Fox v Coates [2010] NTSC 46

PARTIES:	FOX, Bradley Peter
	v
	COATES, Richard James
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20934430, 21023470
DELIVERED:	30 September 2010
HEARING DATES:	15 July 2010
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

CRIMINAL LAW- -POLICE - - RIGHTS, POWERS AND DUTIES - - IMMUNITY FROM SUIT - - APPLICATION AND OPERATION OF IMMUNITY - - Mental Health and Related Services Act (NT) - - Scope of immunity from criminal liability under s 164 of Mental Health and Related Services Act (NT) - - Police can rely on the immunity if they have, in good faith, wrongly or mistakenly acted beyond their powers.

JURISDICTION, PRACTICE AND PROCEDURE -- a Magistrate hearing a committal proceeding is sitting as a justice and not the Court of Summary Jurisdiction - - a Justices Appeal cannot be brought from a ruling at committal - - Justices Appeal dismissed.

ADMINISTRATIVE LAW-- PREROGATIVE WRITS AND ORDERS - - Relief in the nature of orders for Certiorari and Prohibition are granted - - the decision of the learned Magistrate dismissing the application to apply the immunity at the commencement of committal proceedings is quashed and

the committal court constituted by a magistrate sitting as a Justice is prohibited from proceeding further with the committal hearing.

Adult Guardianship Act (NT)
Criminal Code (NT) ss 23, 26, 336(2)
Justices Act (NT) s 163
Mental Health Act (Vic) s 103
Mental Health and Related Services Act (NT) ss 4, 33, 34, 163, 164, 165
Police Administration Act (NT)
Public Sector Employment and Management Act (NT)

Fingleton v The Queen [2005] 227 CLR 166
Little v The Commonwealth (1947) 75 CLR 94 108
Marshall v Watson [1972] 124 CLR 640
Project Blue Sky v Australian Broadcasting Commission [1998] 194 CLR 355
R v Whittington (2006) 17 NTLR 235
R v Whittington No. 2 (2006) 19 NTLR 83
Spooner v Juddow [1820] 18 ER 734
Tcherna v Garner (1999) 154 FLR 243
Wanambi v Edwards [2010] NTSC 43
Webster v Lampard [1993] 177 CLR 598

REPRESENTATION:

Counsel:

Applicant:	Michael Abbott QC; Peter Elliot
Defendant:	Rex Wild QC

Solicitors:

Applicant:	Ward Keller
Defendant:	Office of the Director of Public Prosecutions

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

Fox v Coates [2010] NTSC 46
No. 20934430, 21023470

BETWEEN:

BRADLEY PETER FOX
Applicant

AND:

RICHARD JAMES COATES
Defendant

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 30 September 2010)

Introduction

[1] Bradley Peter Fox (the Applicant) seeks to appeal the decision of a Stipendiary Magistrate allowing committal proceedings against him to continue in circumstances where he asserts a statutory immunity protects him from prosecution. Alternatively, relief is sought by way of orders in the nature of certiorari and prohibition quashing the decision of the learned Magistrate on the same or similar grounds and prohibiting the conduct of further proceedings against him. Senior Counsel who appear in the matter

seek the merits be resolved concurrently with a decision on the procedural correctness or otherwise of the relief sought.[1]

[2] Senior Counsel for the Director of Public Prosecutions (the Respondent) argues (as was argued before the learned Magistrate), that any determination of the application of the statutory immunity was premature as there were not sufficient facts on which the learned Magistrate could make the relevant findings. The same is said of the proceedings in this Court. The Applicant contends sufficient facts are agreed between the parties to determine the immunity question. Further, an alternative ground of appeal or review is contended, namely, that the Applicant was "authorised" to engage in the impugned conduct pursuant to ss 23 and 26 *Criminal Code* (NT).

[3] The Applicant is charged on information alleging he unlawfully assaulted Robert Plasto-Lehner with circumstances of aggravation on 22 December 2007. The offence is alleged to have occurred at the Royal Darwin Hospital (RDH) where Mr Plasto-Lehner had been taken to hospital pursuant to s 163 *Mental Health and Related Services Act* (NT) (MHRSA). Sadly, the Court is informed Mr Plasto-Lehner is deceased[2] but there is no suggestion in these

[1] The Respondent's position is that there is no jurisdiction for this Court to hear an appeal from committal proceedings. On the Respondent advising the Applicant of this view, the alternative relief was sought on behalf of the Applicant. The respondent does not object to time being extended to allow the application to be filed.
[2] Referred to in submissions by both parties before the learned Magistrate and this Court.

proceedings his death was causually connected to the offending alleged against the Applicant.[3]

[4] The immunity claimed is provided by s 164 MHRSA:

> **164 Immunity from suit**
>
> No proceedings, civil or criminal, may be commenced or continued against a person for anything done in good faith and with reasonable care by the person in reliance on any authority or document apparently given or made in accordance with this Act.

The Committal Proceedings

[5] In summarising what occurred at the committal proceedings I have drawn on the material filed in this Court and received by consent.[4]

[6] At the commencement of the committal proceedings on 24 May 2010, Senior Counsel for the Applicant objected to the charge being read. It was argued the s 164 statutory immunity applied, the onus was therefore on the Respondent to establish the immunity did not apply to the *commencement or continuation* of the committal proceedings. The learned Magistrate observed the proceedings had already commenced by virtue of the charge being laid. I agree with the learned Magistrate's observation. As the terms of the

[3] It is understood from the background of submissions in this Court that regrettably Mr Plasto-Lehner died shortly after this incident.

[4] The affidavit and annexures of the applicant's solicitor Julian Troy, affirmed 12 July 2010; a document incorporating relevant parts of the transcript "*Counsel's Summary of the Evidence as Given in the Court Below* (14 July 2010). Transcript of Proceedings before the learned Magistrate 24 May 2010; the Outline of the Appellants Submission (21 June 2010) incorporating various annexures, save that the annexures containing transcripts of records of conversation with the Applicant are not relied on by the Respondent and are not received on any basis to prove the truth of any facts asserted: (the same qualification was made before the learned Magistrate); the Outline of the Respondent's Submissions (12 July 2010) and the Applicant's Submissions in Reply (14 July 2010).

statutory immunity prohibit not only the commencement of proceedings but the continuation of those proceedings, it was argued that if the learned Magistrate was in error in failing to find the immunity applied at the outset, the Court below was without jurisdiction to continue the committal proceedings.

[7] No evidence was called before the learned Magistrate, however both parties addressed the Court on the basis of largely non-contentious facts supplemented by submissions. The argument on the question of the application of the immunity proceeded on the basis of these admitted facts save for the addition of some further facts and certain reservations drawn to the Court's attention on behalf of the Respondent. The particulars of the assault provided to the Court below and to this Court effectively setting out the Respondent's case at its highest are as follows:

> The Crown alleges that Mr Fox had no power to prevent Mr Plasto-Lehner from leaving the hospital.
>
> The Crown alleges that the assault is made up of the following physical actions taken by Mr Fox which make up the single charge of assault:
>
> > Touching Mr Plasto-Lehner on the arm, which immediately flowed to;
> >
> > Forcing Mr Plasto-Lehner to the ground, which immediately flowed to;
> >
> > Physically restraining Mr Plasto-Lehner on the ground with excessive force, which immediately flowed to;

> Placing a knee upon Mr Plasto-Lehner's head and forcing Mr Plasto-Lehner's head to the ground.

[8] It is necessary to summarise the largely non contentious facts that with the consent of the parties were placed before the learned Magistrate by Senior Counsel for the Applicant. This summary includes the substance of submissions made by Senior Counsel for the Applicant as appear relevant to the framework of those facts that were also put before this Court:

> On 22 December 2007 police were called to premises in Darwin because of the behaviour of Mr Plasto-Lehner. It was obvious to those who called the police he was *mentally troubled* (Counsel advised the Court he sought to use a *neutral term*); police who attended as a result of the call formed a view pursuant to s 163 MHRSA that Mr Plasto-Lehner was mentally ill and a danger to himself and it was necessary to apprehend him immediately and take him to RDH. A number of police officers took Mr Plasto-Lehner to RDH. The applicant travelled with another police officer in a car behind the police paddy wagon transporting Mr Plasto-Lehner.[5]
>
> The triage nurse at the hospital assessed Mr Plasto-Lehner as category 2 indicating he should receive treatment fairly immediately. He was taken to the Oleander Room on the ground floor of RDH. The Oleander Room was a room where persons brought to the hospital under the MHRSA were taken so a Doctor could see them.

[5]T at 8.

Mr Plasto-Lehner remained in the Oleander Room for some time and after what Senior Counsel described as a *lengthy delay* saw Doctor Cromarty.

The Applicant had commenced duty at about 3:00pm that day. The s 163 MHRSA apprehension occurred at about 3:15 – 3:20. Arrival at RDH was at about 4:00pm; the triage nurse attended on Mr Plasto-Lehner at about 4:03 and Dr Cromarty saw him at about 4:18pm. The incident forming the basis of the charge occurred at approximately 5:45pm. It was stressed in the committal proceedings these times were approximate.[6]

Rather than staying in the Oleander Room waiting to be taken to Cowdy Ward after a preliminary examination by Dr Cromarty, Mr Plasto-Lehner endeavoured to leave the hospital through doors the public were not permitted to have access to. The doors were for the purpose of ambulance deliveries. Notices to the effect of "Public not allowed" and "No Exit" were in place. Mr Plasto-Lehner in leaving via that exit would have placed himself in considerable danger because of a twenty foot drop over a parapet and balcony. It was at approximately 5:45 that police who had conveyed Mr Plasto-Lehner to the hospital took action to prevent him leaving.[7]

[6]T at 8.
[7]T at 9.

At the time, the Applicant was a serving police officer acting as a police officer, carrying out the duties of a police officer at RDH. It was not suggested there was any malicious intent to inflict more harm than was necessary. It is not part of the prosecution case that the applicant did not act in good faith. It is not alleged the applicant decided not to act as a police officer. The prosecution case is that the applicant was acting as a police officer but had no lawful authority to attempt to stop and in fact stop Mr Plasto-Lehner from leaving the hospital that day because an assessment had occurred under s 34 MHRSA by Dr Cromarty.[8] The prosecution case is that Dr Cromarty did make the section 34 assessment because she came to the view that Mr Plasto-Lehner should be recommended for psychiatric examination. She was satisfied he fulfilled the criteria for involuntary admission on the ground of mental illness. She thought he was psychotic.[9]

The prosecution case is Mr Plasto-Lehner attempted to leave, not just the Oleander Room, but to walk down and go through a door he was not entitled to go out, not permitted to go out and not allowed to go out. He was asked to go back to the room and he declined. It was only then that he was taken to the ground by four police officers and two security officers. The applicant alone has been charged with unlawfully assaulting him. It was not suggested that he was acting

[8] T at 10.
[9] T at 11.

otherwise than as a police officer. He was not activated by malice.[10] Mr Plasto-Lehner was much bigger and much heavier and that is why it required a number of police officers and security guards to restrain him.[11]

Reference was made to the Applicant's statement to police.[12] The following portions were referred to the learned Magistrate:[13]

"When we spoke to him he started ranting and raving about other incidents and started using different names … either way in the Oleander Room or on black plastic chairs. The main concern … was that other persons walk in and out of that area and we have to try and contain this person for his own safety and for our safety … this is where ACPO Morrison and …, immediately grabbed his arms and tried to pull him towards the ground and he started pulling away from us straight away … and possibly an orderly from the wards was trying to control his legs".

There was a struggle, handcuffs were placed on him and he turned a different shade and was put in the recovery position, and handcuffs were removed. Further reference was made to the Applicant's statement to investigating police. The Applicant speaks of what is known of Dr Cromarty's interaction. The Applicant was asked:

"…and after assessing him did she provide any information back to you in relation to what was intended to happen to Mr Plasto-Lehner?" and the applicant said "ah, she saw the person of interest about three times and eventually told me that they were just waiting on the psych nurse or doctor to finish with another patient".

[10] T at 17.
[11] T at 19.
[12] T at 27.
[13] T at 15. I note the limited use that can be made of this material as the Respondent does not rely on it and objected to its use to prove the truth of the contents.

Another patient had been brought into the opposite room by police. Security guards had said in their statement that originally the other patient was placed in the Oleander Room but when they saw Mr Plasto-Lehner and his size, they took the other patient into the room opposite and allowed the Oleander Room to be vacant for Mr Plasto-Lehner to be placed in it.[14]

Further reference was made to the Applicant's statement where Investigating Officer Pollock said:

"I know that our own general orders and memorandums or understandings between Health and Police state that once medical staff have assessed the patient, basically police are free to leave. Is that the case to your mind, on this occasion?"

The Applicant: "No it wouldn't have been safe to do so".

Pollock: "Was there any specific instruction, given to you from health staff to remain at the hospital and assist with the care and control, I suppose of Mr Lehner before he was handed over to mental health?"

The Applicant: "No, there weren't".

Pollock: "So to your mind why were you waiting at the hospital?"

The Applicant: "Because the person hadn't been committed to Cowdy Ward for assessment, for treatment and I had a duty and care to those persons that I conveyed an apparently mentally unstable person, and I was just there for the safety of the persons at the hospital".

[14] T at 28.

"And if it was (inaudible) to go off or not, to remain in the hospital until safety contained".

Further, Investigating Officer Pollock asks:

"So he was certainly (inaudible) in your mind?"

The Applicant: "That's correct".

Pollock: "And that is the duty of care you raised a minute ago – a moment ago hadn't been transferred across to health entirely in your mind?"

The Applicant: "That's correct".

Pollock: "And I understand whilst you were waiting outside the Oleander Room you read one of the warning notices on the nearby exit door out to the hospital grounds, emergency ground, is that right?"

The Applicant: "That's correct".

Pollock: "And what was it that that sign suggested to you?"

The Applicant: "I can't remember word for word verbatim but it suggested that persons who are in care of the Royal Darwin Hospital system not be allowed to go outside for a cigarette or to exit that door for the safety reason of the ambulance utilise that ramp and the significant drop-off of approximately 20 metres from that door to the ground – drop-off to the ground".[15]

The Applicant was asked: "And when you moved in and took hold of Mr Lehman, what was your intention?"

"To gesture to him back. I didn't actually … prevent him from going out over the edge of the balcony, up there where the ambulance came in."

[15] T at 28.

> It was said that on the prosecution case Mr Plasto-Lehner was leaving the room in which he had been placed and was endeavouring to walk out of the hospital through doors which led on to a landing which was known to be dangerous.[16]
>
> Reference was made to a statement of Sergeant Hansen who was to be called as a prosecution witness. This includes a report Sergeant Hansen made where he came to the opinion that the police involved in the restraint on the occasion acted in accordance with policy and current police training and it was his opinion that most police in the jurisdiction would have applied the ground stabilisation in the same way as the applicant did with his team had they been placed in the same circumstances.[17]

[9] Senior Counsel for the Respondent made submissions that included outlining reservations taken to the statements made by the Applicant to Investigating Officers and put forward further facts on which the Respondent relied. The facts put on behalf of the Respondent with submissions by Senior Counsel for the Respondent relevant to how the Respondent viewed those facts were as follows:

> The prosecution case was not as the Applicant had stated when he gave an interview to police officers in February 2008. The prosecution do not admit what the Applicant said in that statement as

[16] T at 29.
[17] T at 29.

being the basis on which the Court should rule in the case.[18] The particulars were not elements of the offence and it was not obligatory on the prosecution to prove each and every one of the particulars.

Further facts on which the prosecution would rely would be put. Although agreeing that on behalf of the Applicant an accurate summary had been given, on behalf of the Respondent, the Court was told it "doesn't tell the full picture from the prosecution's point of view".[19]

Senior Counsel for the Respondent conceded Mr Plasto-Lehner was 191 centre metres and 126 kilo's, equating to six foot three and just under twenty stone, he was described as a *big man*. Senior Counsel told the Court that the size of Mr Plasto-Lehner was an issue everyone was aware of during the course of what occurred at the hospital.

Shortly prior to 5:45 Mr Plasto-Lehner had asked to be taken to the toilet, an area called the fast track area of the accident and emergency department of the hospital and he was with Constable Eric Morrison and the security guard from the hospital, Randal Edwards. Mr Edwards had developed a good relationship with Mr Plasto-Lehner during the hour or so that he had been waiting for examination by the psychiatrist. Immediately before 5:45 Mr Plasto-

[18] T at 30.
[19] T at 30.

Lehner was asking to be taken outside for a cigarette, saying that he wanted fresh air and saying so in a voice loud enough to be heard by a number of nursing and security staff at the hospital. Apparently none of the police officers heard that. Senior Counsel for the Respondent submitted the evidence would tell the learned Magistrate of that in due course.

It was understood by a number of hospital staff that Mr Plasto-Lehner wanted to go outside either for fresh air or a cigarette. As Mr Plasto-Lehner approached where the Applicant was, he was clearly heading towards the outside door when he was "notionally apprehended" (Senior Counsel's words) by the Applicant, taken to the ground or taken to the floor and that was done by the Applicant in company with Mr Morrison. That part of the facts which had been put were not disputed.[20] He was taken to the ground in what was described by Senior Counsel as *violent circumstances*. It may be in accordance with some police protocols, but on the Respondent's case *it was not then necessary*. He was taken to the ground in *rough circumstances* and what immediately occurred after that was that the Applicant placed his knee on his shoulder blade area and one knee then went onto Mr Plasto-Lehner's head, forcing it onto the ground in what some witnesses would say was a *thud*. Almost immediately there were signs of blood coming from Mr Plasto-Lehner's head.

[20] T at 31.

Hand cuffing which was taking place at the time, was completed, but almost immediately he was released again because it was clear that he was struggling for breath.

Mr Plasto-Lehner was heading towards the back door. He was not saying "I am going to jump over the ledge". He was not saying anything about running away, he was talking about going outside to get some fresh air and/or to have a smoke. That was the situation that confronted the Applicant, not a breach of the peace, not a situation of emergency and not a situation that called for the measures which were taken by the Applicant as leader of the police personnel at the time. The Applicant was immediately supported by other people who, (and Senior Counsel for the Respondent said he used this expression carefully) "jumped on" Mr Plasto-Lehner and held him down while hand cuffing took place. It was conceded that he was struggling and one witness would give evidence that he said "let me up" and it was clear enough that he was struggling, until the hand cuffs were secured and he apparently went limp.

The presentation of evidence by the Respondent would give the Court a different picture to what is argued on behalf of the Applicant and makes a difference to the question of the immunity. From the medical staff's point of view this was a situation that did not require drastic treatment and they were aghast at what police officers and the Applicant in particular did. Medical staff asked the Applicant to

desist and initially he refused. What occurred was a *major over reaction* by police officers and the Applicant. The offence is not excused by any of the provisions of the *Criminal Code* and not by the immunity.

[10] Accompanying the facts that both parties put before the learned Magistrate was significant legal argument. Those arguments have been repeated and in some instances developed further in this Court and will be dealt with subsequently in these reasons. The learned Magistrate gave the following *ex tempore* reasons for concluding the immunity was not available at the commencement of the hearing:

> "In my view the immunity under s. 164 of the Mental Health and Related Services Act was correctly raised at the outset of these proceedings. The application of that immunity, however is a little more problematic. The operation of s.164 must be read in context of the Act as well as those High Court authorities produced to me today.
>
> It became clear to me in my deliberations over lunch that for the court to dismiss the charge on the basis of this immunity with very little evidence before it would not be sustainable. The only evidence I have before me are the electronic records of interview with the defendant, which were tendered on the basis as to what the defendant had said in his electronic record of interview, not the truth of what he said. They are statements in the normal course which would not have been admissible and without acceptance as to the truth of those statements, they are of very little assistance to this court in my deliberations on 164.
>
> I, therefore, rule that at this point in time I cannot be satisfied that the immunity is available to Mr Fox, however, I am willing to

> reconsider that application at the conclusion of the evidence called for the prosecution".[21]

Relevant Case Law Concerning Immunity from Suit and Protective Provisions

[11] The recent case law indicates an immunity should be applied as soon as it is evident the facts are available to support its application.[22] The s 164 MHRSA immunity is expressed in wide terms – *commenced or continued* – indicative of compatibility with that principle. In *Fingleton v The Queen*[23] the statutory immunity available to judicial officers in the exercise of administrative functions was not considered in criminal proceedings brought against the Chief Magistrate of Queensland until the relevant conviction was appealed to the High Court. The appeal was allowed on the basis that the immunity covered the impugned conduct notwithstanding it had not been raised previously. In determining the appropriate time to deal with the immunity, Gleeson CJ said:

> "It is appropriate to deal with the question of immunity first because, if the appellant's argument is correct, there should never have been a trial of the other issues in the case".[24] (my emphasis)

Further, His Honour noted:[25]

> "If the appellant's present argument is correct, then it was only necessary to identify her functions and powers under the Magistrates Act in order to reach the conclusion that she could not be held criminally responsible for the conduct in question. There was no fact in issue requiring the decision of a jury".

[21] T at 36.
[22] *Fingleton v The Queen* [2005] 227 CLR 166.
[23] Ibid
[24] Ibid 174.
[25] Ibid 181.

[12] Gummow and Heydon JJ considered that as a result of the immunity the appellant in that case should not have been put to trial.[26] Kirby J came to the same conclusion.[27]

[13] Although there are some further facts the Respondent here asserts are applicable and submits they need to be determined prior to determining the issue of the immunity, I am drawn to the conclusion that if an agreed substratum of facts exist sufficient to show that as a matter of law the immunity applies, the question must fall to be determined on that factual foundation. It would defeat the purpose of the statutory immunity to imply there was an obligation to examine all of the facts before determining the application of the immunity. On behalf of the Respondent it is submitted the present case is to be distinguished from a more straight forward factual question of whether, for example judicial immunity applies or a question of time limitations is to be determined.[28] In my view the terms of the MHRSA immunity provide an obligation to consider the issue on a continuing basis to avoid contravention of the immunity provision. Kirby J makes a number of observations in the context of judicial immunity:[29]

> Secondly, the purpose of the immunities provided by the cited provisions of the Queensland statute law is to forestall, in the cases to which they apply, the very kind of proceedings that occurred in this instance involving as they did curial examination of the exercise of functions and powers which the statutory provisions aimed to remove from such accountability, and do so for important principles of public policy supportive of judicial independence. It would defeat

[26] Ibid 211.
[27] Ibid 212.
[28] See *R v Whittington* (2006) 17 NTLR 235, confirmed in *R v Whittington* No. 2 (2006) 19 NTLR 83.
[29] *Fingleton v The Queen* at 226-227.

> the expression and policy of the legislation and be wholly inappropriate to introduce an obligation in every case to examine all the facts so as to provide the characterisation of the "true nature" of what was done or omitted to be done by the judicial officer as *within* or *outside* the exercise of that officer's functions. To require this would be to undermine the achievement of the purpose of the immunity. It would render it ineffective in practice and would be contrary to the obvious object of the Queensland Parliament in enacting the provisions as it did.
>
> Cases might arise in which an issue as to the characterisation of the judicial officer's functions and powers is presented so as, arguably, to take the exercise of those functions and powers out of the immunity provided for in the legislation. It is unnecessary in this appeal to explore the circumstances in which that might be so. It is sufficient to say that the exercise by the appellant of the functions and powers conferred on her under s 10 of the Magistrates Act with respect to Magistrate Gribbin, as now disclosed in all its detail in these proceedings is clearly within the classification of a performance or exercise of an administrative function and power such as conferred on her by s 10 of the Magistrates Act. If the immunity point had been raised at the proper time (namely when any charge for criminal responsibility was being considered by the prosecution, at the directions hearing or on any arraignment of the appellant), the facts then known would have demanded classification of the appellant's conduct as falling within s 30 of the Code.

[14] In the present case, for practical purposes, determining the application of the immunity at the outset means taking the Respondent's case at its highest on the facts it will rely on to negative the operation of the immunity. The task is to determine whether on the known facts the Applicant's conduct should be classified as falling within s 164 MHRSA.

[15] One point of distinction with *Fingleton v The Queen* is that *Fingleton* is not a case concerned with and does not refer to resolving matters of immunity at committal or the commencement of a committal, however, given the terms

of s 164 MHRSA, clearly the immunity is not confined to "trial"[30] but rather, "proceedings", "commenced or continued". Senior Counsel for the Applicant indicated proceedings could have been brought against the Respondent given the breadth of the immunity. As should be readily acknowledged, such proceedings would be anathema to a Court's usual process in most contexts as it would risk concurrently reviewing the decision to prosecute. In the circumstances of this case the resolution of the immunity issue in my respectful view is preferably ventilated before a court rather than dealt with in a manner that would involve by necessity a process that would be tantamount to a review of the Respondent's decision to prosecute, a decision based on broader criteria than would be usual before a Court. Although in the circumstances of this case I hold a preference for the ventilation of arguments by both parties in open Court, to ensure the integrity of s 164 MHRSA is not defeated the issue should be determined as soon as possible (if sufficient facts can be discerned), after the commencement of the relevant proceedings.

[16] That considered, it is clear that many of the reported decisions dealing with the application and operation of immunities concern civil cases where the determination of the "immunity point" is determined concurrently and finally with the other issues in the case. *Fingleton v R* indicates that procedure should not be followed unless it can be said that the facts as known before the Court require a classification that takes it out of the terms

[30] Section 336(2) *Criminal Code* (NT) provides a 'trial' is deemed to begin when an accused is called upon to plead.

of the immunity provided by statute. The Respondent would argue the facts to be proved in this case place it in that category, however that assertion requires close examination lest in the process of examining the relevant facts leads in effect to the immunity being defeated in circumstances where it is later found to apply.

[17] The Applicant relies on the reasoning in *Marshall v Watson*[31] that concerned the interpretation of s 103 *Mental Health Act* (Vic). That provision reads:

> "No civil or criminal proceedings shall lie against any person for anything done in reliance on any recommendation order or other document apparently given or made in accordance with the requirements of this Act".

[18] A Victorian police detective ("Marshall") was sued by one Watson as Watson had been taken to hospital by Marshall and other police for psychiatric assessment in circumstances where there was no power in the then *Mental Health Act* (Vic) to arrest and detain a person.

[19] In that case the Police Officer was unsuccessful in reliance on the protection afforded by s 103 *Mental Health Act* (Vic). In the earlier proceedings Watson had been successful in an action for trespass to the person and was awarded $200 damages. In the discussion on the meaning of *recommendation order or other document* (as appears in s 103 *Mental Health Act* (Vic)) Barwick CJ examined whether the purpose of the section was to protect persons who had acted upon a *defective* recommendation or

[31] [1972] 124 CLR 640.

document and whether the section was limited in its operation only to those cases. He considered it was not so limited, but rather[32]:

> "It extends to a case where reliance has been placed on a genuine document in due form, which in law did not afford a justification for the action taken, but which in the circumstances could reasonably and honestly have been acted upon by a person in the position of the appellant".

[20] Commenting on the same argument, namely that the protective provision might only protect those who rely on what proved to be defective documents, Stephen J said the section[33]:

> "[H]as a wider operation than His Honour was prepared to give it; it is not confined to acts done in reliance upon defective documents, but extends to any act of which it can be said that the actor, knowing of a document which was apparently given or made in accordance with the Act's requirements, believed that, by reason of that document, his act was lawful; it is irrelevant whether or not the document, expressly or by implication, authorised the act".

> "This meaning of s 103 appears to me to conform to the ordinary grammatical sense of the words used and gives to the section an operation similar to that assigned to protective provisions frequently found in other legislation conferring statutory powers".

[21] His Honour applied the reasoning of Dixon J concerning protective provisions examined in *Little v The Commonwealth*:[34]

> "Such enactments have always been construed as giving protection, not where the provisions of the statute have been followed, for then protection would be unnecessary, but where an illegality has been

[32] Ibid 645.
[33] Ibid 650.
[34] (1947) 75 CLR 94 108.

committed by a person honestly acting in the supposed course of the duties or authorities arising from the enactment".[35]

[22] Further, Stephen J applied the following from Dixon J in *Little v The Commonwealth* concerning the precise conditions to be fulfilled before the protection provided by such sections could operate:[36]

> "Clearly the purpose of a provision limiting or qualifying rights of action against officers and others acting under a Statute would not be fulfilled by an interpretation excluding from its operation cases arising from mistaking the law or failing to comply with the requirements of the law."

[23] Stephen J concluded that s 103 *Mental Health Act* (Vic) could apply if two conditions were satisfied. First, that the person relying on the protective provision, whether mistakenly or not, believed that what he was doing was lawful, and that belief was based upon the existence of a document. Second, that the document is one which could be said that it was apparently given or made in accordance with the requirements of the Act.[37] Officer Marshall was unsuccessful in his reliance on the immunity in that case as he had acted independently and without reliance on the documents apparently made in accordance with the statutory requirements.

[24] In *Little v The Commonwealth* Dixon J relied on a number of older authorities supportive of the general proposition that protective provisions would still operate when a person was acting honestly yet illegally in the mistaken belief that a Statute conferred certain powers that it did not.

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[35] Ibid. 108.
[36] Ibid. 111.
[37] *Marshall v Watson* at 651.

Reliance on this line of authority was sourced in *Spooner v Juddow*[38] where Lord Campbell stated:

> "There can be no rule more firmly established, than that if parties *bona fide* and not absurdly believe that they are acting in pursuance of Statutes, and accordingly to law, they are entitled to the special protection which the Legislature intended for them, although they have done an illegal act."

[25] Further, Dixon J examined the past practice of Courts requiring bona fide *and* reasonableness to be found as preconditions to the operation of a protective provision. His Honour also discussed the tension between permitting protection where a person believes they have been authorised to act but providing some limits on the protection:[39]

> It has, however, been found not easy to define the exact conditions which must be fulfilled to qualify for protection. Bona fides has been regarded as indispensable. But the difficulty has been to give such provisions an operation which, on the one hand, will not be so narrow that it goes little, if at all, beyond what is authorized by the substantive parts of the enactment, and, on the other, will not be wide enough to cover wrongful acts so outside the scope of the authority given by the statute that it can hardly be supposed that it was intended to protect those responsible. In *Cann v. Clipperton*, Williams J. said:- "It would be wild work if a party might give himself protection by merely saying that he believed himself acting in pursuance of a statute; for no one can say what may possibly come into an individual's mind on such a subject. Still, protecting clauses, like that before us, would be useless if it were necessary that the person claiming their benefit should have acted quite rightly. The case to which they refer must lie between a mere foolish imagination and a perfect observance of the statute".
>
> As might be expected recourse was made to the conception of "reasonableness" in an attempt to pass between these Symplegades. Accordingly, some decisions added to good faith the further

[38] [1820] 18 ER 734 at 744.
[39] *Little v The Commonwealth* at 111. (footnotes omitted).

> condition that the defendant must have proceeded on reasonable grounds in supposing that he was acting in pursuance of the statute. Thus, in *Hughes v. Buckland*, an action for wrongful arrest, Parke B., speaking of a provision limiting the time for "an action against any person for anything done in pursuance of this Act" said:- "The Act is general in its terms, and gives protection to all persons for all acts done in pursuance of the Act, because, in such a case, a party would be acting legally, and therefore would not require protection. The words, therefore, must be qualified by the decisions; and then the meaning will be, that a party, to be entitled to protection, must bona fide and reasonably believe himself to be authorized by the Act."

[26] Further, His Honour examines decisions dispensing with reasonable grounds:[40]

> In dispensing with the necessity of reasonable grounds, these decisions did not escape comment or criticism and perhaps qualification (*Leete v. Hart*). But the effect of the subsequent case of *Chamberlain v. The King* seems to be that, provided there are some circumstances on which to base the belief, it is enough that the belief is honest. No doubt is it some aid to understanding if a distinction is maintained between departures from the law and errors of fact as sources of liabilities incurred in acting bona fide in pursuance or execution of a statutory provision and so the subject of protection. But that the former are covered as well as the latter is definitely decided by *Selmes v. Judge*. A short passage from the judgment of *Blackburn* J. will make this clear and will also sufficiently indicate the nature of that case. "The only illegal act done by the defendants was to make an informal rate; they proceeded to collect it, and received from the plaintiff the amount assessed upon him; in these transactions it is clear that the defendants intended to act according to the duties of their office as surveyors, although they mistook the legal mode of carrying out their intention. Neither in *Hermann v. Senschal* nor in *Roberts v. Orchard* was it decided that a defendant would not be entitled to notice of action, because he had been mistaken in the law". It is true that in *Maxwell's Interpretation of Statutes* the view is expressed that apparently there would be no protection for an arrest made in misconception not of the facts but of the law. I think the true rule is given in *Halsbury, Laws of England*, 2nd ed. vol. 26, p. 296:- "A defendant who honestly intends to act in execution of a public duty may be protected although he acts in ignorance, or under a mistake, as to the law."

[40] *Little v The Commonwealth* at 111-112. (footnotes omitted)

[27] Finally, His Honour concludes the question is whether a person acts honestly in a course of action that falls within the general purpose of the provision:[41]

> The truth is that a man acts in pursuance of a statutory pro-vision when he is honestly engaged in a course of action that falls within the general purpose of the provision. The explanation of his failure to keep within his authority or comply with the conditions governing its exercise may lie in mistake of fact, default in care or judgment, or ignorance or mistake of law. But these are reasons which explain why he needs the protection of the provision and may at the same time justify the conclusion that he acted bona fide in the course he adopted and that it amounted to an attempt to do what is in fact within the purpose of the substantive enactment.

[28] The approach to the interpretation of protective provisions submitted on behalf of the applicant as discerned from the line of authorities commencing in *Little v The Commonwealth* is supported by the majority in *Webster v Lampard*:[42]

> One can find support in past cases for the view that a defendant who genuinely but mistakenly believed that he or she was acting in pursuance or execution of a statutory provision or in the discharge of some public duty or office is not entitled to rely upon a defence of the kind involved in the present case unless his or her belief in that regard was based on objectively reasonable grounds. That view has not, however, prevailed. The course of authority is traced by Dixon J. indicated in *Trobridge v. Hardy*, it should now be accepted as settled "that, while there must be some factual basis for the belief, and while the actual facts known to a defendant may often be relevant to the question of the existence of a real belief, it is not necessary that the belief should be based on reasonable grounds".

[29] Of primary relevance to the circumstances of this case is the principle that the benefit of the s 164 MHRSA immunity may be applied notwithstanding

[41] *Little v The Commonwealth* at 112.
[42] [1993] 177 CLR 598 at 607.

the Applicant may have gone beyond his powers provided there is good faith, and that he has acted with "reasonable care." This is not a case concerned with reliance on a "document" as in *Marshall v Watson*, but in my view relevantly engages "authority" under the MHRSA. That approach accords with the natural meaning of the section, that is "authority", "apparently given or made in accordance with this Act."

Discussion of the Relevant Provisions of the MHRSA and Application to the agreed facts.

[30] Section 163[43] MHRSA relevantly provides police may apprehend a person and take the person to a medical practitioner, for an assessment under s 33 MHRSA, if police believe on reasonable grounds the person may be mentally ill or mentally disturbed, the person has attempted suicide, self harm or harm of another person in the preceding 48 hours, (or is about to do the same) *and* it is necessary to apprehend the person *or* it is not practical to seek relevant medical assistance,.

[31] Section 33 MHRSA directs an authorised psychiatrist or designated health practitioner to assess and determine whether a person is in need of treatment as soon as practicable. It was not in dispute the Applicant was on duty as a serving member of the Northern Territory police. It was not in dispute the Applicant and other police officers validly exercised their powers under s 163 MHRSA to apprehend Mr Plasto-Lehner and take him to RDH where he

[43] All sections quoted are from the MHRSA as in force at the relevant time. Although extensive amendments were made by Act No 8 of 2007, those amendments did not enter into force until 2 March 2009. Section 32A as recently considered in *Wanambi v Edwards* [2010] NTSC 43 was not in force at the time of this incident.

was admitted to hospital by the triage nurse.[44] There was nothing in the facts to suggest police, (including the Applicant), did not believe they were acting within power during the period they were waiting with Mr Plasto-Lehner in the Oleander Room or that they did not believe their powers extended to stopping him from leaving the hospital. The Respondent does not assert to the contrary, however, it is the Respondent's case[45] the Applicant had no power to prevent Mr Plasto-Lehner from leaving the hospital at the relevant time.

[32] It is the Respondent's case and not in dispute that Dr Cromarty conducted a preliminary assessment of Mr Plasto-Lehner. It is submitted on behalf of the Applicant Dr Cromarty *claimed* to be acting pursuant to s 33(1) MHRSA and was apparently seeing Mr Plasto-Lehner with a view to assessing and determining whether he was in need of treatment. Subsequently, it is submitted Dr Cromarty has *claimed* to have formed the view that Mr Plasto-Lehner fulfilled the criteria for involuntary admission into hospital on the grounds of mental illness and made a recommendation for a psychiatric examination of him to take place.[46] The use of the word ("claimed") in submissions on behalf of the applicant in reference to the proposed evidence indicates there may be some dispute about what Dr Cromarty has said in relation to the legal basis of her decisions, however a consideration of the facts at this stage means I am obliged to accept facts taking the

[44] Described in para 8 above.
[45] Particulars at para 7.
[46] Appellant's submissions, para 12 & 13.

Respondent's case at its highest. No contrary facts concerning the exercise of Dr Cromarty's powers are before this Court or the Court below. For the purposes of these proceedings, I accept Dr Cromarty conducted an assessment pursuant to s 33 MHRSA.

[33] Section 34 MHRSA provides the relevant medical or mental health practitioner must make a recommendation for psychiatric examination if, after assessing the person they are satisfied the person fulfils the criteria for involuntary admission. Dr Cromarty made such a recommendation, or purported to make the recommendation.

[34] At the relevant time, s 34(2) MHRSA provided "A recommendation for psychiatric examination is to be in the approved form." It is argued on behalf of the Applicant the Form used by Dr Cromarty did not comply with s 34(2) as it was not in the *approved form*.[47] Section 4 MHRSA states "approved" means approved by the Secretary in writing. "Secretary" means the Chief Executive Officer, within the meaning of the *Public Sector Employment and Management Act*, of the Agency. Although it appears to be accepted Dr Cromarty would have believed this to be the relevant form, it did not comply with the s 34(2) MHRSA in strict terms. It is not disputed by the respondent there was no *approved form* at that time. Although there has not been compliance in the face of a strict provision "*is* to be in the approved form," in my view the intent of the legislation is not such as to

[47] A copy of the form used by Dr Cromarty is before the Court.

invalidate any act done in breach of the section.[48] There is nothing in the MHRSA that would warrant treating the recommendation under s 34 as invalid by reason of use of a faulty or non-approved form. I agree with the Respondent's argument this was an effective 'sectioning' of Mr Plasto-Lehner. It is submitted and I agree that in any event the Applicant cannot rely on any form, defective or otherwise, to grant powers that he did not in law possess.

[35] A recommendation for psychiatric examination pursuant to s 34 MHRSA authorises the person making the recommendation (here, Dr Cromarty), an ambulance officer or other person specified to take reasonable measures to control and take the person to an approved treatment facility. It includes the power to enter land or premises for that purpose;[49] to hold the person at a hospital or other place until it becomes practicable to take the person to the approved facility;[50] to administer certain emergency treatments without the approval that ordinarily would be needed from the Mental Health Review Tribunal[51] and to detain the person at an approved treatment facility for up to twelve hours.[52] Section 34(4) MHRSA provides the recommendation may authorise a member of the Police Force to exercise, or to assist a person

[48] *Project Blue Sky v Australian Broadcasting Commission* [1998] 194 CLR 355 at 389.
[49] Section 34(3)(a) MHRSA.
[50] Section 34(3)(b) MHRSA.
[51] Section 34(3)(k) MHRSA.
[52] Section 34(3)(d) MHRSA.

exercising the first of those powers, namely to control and take the person to an approved facility.[53]

[36] In this case, there was no recommendation for police assistance under s 34(4) MHRSA on the Form relied on by Dr Cromarty, albeit not an approved form. Even if there had been, by operation of s 34(4) MHRSA, authority given to police to act or assist, could go no further than assisting to take reasonable measures in the circumstances mentioned in s 34(3)(a). In common with other statutes dealing with the health of persons unable to consent to treatment or other decision making,[54] the MHRSA evinces an intention[55] that consideration be given to use of the least restrictive alternative when various intrusive steps are taken under the MHRSA.

[37] Section 34 MHRSA expressly provides for one circumstance where police may be authorised to aid the control of a person who fulfils the criteria for involuntary admission. I have concluded the Applicant cannot rely on that power. This is not conclusive however on the question on whether police still possess other powers that may authorise them to act as the applicant and others[56] have done here. Similarly, it is not conclusive on the question of whether the immunity under s 164 MHRSA may still be invoked if the applicant has not acted fully in accordance with the powers conferred by

[53] Section 34(3)(a) MHRSA.
[54] See eg. *Adult Guardianship Act* NT.
[55] Section 34(4)(a)….there is no less restrictive alternative.
[56] Other police officers and hospital security guards who have no further identified powers were also involved in the restraint of the applicant.

statute or the common law, but believed he was acting in accordance with those powers.[57]

[38] It is accepted by the parties s 163 MHRSA authorized police including the Applicant to apprehend Mr Plasto-Lehner[58] and take him to the appropriate mental health practitioner for assessment under s 33 MHRSA. Section 163 MHRSA does not expressly authorise restraint beyond police taking the person to a medical practitioner for assessment. The purpose of the apprehension is the assessment, however there is some contemplation within s 163 MHRSA that police may detain. Section 163(5) MHRSA provides a police officer must give the medical practitioner details of their reasons for apprehending the person and any restraint or other type of force used *to apprehend and detain the person*. Section 163 MHRSA therefore admits an application allowing for detention incidental to the apprehension for assessment. It would be wrong to suggest that apprehension in this context could not ever allow detention; the section itself when read as a whole envisages there may be a form of detention incidental to the apprehension.

[39] Regardless of that, on the material before this Court and before the learned Magistrate, it is clear attending police including the Applicant and the security officers employed by the hospital acted in a manner consistent with a belief they were still required to ensure Mr Plasto-Lehner remain and complete certain medical processes before he could leave that part of the

[57] The common law must be seen to be problematic in the context of the exercise of power over persons who are mentally ill, rather than powers more traditionally engaged in investigation of criminal matters.
[58] Conditions precedent to the exercise of police power under s 163 are set out in para 29 above.

hospital where he was waiting. It is not suggested police including the Applicant were present for any other reason than to carry out, or continue to carry out their duty at the relevant time. This state of affairs clearly raises the question of whether the immunity under s 164 MHRSA may be successfully invoked either through police acting in accordance with their powers, alternatively if as a matter of strict interpretation they were without power when Mr Plasto-Lehner was apprehended, notionally or otherwise, then the question is whether police can rely on the immunity if they have, in good faith, wrongly or mistakenly acted beyond their powers.

[40] Although I have concluded the s 34 MHRSA recommendation of Mr Plasto-Lehner is not invalidated by use of a non-approved form, and there are facts supportive of the Applicant being aware of Mr Plasto-Lehner being 'sectioned',[59] from all of the material before the Court, excluding the Applicant's statements, for all intents and purposes, Mr Plasto-Lehner still appeared to be a person going through a process to treatment that was not yet complete and police including the Applicant all continued to act as though they had the power to ensure Mr Plasto-Lehner stayed to complete the process. As they acted initially under powers they possessed under s 163 MHRSA it is reasonable to infer they believed their initial powers continued. There is no suggestion police were present for any other purpose other than to see Mr Plasto-Lehner through to another stage of treatment.

[59] Brief reference was made in submissions to proposed evidence that Dr Cromarty told the Applicant she had 'sectioned' Mr Plasto-Lehner.

There is no evidence or assertion they were told to leave after the initial assessment.

[41] As a matter of strict interpretation, in my view the powers under s 163 MHRSA were not extant at the time of the purported apprehension of Mr Plasto-Lehner, however all the indications on the available evidential material are that the Applicant and other police officers believed they were still exercising legitimate powers in relation to a person requiring assessment and treatment. Similarly, hospital employed security officers acted as though they believed they had certain powers of restraint when it is difficult to source those powers in the MHRSA in its form at the relevant time. Had Mr Plasto-Lehner been successful in leaving without being treated, at some point s 163 MHRSA could have been invoked again if the criteria for its use was clear for a further apprehension.

[42] As noted in the authorities discussed, immunity from suit or protective provisions exist to protect those who have committed an illegality honestly acting in the supposed course of the duties or authorities arising from the enactment.[60] Otherwise, there is little or no point to the immunity provision. Importantly, the terms of the immunity in s 164 MHRSA embrace this concept as it may be invoked (relevantly here), in reliance on any authority "*apparently* given or made in accordance with this Act." The use of the word *apparently* in the legislation is apt in this situation where all involved in the incident, (including importantly the Applicant), are

[60] Dixon J in *Little v The Commonwealth* [1947] 75 CLR 94.

acknowledged to be acting in good faith and further, all are *apparently* acting in accordance with assumed powers. That is, good faith according to authority under the MHRSA, namely s 163. As a matter of law, in my view that power under s 163 did not extend to the impugned apprehension or purported apprehension of Mr Plasto-Lehner at the relevant time, however it was apparent to the Applicant and a number of other persons present that they were exercising some powers under the MHRSA. The interpretation of s 164 MHRSA in this way is consistent with the general principles of interpretation of immunities as can be discerned from the cases submitted by the parties before this Court.

[43] As emphasized on behalf of the Respondent, s 164 MHRSA has two further limbs beyond the question of authority to act, namely "good faith" and "reasonable care." "Good faith" is not in dispute. The question of "reasonable care" is disputed by virtue of facts that form the basis of an argument that the apprehension and ground stabilising utilised by the Applicant and others was excessive. The particulars allege physical restraint of Mr Plasto-Lehner on the ground with *excessive force*.[61] The Respondent argues *reasonable care* involves an objective assessment of what is necessary action or force in the circumstances. Medical Staff at the hospital would give evidence that the actions of the Applicant were unnecessary,

[61] Para 7 above.

excessive and they were aghast.[62] Although not defined in the MHRSA "reasonable" in most contexts connotes some form of objective assessment.

[44] Senior Counsel for the Respondent has submitted the immunity contained in s 164 MHRSA was most likely drafted with medical staff in mind as the primary persons engaged under the MHRSA. There is significant force in that observation. Clearly the assessment of what is *reasonable care* in the circumstances will vary in some respects depending on perspective, in this instance perhaps the occupation of the persons observing the apprehension. I reject the Applicant's argument that this is a completely subjective standard. In my view the approach to *reasonable care* in this context should be read to be compatible with the approach taken to the *reasonable person* in other areas of the law, so that *reasonable care* refers to a legal standard that is not solely the Applicant's subjective view but a person of ordinary prudence, using ordinary care and skill, but importantly *in the circumstances* of (here) the Applicant.[63] Although there may be other views that the apprehension and consequent ground stabilizing were or appeared to be excessive, the appropriate objective standard to apply is the police protocols and practice concerning ground stabilizing. This involves *reasonable* compliance with those protocols. In my view the Respondent cannot negative *reasonable care*. If I am wrong on this point and the test is subjective as asserted by the Applicant, (that is whether the Applicant

[62] Para 9 above.
[63] Drawn from a useful summary of a discussion of "reasonable person" in Balkin and Davis, "Law of Torts" (4th ed) at 268.

believed he was acting with *reasonable care),* it is relevant to note the Respondent's case is not a denial that the Applicant believed he was acting with reasonable care. In terms of any subjective belief, the Respondent cannot in my view negative that the Applicant believed his actions were taken with reasonable care. I therefore conclude the immunity applies to the actions of the Applicant.

[45] Assuming for the purpose of argument the Applicant cannot rely on assumed powers possessed under s 163 MHRSA, s 165 MHRSA provides:

> "A person may use reasonable force to restrain a person being treated under this Act –
>
> (a) to prevent the person harming himself or herself or another person or
>
> (b) to maintain the good order and security of an approved treatment facility or the approved treatment agency."

[46] Reviewing all of the material before the learned Magistrate and this Court, the only clear conclusion I can come to is the Applicant, other police and security officers took the restraint action they did in respect of Mr Plasto-Lehner for either or both of two permissible justifications under s 165 MHRSA. Although there is some evidence in the Respondent's case that hospital staff had heard Mr Plasto-Lehner wanted to go outside either for fresh air or a cigarette, there is also evidence he endeavoured to leave the hospital through doors the public were not permitted to have access to; they were for ambulance deliveries and marked "No Exit". Mr Plasto-Lehner

would have placed himself in danger because of the drop over a parapet and balcony.[64] The question of "reasonable force" needs to be referenced to relevant police practice and protocols and the belief of the Applicant. Viewed in that light, the facts do not disclose the force as unreasonable in the circumstances.

[47] The Applicant has submitted that by virtue of general police powers under both the common law and *Police Administration Act* (NT) and by virtue of the oath that all police officers' swear to "see and cause Her Majesty's peace to be kept and preserved," the Applicant may resort to justifying the apprehension to prevent a breach of the peace. In my view it was not appropriate for the learned Magistrate to rule on that point at the outset of the hearing, nor should this Court rule on it at this point. The considerations concerning the availability of the immunity under s 164 MHRSA should be confined to the provisions of the MHRSA. Other sources of authority the Applicant may rely on require a broader consideration of facts than those that are clearly agreed and do not require early resolution in the same way as a ruling on an immunity does. The ground of appeal asserting authorization is in the same category. The Court in my view is obliged to entertain the immunity point at the outset or on a continuing basis if initially it is found the facts do not support the application of the immunity. The considerations concerning the MHRSA immunity should be confined to the MHRSA itself.

[64] T at 8 and 9.

Correct Process

[48] The Applicant initially proceeded by way of a Justices Appeal.[65] After being referred to the authorities by the Respondent,[66] the Applicant filed an originating motion seeking the alternative relief. On the basis of Thomas J's reasoning in *Tcherna v Garner*, (that a Magistrate when hearing a committal is sitting as a justice and not the Court of Summary Jurisdiction), and the provisions of the *Justices Act* (NT), I agree the appeal is incompetent and will be dismissed.[67]

[49] There has been argument that the decision of the learned Magistrate was not a decision to dismiss the application to apply the immunity as the learned Magistrate's decision indicated being prepared to entertain the application at the completion of the committal. It may well be that the learned Magistrate's decision would be different at the conclusion of the committal, however the conclusion here is that the immunity must be considered on its terms and if required to be ruled on at the outset. The terms of s 164 MHRSA indicate that is the position. Given the findings I have made, the committing Magistrate is without jurisdiction and I will make the following orders:

1. The Justices Appeal in action 20934430, JA 14 of 2010 is dismissed.

[65] JA 14 of 2010, No 20934430.
[66] In particular, *Tcherna v Garner* (1999) 154 FLR 243.
[67] Section 163 *Justices Act* applies only to the Court of Summary Jurisdiction.

2. On file 74 of 2010 action 21023470, the decision of the learned Magistrate dismissing the application to apply the immunity at the commencement of committal proceedings in matter no. 20934430 wherein Richard James Coates is the Informant and Bradley Peter Fox is the Defendant is removed to this Court and quashed.

3. On the same file and in the same action as paragraph 2 of the orders herein, the committal court constituted by a Magistrate sitting as a Justice is prohibited from proceeding further with the charge on information wherein Richard James Coates is the Informant and Bradley Peter Fox is the Defendant.

I will hear the parties on costs.