Gabrielle Appleby, University of NSW Law Faculty Professor, believes the kind of judicial misconduct that led to this case has a very real potential to damage public perception of the quality and fairness of the administration of justice.

"The case itself provides a remedy for the resulting injustice," Appleby says, but goes a step further in saying it also serves to demonstrate the need for reform.

"As the Australian Law Reform Commission recently recommended, a key dimension of maintaining public confidence in the federal judiciary today is the implementation of a judicial commission to provide an independent, fair and timely mechanism to deal with complaints regarding this type of misconduct."

The ruling, it is hoped, provides some relief to the applicant in this individual case, but Appleby is concerned that while it allows further judicial recognition of the unacceptable behaviour of Judge Vasta on the bench, it does not provide an institutional response for dealing with such conduct in future.

"In the past, Judge Vasta has agreed to stand down from administrative roles on the Court and (has) received mentoring, but that's been the extent of the institutional response to his conduct," she says, adding her voice to the growing chorus of calls for an independent commission to investigate misconduct by federal judges.

The need for certainty and consistency

In commenting on the extraordinary case, President of the LCA, Luke Murphy, posed the need for "certainty and consistency" across Australian courts and tribunals regarding immunity and accountability of judicial officers.

"The majority of Australia's states and territories have an independent statutory mechanism to receive, manage and investigate complaints about judicial officers," Murphy said in a statement, adding that the LCA has long supported the establishment of a federal commission.

"This initiative is one that can fairly and punctually address complaints directed to the federal judiciary in an independent and structured manner."

It's a sentiment echoed by the Australian Bar Association, which is also urging swift consideration of legislative reform in the wake of this case.

Appleby believes the time is nigh for a mechanism that can provide “a fair and timely process” for the investigation of matters at both an individual and systemic level.

“There is a need for an appropriate institutional response, whether that be through appropriate disciplinary sanctions, or referral to Parliament for consideration of the ultimate sanction of removal.”

The federal government has given in-principle support for a commission to investigate complaints against federal judges, but the process appears to have stalled.

This, Appleby says, is despite a recommendation from the Australian Law Reform Commission, which found the establishment of such a mechanism is “perceived to be the most important reform to protect public confidence in the Australian judiciary”.

Existing mechanisms in place

While not entirely dismissing the idea, Blundell is not wholly convinced of the need for a judicial commission at federal level, offering that the Wigney ruling is an example of the judiciary operating in the way it should.

“While the original decision (from Vasta) should not have been made, it was overturned and now there are consequences. That’s what we would hope to see.”

As a media lawyer, Blundell says he and his colleagues see “people complaining about a lot of things,” but there are existing mechanisms in place for appeal.

“There is already an opportunity to appeal, or to seek leave to appeal, going all the way to the High Court. There is a process by which complaints can be heard”, he says, but concedes having a federal body that takes best practice from and mirrors the states’ commissions may have value.

“Not that we can ever undo the damage Mr Stradford suffered, and that’s the problem: if we were to have a judicial commission in place, would that have affected this situation? I’m not sure. You can’t oversee every single decision in real time.”

When it comes to the issue of judicial immunity, Murphy makes the compelling point that the term does not mean a lack of accountability.

“The exercise of judicial power carries enormous responsibility and the effects of judicial decisions on parties can be profound.”

Appleby agrees wholeheartedly. “Judicial immunity exists to protect judges when they are exercising their functions,” she says. “It was never intended to protect rogue or misbehaving judges.”

However, the professor warns that whether the limits on judicial immunity means judges are appropriately accountable is an entirely different question.

“Judges are accountable in different ways – including through the appeal process and the requirements of open justice and delivery of reasons. However, for now and until we have a federal judicial commission there is no institutional mechanism tasked to receive complaints about, investigate, and respond appropriately to judicial misconduct.

“In a modern judiciary, this is a major accountability gap that needs to be addressed to maintain public confidence in the administration of justice.”

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On the other side of the coin is the issue of judicial independence, and the implications of the case for the judiciary in terms of confidence in acting without fear or favour.

Appleby points to the concern expressed by the Australian Judicial Officers Association, which has indicated it is reviewing the case carefully for implications for its members.

“This case represented a pretty extreme case of a judge acting outside of his power. The implications for most members of the Australian judiciary and on other cases, therefore, are likely to be very minimal. However, there have been some calls, for instance, from the LCA, that the case perhaps highlights a need for more legislative clarity on the boundaries of when judicial immunity will and will not apply.”

Blundell also believes there is little cause for concern.

“Justice Wigney went back over some 400 years’ worth of cases looking at this question of judicial immunity. He was very careful to consider the principles in great detail to ensure we have something that enables us to see the four corners of what immunity looks like – when a judge should be entitled immunity and when a judge might go out outside it.”

He says the conduct at the heart of the case was “fairly unusual” in that the finding of contempt was made so quickly.

“Judges are generally pretty careful to actually make a finding of contempt, so I don’t know that the judiciary will be particularly concerned.”

On the shoulders of a human being

Where and how exactly the dust settles in the wake of the Stradford v Vasta storm remains to be seen, but the conversation surrounding the judiciary has it seems been largely welcomed by the legal sector.

In considering the various issues brought to light by the case and Justice Wigney’s landmark ruling, Jake Blundell stresses the importance of heeding the underlying message.

“At the end of the day, it’s a bad result for the judge (Vasta) and it’s a good lesson for all of us, including the judiciary, that those principles of giving somebody the opportunity to be heard, of making proper inquiries, of taking things one step at a time and satisfying yourself at each step at each of those steps that you’ve done everything required, that’s really important.

“It’s about ensuring that justice is done, and that justice is seen to be done. These aren’t just empty words. These are things that matter to real people’s lives every day.”

Blundell also sounds a note of empathetic caution, with a reminder to remain cognisant of the human element in consideration of the judiciary.

“These are human beings. We should remember that about each of these people who sit in that position with the wigs and robes. The wigs and robes are designed to create a sense of the separation of authority, so that we respect that authority. It’s a bit of theatre, but it’s important because it’s important for people to respect the tradition and the role. It’s important to understand that it’s not an easy job that comes with the authority a judicial official wields.

“With that authority comes an enormous amount of responsibility, but it rests on the shoulders of a human being.”