

# Law Reform Commission

## REPORT 24 OUTLINE (1975) - PROCEEDINGS BY AND AGAINST THE CROWN

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## **Section 1 - Purpose Of This Paper**

The purpose of this Outline is to facilitate a quick appreciation of the principal recommendations contained in the report of this Commission on "Proceedings by and against the Crown". It is not a complete summary of the report.

Footnote references are, except where otherwise stated, references to the report.

## Section 2 - The Crown

The Colony of New South Wales inherited the general body of the law of England. This included the law governing the redress which a subject could obtain against the Crown, the procedures by which that redress could be obtained, the redress which the Crown could obtain against a subject, and the procedures by which that redress could be obtained. In modern speech it is more common to speak of the "State" rather than of "the Crown". But in the tradition of the law the accepted usage is to speak of "the Crown". In this Outline we adopt this usage: but it needs to be kept in mind that, for our purposes, "the Crown" means the "State". It does not mean the Queen as a person. <sup>1</sup>

### FOOTNOTES

1. Part 2 Section 1.

## Section 3 - The Law Which The Colony Inherited

At the foundation of the Colony, English law in respect of proceedings against or by the Crown was complex and cumbersome.

The main procedure by which a subject could obtain redress was by what was known as the petition of right. This was a petition to the Crown for permission to sue it. Where the Crown gave this permission the subject could then sue the Crown. But the Crown would not give this permission where the claim of the subject was for damages in respect of a tort<sup>2</sup> which the subject claimed that the Crown, by its servants or agents, had committed. There was no way in which a subject could sue the Crown for damages in respect of a tort. He could sue the servant or agent of the Crown who acted wrongfully. But he could not sue the Crown itself. If he sued the servant or agent, and won, he might have a hollow victory: for the servant or agent might not have the means to satisfy the judgment. It was the practice of the Crown to pay damages awarded against its servant or agent where it was satisfied that the servant or agent had acted within the general scope of the authority given to him as the servant or agent of the Crown. But this practice was of no comfort to a subject where he was unable to obtain judgment against a servant or agent of the Crown because he was unable to identify the particular servant or agent who had committed the tort. And even if he were able to identify the particular servant or agent, and he obtained judgment against him, the Crown still might not pay - for it might take the view that the servant or agent had not been acting within the general scope of his authority. If the Crown took this view and, accordingly, refused to pay, there were no means whereby the subject could obtain a determination by a court that, in fact, the servant or agent had been acting within the general scope of his authority.

The position was little better in respect of cases in which the Crown sued a subject. Although the Crown could sue by the ordinary process by which a subject sued another subject, it was not bound to use this process. It could use, instead, a variety of special processes which were available only to the Crown. These processes were archaic and technical and gave the Crown great advantages which were not enjoyed by a subject when suing another subject.<sup>3</sup>

### FOOTNOTES

2. A tort is a wrongful act, such as causing damage by negligence, which is not merely a breach of a contractual, obligation.

3. Part 8 Section 2.

## Section 4 - The Bold Innovation In New South Wales

In England the law described in the last Section remained in force, with only minor procedural improvements, until 1947. Ninety years earlier, a bold innovation was made in New South Wales by the Claims against the Government Act, 1857. <sup>4</sup> That Act recited that the ordinary remedy of petition of right was of limited operation, was insufficient to meet all cases of disputes and differences between the subjects and the Crown and was "attended with great expense inconvenience and delay". It provided that upon the petition of a subject, any case of "dispute or difference", and this included a claim by a subject for damages for a tort committed by the Crown, could be referred for trial in the Supreme Court against a nominal defendant appointed by the Governor. In 1876, by the Claims against the Colonial Government Act of that year, <sup>5</sup> this new procedure was strengthened. It provided that "any person having or deeming himself to have any just claim or demand whatever against the Government" <sup>6</sup> could petition the Governor to appoint a nominal defendant and, upon the appointment being made, sue the nominal defendant in any court of competent jurisdiction. <sup>7</sup> The Crown could not escape the hazards of litigation by declining to appoint a nominal defendant. The Act provided that in default of an appointment being made "the Colonial Treasurer for the time being shall be the nominal defendant". <sup>8</sup> The Act further provided that upon the subject suing the nominal defendant "the proceedings and rights of parties therein shall as nearly as possible be the same and judgment and costs shall follow or may be awarded on either side as in an ordinary case between subject". <sup>9</sup> This last-mentioned provision is still subject and the basic formula for the liability of the Crown in New South Wales to subjects and the procedure remains as provided by that Act. The current Act is the Claims against the Government and Crown Suits Act, 1912. We refer to it as the Claims against the Government Act.

In 1881, the Privy Council in its judgment in the famous case of *Farnell v. Bowman* <sup>10</sup> declared that these provisions of the Claims against the Government Act are to be given their full meaning and that a subject can obtain a judgment against the nominal defendant, which the Crown has to pay, for damages for any tort which the Crown, by its servants or agents, has committed.

A distinguished judge of the High Court <sup>11</sup> has said that this decision by the Privy Council was "epochal" and "cataclysmic": and so it was. Not until 1947 did the Crown in England become liable for damages for tort.

### FOOTNOTES

4. Act 20 Vic. No.15.

5. Act 39 Vic. No.38.

6. S.2.

7. S.3.

8. S.2.

9. S.3.

10. (1887) 12 A.C. 643. This case is discussed in Part 4 Section 2.

11. Sir Victor Windeyer (now retired) in his judgment in *Downs v. Williams* (1971) 126 C.L.R. 61 at p.80.

## Section 5 - The Operation Of The Claims Against The Government And Crown Suits Act, 1912

There is no cause for dissatisfaction with the basic formula of the Claims against the Government Act that “the proceedings and rights of parties therein shall as nearly as possible be the same ... as in an ordinary case between subject and subject”. it has worked very well. <sup>12</sup> At about the turn of the century some of the judges of the Supreme Court held exaggerated fears that application of the formula might hamstring the Crown in some areas of government by, in effect, handing over those areas to “the uncertain, unstable and unskilled management of the jury box”. <sup>13</sup>

These fears have simply not been borne out and they are no longer entertained. <sup>14</sup> We see no reason for not continuing the formula.

We are not tempted to alter it by the fact that a different approach was taken, in the United Kingdom, by the Crown Proceedings Act 1947, <sup>15</sup> and that this different approach has been adopted in New Zealand and in Canada. That Act spells out in some detail the sorts of grievances for which a subject can obtain redress against the Crown. That is a much more cautious approach than the one taken by the New South Wales Act. But more than a century of experience with the approach taken by the New South Wales Act (and by similar legislation of the Commonwealth and of some of the other States) demonstrates that this caution is not needed. Indeed, it is dangerous to spell out the sorts of grievances for which a subject can obtain redress. Some, for which a subject ought to be able to obtain redress, may be overlooked. And the law is not static. The courts are constantly refining the law dealing with grievances between subjects. If, in this State, we were to adopt the English approach there would be, necessarily, the risk that we would spell out those grievances for which a subject can obtain redress against the Crown in such a way that a subject would be denied the benefit of developments made in the law by the courts.

We recommend that no change be made to the basic formula as to the liability of the Crown expressed by the Claims against the Government Act.

### FOOTNOTES

12. Part 4 Sections 4-8.

13. Part 4 Section 4. 14. Part 4 Section 5.

15. Part 4 Section 7.

## Section 6 - Liability Of The Crown For Breach Of Statutory Duties

But we should mention a rather troublesome decision given by the High Court in 1971 in the case of *Downs v. Williams*.<sup>16</sup> In that case the plaintiff had been injured by an unguarded grinding wheel in premises occupied by the Crown. For the purposes of its decision the High Court assumed that these premises were a factory. The Factories, Shops and Industries Act, 1972, requires the occupier of any factory (not specially exempted) to securely guard dangerous machinery such as grinding wheels. The grinding wheel which injured the plaintiff had not been guarded and this was the reason for his being injured. He sued the nominal defendant for damages for breach of the statutory duty. There are two distinct advantages to any plaintiff where he is able to base his claim upon breach of a statutory duty. One is that the defendant cannot escape liability by proving that, although he broke the statutory duty, he had nevertheless taken reasonable care for the plaintiff's safety. The other is that the amount of the damages which the plaintiff recovers, if he proves the breach of statutory duty, are not reduced because of any failure on his own part to take reasonable care for his own safety. Seeking, no doubt, to obtain these advantages the plaintiff in *Downs v. Williams* based his claim upon breach by the Crown of the statutory duty to guard dangerous machinery. If the factory had been occupied by a subject, and not the Crown, and the plaintiff had sued that subject, he would have succeeded in his claim. But the plaintiff's claim against the Crown failed, notwithstanding the basic formula of the Claims against the Government Act that "the proceedings and rights of parties therein shall as nearly as possible be the same ... as/in an ordinary case between subject and subject". But the claim did not fail because of any deficiency in the formula. It failed because Parliament did not provide, in the Factories, Shops and Industries Act, that the Crown was to be bound by the provision which required dangerous machinery to be guarded. Accordingly subjects had the statutory duty to guard dangerous machinery: but the Crown did not. The debates in Parliament, when the Factories, Shops and Industries Bill was being considered, suggest strongly that members of Parliament believed that it was not necessary to provide that the Crown was to have the statutory duty because, even without such a provision, the Crown would be bound by the section of the Act which imposed the duty.<sup>17</sup> This was not so. A misunderstanding such as this should never be allowed to occur again. We have examined therefore the law which courts apply in deciding whether an Act binds the Crown notwithstanding that there is no provision in it which expressly says so. We find it to be unsatisfactory and we recommend reform. We return to this matter later in this Outline (Section 13).

### FOOTNOTES

16. (1971) 126 C.L.R. 61. This case is discussed briefly in Part 4 Section 9. It is more fully discussed in Appendix C to the report.

17. Part 14 Section 11.

## Section 7 - A New Crown Proceedings Act

We have said that the basic formula of the Claims against the Government Act works well and that it should be retained. But in some other respects the Act is inadequate or out of date.

One of these is that it is an unnecessary complication that a subject must have a nominal defendant appointed before he can sue.<sup>18</sup> This causes delay. It has happened, too, that the person appointed to be the nominal defendant has died before the case has been decided. Where this happens, the plaintiff has to go to the further trouble, and incur the further delay, of having someone else appointed to be the nominal defendant. There is no reason why it cannot simply be provided that the subject may sue the State directly as the "State of New South Wales". We recommend that this be done.<sup>19</sup>

Another deficiency in the Act is that it does not extend to the case where the Crown sues a subject and the subject wishes, in those proceedings, to counterclaim against the Crown. We recommend that it be provided that a subject may counterclaim against the Crown.

A further deficiency in the Act is that it does not provide that the Crown, like a subject, must pay interest on judgment debts.<sup>20</sup> We recommend that it be provided that the Crown shall do so.

The recommendations referred to in this Section could be given effect to by amendments to the Claims against the Government Act. There is, however, some dead wood in it which needs to be removed, and we suggest that there be a new Act, entitled the Crown Proceedings Act, replacing the existing Act.<sup>21</sup>

### FOOTNOTES

18. Part 5 Section 2.

19. Part 5 Section 3.

20. Part 5 Section 5.

21. A draft Bill appears as Appendix D to the report.



## Section 8 - Amendment Of The District Court Act, 1973, And Of The Courts Of Petty Sessions (Civil Claims) Act, 1970

The proposed new Act, like the Claims against the Government Act enables a subject to "sue" the Crown at law or in equity. But there are important court procedures, provided by legislation, which are not such that by availing himself of them a person "sues" any other person.<sup>22</sup> These procedures are available to a subject, in relation to the Crown, only if the relevant legislation binds the Crown. There is no difficulty in respect of the Supreme Court. The Supreme Court Act, 1970, is expressed to bind the Crown. But neither the District Court Act, 1973, nor the Courts of Petty Sessions (Civil Claims) Act, 1970, is expressed to bind the Crown. The consequences of this omission are unfortunate. For example<sup>23</sup> -

- (a) In the District Court an intending plaintiff cannot obtain an order that the Crown give preliminary discovery<sup>24</sup>
- (b) In neither the District Court nor a court of petty sessions is a person entitled to interplead<sup>25</sup> in respect of a claim of the Crown; and
- (c) In neither the District Court nor a court of petty sessions can salary or wages due to a Crown employee be garnished.<sup>26</sup>

There is no justification for the Crown not being bound by these Acts. We recommend that they be amended to provide that the Crown is bound by them. We also recommend that it be provided, as a consequential amendment, that the Crown is bound also by the Law Reform (Law and Equity) Act, 1972. This Act requires like effect to be given, in the District Court or a court of petty sessions, to an equitable ground of defence as is given, in a like case, in the Supreme Court.

### FOOTNOTES

22. Or, at least, it is very doubtful whether he "sues" that person.

23. Part 6 Section 1.

24. Preliminary discovery enables an intending plaintiff who wishes to sue on a cause of action, but who is unable to ascertain the name or address of the person against whom the alleged cause of action lies, to compel any person who has that information to disclose it.

25. Interpleader is a very useful procedure. A person may owe money or have in his possession goods which do not belong to him. But he may be uncertain about which of rival claimants is entitled to receive the money or the goods. Interpleader enables him to require the rival claimants to litigate their claims between themselves without him becoming embroiled. Another type of interpleader enables a sheriff, or bailiff, who has seized, or who proposes to seize, money or goods for the purpose of satisfying a court judgment to have any rival claims to the money or goods litigated between the claimants themselves.

26. Garnishment is the procedure by which a judgment creditor can obtain an order of the court that the employer of the debtor make deductions from the debtor's salary or wages, the amount deducted being applied towards satisfaction of the judgment debt. Section 56A of the Public Service Act, 1902, gives a discretionary power to any permanent head of a government department to make deductions, without a court order, from the salary or wages of a person employed, in that department, under that Act. But many persons, who are employees of the Crown are not employed under that Act.

## Section 9 - Proceedings By The Crown Against A Subject

We have pointed out, in Section 3 of this Outline, that the English law which the Colony inherited enabled the Crown to sue subjects by a variety of special processes which gave the Crown great advantages. Nothing needs to be done about these processes. The Crown does not use them. It uses the same process as that by which a subject sues another subject. There is no reason to fear that the Crown may seek to revive the special processes. They have receded into history.<sup>27</sup>

### FOOTNOTES

27. Part 8 Section 4.

## Section 10 - Title Under Which The Crown Is A Party To Proceedings

Quite apart from proceedings brought by a subject against the Crown pursuant to the Claims against the Government Act, there is a considerable amount of other civil litigation to which both a subject and the Crown are parties.

There are proceedings which are brought, not by a subject against the Crown, but by the Crown against a subject. These proceedings are brought under the title of the Attorney General.

There are also proceedings brought by a subject against the Attorney General to obtain equitable relief against the Crown.<sup>28</sup>

Although these proceedings are brought against the Attorney General they are, in substance, proceedings against the Crown itself.<sup>29</sup>

It is an unnecessary complication that there is more than one title under which the Crown may be a party to civil litigation. We have already recommended that where a subject sues the Crown under the Crown Proceedings Act, the new Act to replace the Claims against the Government Act, the Crown shall be sued under the title "State of New South Wales". We recommend that legislation be enacted to provide that in any civil proceedings, no matter how brought and whether brought by a subject or brought by the Crown, the title under which the Crown is a party shall be "State of New South Wales".<sup>30</sup>

### FOOTNOTES

28. Part 7 Sections 1, 2.

29. Part 7 Section 3. The subject may obtain like relief by suing the Crown under the claims against the Government Act.

30. Part III of the proposed Crown Proceedings Act so provides. However, the complication can occur that the Crown is a party in separate inconsistent interests. For example, in the one proceedings the Crown may seek to assert a claim of its own to property yet also, as *parens patriae*, seek to assert an inconsistent claim that the property is subject to a charitable trust. Part III of the proposed Act provides that in such a case the Crown, in respect of one of the separate inconsistent interests, shall be a party under the title "State of New South Wales" and, in respect of each other of those interests, shall be a party under the name of a person nominated by the Attorney General in respect of that interest. The problem of separate inconsistent interests is discussed in Part 10 Section 1 of the report.

## Section 11 - The Crown Should Be Bound By Legislation Directed To Making General Provisions As To Procedural Or Substantive Rights In Litigation

We have already recommended that the District Court Act, 1973, the Courts of Petty Sessions (Civil Claims) Act, 1970, and the Law Reform (Law and Equity) Act, 1972, be amended to provide that they bind the Crown. There is other legislation which should be amended to provide that it, also, binds the Crown. It is legislation which is directed to making general provision as to procedural or substantive rights in litigation. This legislation is comprised of the Law Reform (Miscellaneous Provisions) Act, 1944, Parts II and III of the Law Reform (Miscellaneous Provisions) Act, 1946, the Law Reform (Miscellaneous Provisions) Act, 1965, and the Statutory Duties (Contributory Negligence) Act, 1945.<sup>31</sup> In proceedings to which the basic formula of the Claims against the Government Act applies,<sup>32</sup> the subject who is suing the Crown has the rights conferred by these enactments, "as nearly as possible ... the same ... as in an ordinary case between subject and subject". He has these rights even though the enactments do not bind the Crown.<sup>33</sup> But the position would be more straightforward if these enactments directly provided that the Crown is bound by them. There is another reason why it is desirable that these enactments be expressed to bind the Crown. It is this. As we have pointed out, both a subject and the Crown may be parties to civil litigation to which the basic formula of the Claims against the Government Act does not apply. In such litigation, also, the Crown should be bound by them.

We recommend that these enactments be amended to provide that they bind the Crown. We further recommend that future legislation which, like these enactments, is directed to making general provision as to procedural or substantive rights in litigation, be expressed to bind the Crown.

### FOOTNOTES

31. This legislation is discussed in Part 4 Section 10 and Part 9 Section 2.

32. The formula is repeated in Section 5 of the proposed Crown Proceedings Act.

33. Part 4 Section 10.

## Section 12 - Liability For Torts Committed By Persons Performing An Independent Function Given To Them By Law 34

The proposed new Crown Proceedings Act does not deal with one problem to which judicial decisions have directed attention. The problem arises where an officer of the Crown commits a tort in the performance, or purported performance, of a function which is not one entrusted to him by the Executive Government but is one given to him by the law itself. It is better that this problem be dealt with by separate legislation.

The nature of the problem is best indicated by example. It was clearly revealed by the decision of an English court, in 1864, in the case of *Tobin v. The Queen*.<sup>35</sup> The facts were these. Tobin owned a ship. It was seized by the commander of a ship of the navy. The commander claimed that Tobin's ship was a slaver and that the seizure was lawful because the Slave Trade Act 1824 required commanders of ships of the navy to seize slavers. Tobin denied that his ship was a slaver and claimed that, accordingly, the seizure was unlawful. He sued the Crown for damages. He failed. The court held that the Crown could not be liable, even if Tobin's ship was not a slaver and the seizure was unlawful. There were a number of grounds for the decision. One was that the claim was a claim for damages for tort: and in England, at that time, a subject could not sue the Crown in tort. Another, and the one which gives rise to the problem with which we are here concerned, was that, assuming that the Crown would have been liable if the commander had seized the vessel pursuant to the orders of the Crown, it still was not liable because the commander "in seizing the vessel, was not acting in obedience to a command of Her Majesty but in the supposed performance of a duty imposed upon him by act of parliament". The court declared that "when the duty to be performed is imposed by law, and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment". Although, it said, the commander "was appointed to the ship, and ordered to the station, and employed by the Queen, still we think that the duty which he had to perform in relation to the slave-trade was not created by command of the Queen".

It was unjust that Tobin was denied redress against the Crown on this ground. If his ship were unlawfully seized by the commander the law should have enabled him to obtain damages from the Crown. But the reasoning which led to this denial of justice has been accepted and applied, as we shall see, in more modern cases. It is still the law. It is time it was changed.

The reasoning rests on a premise of doubtful validity.<sup>36</sup> The premise is that a function (by which term we include duty, and power which is imposed by law upon an officer of the Crown is not a function which is imposed by the will of the Crown. Is this really so? It depends upon what one means by the Crown. There was a time when it "was almost treasonable to separate the capacity of the king as man from his capacity as king".<sup>37</sup> That time is long gone. The modern concept of the Crown, so far as relevant for our purposes, is the concept of the State. What we are concerned with is the acceptance of responsibility by the State for harm done to citizens by State officials in carrying out the will of the State. In this context, legislation of the State is no less an expression of its will than are administrative directions given by the authority of a Minister. Assume that in *Tobin v. The Queen* the policy that slavers be seized had been given effect to by the Slave Act providing that the Lords of the Admiralty were authorised to make a general order that commanders of ships of the navy shall seize slavers and by the Lords making that order. If that had been done, it would have been beyond argument that it was by the will of the State that the commander had the duty. It should not have made any difference that precisely the same policy of the State was given effect to by the Act itself requiring commanders to seize slavers. We see no reason why the Crown should be any less liable for what its officers do in the performance, or purported performance, of a function which they are given by the law than it is liable for what they do in the performance, or purported performance, of a function which they are given by the Executive Government. Nor do we consider that it should make any difference whether the function is one conferred by an Act or one conferred by the common law - for Parliament can change the common law where it does not accord with its will.

One of the significant consequences of the reasoning in *Tobin v. The Queen* is that the State is not liable for a tort committed by a policeman in the performance, or purported performance, of a function which the law provides that he has by virtue of that office. Thus, in 1906, the High Court, following that reasoning, held in the case of *Enever v. The King*<sup>38</sup> that the Crown is not liable for a wrongful arrest made by a policeman. As the then Chief Justice, Sir Samuel Griffith, put it, "the powers of a constable ... whether conferred by common law or statute law, are exercised by him by virtue of his office, and cannot be exercised on the authority of any person but himself". Another of the judges put it this way - "Is a person who is obeying or endeavouring to obey the authority of an Act of Parliament so under the control of the State as to render the State responsible? It appears to me that in order to establish that position it must be shown that the control, if any, under which the person acted was that of the Executive Government of the State. The difficulty of sustaining that position was obvious." It seems to us that the law required the judge to ask himself the wrong question. The question should have been whether the power to arrest was one which the policeman had by the will of the State. It was the will of the State that he have the function to make arrests - albeit that the will of the State was expressed by the law rather than by administrative directions.

The liability which we believe the Crown should have is in harmony with a radical change which has developed in the general law of torts over the last fifty years or so.<sup>39</sup> The courts used to take the view that where a person exercised a function which so depended upon his own personal skill and judgment that no one else could effectively control him in its exercise, that person alone was responsible for any tort which he committed in the performance of that function. Thus a hospital was not liable for the negligence of doctors or nurses on its salaried staff. This is not now the case. The hospital is liable. A new approach, still in the course of development, has emerged. It is this. If a man conducts any business or other activity, and employs a person to act as an integral part of his organisation for carrying on that business or activity, as distinct from that person carrying on his own business or activity, the employer is liable for any tort that person commits in doing his work - and it matters not that the work is of such a nature that the employer cannot effectively supervise or direct him in performance of it. The liability arises not because the employer has done anything personally blameworthy but because he must accept responsibility for what is done by a member of his organisation. It would be going too far to say that this new approach has yet crystallised into a firm rule of law. But it underlies modern decisions. It is a commendable approach. It supports our view that the Crown ought to be liable for all the torts which its officers commit as members of the organisation of the State. It would be unreal to consider that in doing their work as officers of the Crown they are in business for themselves or are carrying out their activities on their own account.

The problem of the liability of the State, which we are here considering, arises not only where the wrongdoer holds what is properly regarded as being an office but also in respect of ordinary public servants. For example, in one case the High Court held that the Crown was not liable for the negligence of a solicitor employed in the State Legal Aid Office.<sup>40</sup> This public servant was dilatory in furnishing a report to the court, in consequence of which the claim of a litigant failed. The basis of this decision was that in furnishing the report the public servant was acting pursuant to a personal obligation which was imposed upon him by statutory authority (the rule of court made under the relevant Act), this obligation arising from the registrar of the court's referring the matter to him for report, and the duty of the public servant being to exercise his own skill and judgment. This was the court's reasoning - notwithstanding that the report related to the entitlement of the litigant to a form of legal aid, and that the public servant was employed in the State Legal Aid Office. The decision accords with the reasoning in *Tobin v. The Queen* and other cases which have applied that reasoning. But it is a decision which shocks one's conscience.

Before we proceed to the specific recommendations which we make we deal with a complication. It is this. Cases do occur, although infrequently, in which the law imposes the relevant function upon an officer or servant of the Crown but upon a servant of a private employer.<sup>41</sup> Our work would not be complete unless our recommendations extend to these cases. A recent decision of the Court of Appeal of this State is a good instance of these cases.<sup>42</sup> The facts were these. A private employer, a local council, had a swimming pool to which members of the public were admitted. A servant of the council supervised the conduct of these people. The council had him appointed a special constable so that he could more effectively do this. The Act under which he was appointed provided that every special constable was to have all the powers, authorities and duties of any constable duly appointed. In reliance upon these powers, authorities and duties, he arrested a schoolteacher for allegedly obstructing the entrance to the pool when marking a roll. The court held that even if the arrest was wrongful, the private employer, the council, was not liable for the tort. It followed the reasoning in *Tobin v. The Queen*. The court said that "it matters not whether the person who effects the arrest is in the service of the Crown

or of a private body ... [T]he governing factor is that the act is done by a person in the exercise of an authority vested in him by virtue of an office held by him independently of the nature of his employment even although his appointment to that office may come about by reason of that employment". This is the law. But can it be said to be just?

We come now to our specific recommendations.<sup>43</sup> The substance of them is this. Legislation should be enacted to the effect that where a servant of the Crown, or of any other master, is guilty of a tort in the performance or purported performance by him of a function conferred or imposed upon him by law and the performance or purported performance was-

- (a) directed to or incidental to the carrying on of any business, enterprise, undertaking, or activity of the master; or
- (b) an incident of his service,

the master shall be liable for the tort. But we would leave no room for the Crown to argue that some of its officers, such as policemen,<sup>44</sup> are not, technically, its servants, even though they are in the service of the Crown. We recommend that it be provided that the Crown shall be liable where a person who is in its service, although not its servant, commits a tort in the course of that service and in the performance or purported performance of a function conferred or imposed upon him by law.

## FOOTNOTES

34. Part 13.

35. (1864) 16 C.B.(N.S.) 310; 143 E.R. 1148. This case is discussed in Part 13 Section 2.

36. Part 13 Sections 4, 5.

37. Holdsworth, A History of English Law,, 3rd edn. (1944), Vol.9 at p.5.

38. (1906) 3 C.L.R. 969. This case is discussed in Part 13 Section 4. See also Part 13 Sections 8-15.

39. Part 13 Section 21.

40. Part 13 Section 17.

41. Part 13 Sections 20, 23-25, and 29.

42. Part 13 Section 20.

43. The recommendations are set out in full in the draft Bill which appears as Appendix F to the report.

44. Part 13 Section 16.

## Section 13 - The Application Of Statutes To The Crown 45

We have noted, in Section 6 of this outline, that we have considered, and have found to be unsatisfactory, the law which the courts apply in deciding whether an Act, or a particular provision of an Act, binds the Crown. <sup>46</sup>

The law is this <sup>47</sup> - if the Act expressly provides that the Act, or provision of it, binds the Crown, the Crown is bound; but if the Act does not so provide there is a presumption that the Crown is not bound even though the provisions of the Act, or the provision in question are expressed generally and are literally every bit as applicable to the Crown as they are to subjects. "This presumption is rebutted where it is a "necessary" inference that it was intended that the Crown be bound. This inference can be drawn if the purpose of the Act, or provision of it, would be "wholly frustrated", unless the Crown were bound. It may be taken that general legislation which is as basic to general transactions as is the Sale of Goods Act, 1923, will be construed as binding upon the Crown notwithstanding that it does not expressly state that the Crown is bound by it. Why, it may be asked, would the purpose of the Sale of Goods Act, 1923, be wholly frustrated if that Act did not bind the Crown? The answer may be this. It is of fundamental importance in the conduct of commercial affairs that there be uniform rules of law binding upon all parties to a contract for the sale of goods. An exception in favour of the

The purpose of the Act must Crown would destroy the uniformity. The purpose of the act must be taken to be the prescription of standard rules applicable to all contracts for the sale of goods. Exception of the Crown, therefore, would wholly frustrate this purpose of achieving uniformity. But if this be the explanation, the test of total frustration is otiose. For one has answered the question whether it is intended that the Crown be bound by the very first step in the reasoning - namely that it is intended that the standard rules laid down by the Act are to apply to all contracts for the sale of goods. The test of total frustration may conceal, rather than elucidate, the considerations which influence the courts. But one thing is clear. It is that it is far from easy to persuade the courts that it is a necessary inference that it was intended that the Crown be bound. Relatively little legislation is of the character of the Sale of Goods Act, 1923. In general, where legislation does not expressly state that the Crown is bound, the presumption that it is not bound is almost irrebuttable. It is not enough that the provisions are expressed in general terms, without any statement that the Crown is to be exempt, and that the provisions are "manifestly intended to secure the public welfare". For the Privy Council <sup>48</sup> has declared that "every statute must be supposed to be for 'the public good', at least in intention". Thus, in *Downs v. Williams* <sup>49</sup> the High Court held that notwithstanding that the Factories, Shops and Industries Act, 1962, provides in general terms that the occupiers of factories shall fence dangerous machinery, and notwithstanding that the beneficent purpose of the provision is that workers be protected from injury, the Crown is not bound by that provision.

It would seem that Parliamentarians have assumed, on many occasions, that the legislation would be construed by the courts as binding on the Crown whereas, in fact, it has not bound the Crown. <sup>50</sup> As we have already pointed out, debate on the Factories, shops and Industries Act, 1962, suggests strongly that this was the case in respect of the statutory duty to fence dangerous machinery. In respect of other legislation amendments subsequently made suggest that, at the time when the original legislation was enacted, it was not appreciated that the Crown would not be bound (or, at least, that it would be doubtful whether the Crown was bound). <sup>51</sup> Two examples suffice. The Compensation to Relatives Act, 1897, which provides for the recovery by dependent members of the family of a person wrongfully killed of damages for their financial loss, was not expressed to bind the Crown. In 1928 the Act was amended to provide expressly that the Crown is bound by it. Likewise the Scaffolding and Lifts Act, 1912, was not expressed to bind the Crown. In 1948 the Act was amended to provide expressly that the Crown is bound by it. It is not surprising that Parliamentarians have assumed, wrongly, that the courts would be far readier than in fact they are to infer that an Act, expressed in language as apt to apply to the Crown as it is apt to apply to subjects, is meant to bind the Crown. The law does not, in this regard, accord with the reasonable expectation of those not versed in its subtleties. Injustice to subjects has ensued. The law should be reformed.

The substance of our recommendations for reform is this. The presumption that it is not intended that the Crown be bound by a legislative provision unless either it is expressly stated that the Crown is to be bound or it is a



necessary inference that it is intended that the Crown be bound should be abolished. In place of this presumption legislation should be enacted to the effect that where, but for the former presumption, a legislative provision would bind the Crown, it shall be construed as binding the Crown except in so far as it is unlikely that it would have been intended that it bind the Crown having regard to -

- (a) the foreseeable extent to which the provision, if binding the Crown, might impede it in any activity and the foreseeable extent to which that impediment might be against the public interest;
- (b) the foreseeable extent to which the provision, if binding the Crown, might burden it in respect of any property and the foreseeable severity of that burden as compared with the burden upon other persons, bound by the provision in respect of any property; and
- (c) the foreseeable extent to which the purpose or any of the purposes of the provision might fail if the crown were not bound and the foreseeable extent to which that failure might be against the public interest. <sup>52</sup>

In short, the Crown should be bound unless, having regard to these matters, the reasonable inference is that it is unlikely that it would have been intended that the Crown be bound. <sup>53</sup>

We consider that these recommendations, if implemented, would prevent recurrence of the injustices which have ensued from the present unsatisfactory law, yet afford to the Crown all the special protection which it can reasonably expect the law to give it. If, in any particular case, it desired greater protection, or were not prepared to leave the matter to the courts, there would be nothing to stop it from having an express provision in the legislation in question that the Crown is not bound.

These recommendations provide for radical reform. We consider that nothing short of radical reform meets the need. But if they are not acceptable we recommend that at least one modest reform be made. It is that if the present rule is to be retained - namely that it is presumed that the Crown is not bound unless it is expressly stated that it is bound or it is a necessary inference that it is intended that it be bound - it should be provided that the rule does apply in respect of any statutory duties breach of which would entitle a person thereby suffering harm to recover damages. <sup>54</sup> Such a provision would prevent a recurrence, in respect of legislation to which it applies, of injustice of the type that occurred in *Downs v. Williams*.

Neither our recommendations for radical reform nor the modest recommendation, referred to in the last paragraph, would apply to existing legislation. They would apply only to legislation enacted after they were implemented. We recommend, therefore, that a body be established to review existing legislation. There are strong grounds for believing that it is only because of oversight or misunderstanding that some of the existing legislation, which does not bind the Crown by necessary implication, does not expressly provide that the Crown is bound. It is desirable that, if this body is established, it also keep under review future legislation. We consider it essential that it do so if our recommendations for radical reform are not implemented.

## FOOTNOTES

45. Part 14.

46. The limited extent to which the basic formula of the Claims against the Government Act prevents ensuing justice is discussed in Part 4 Sections 9, 10.

47. Part 14 Sections 1-6.

48. In *Province of Bombay v. Municipal Corporation of Bombay* [1946] A.C. 58 at p.63.

49. (1971) 126 C.L.R. 61.

50. Part 14 Section 11.

51. Part 14 Section 32.

52. The recommendations are set out in full in Part 14 Section 14. It is discussed in Part 14 Sections 15-26.

53. If, of course, it were expressly provided that the Crown were bound, there would be no room for the inference.

54. The recommendation is set out in full in Part 14 Section 30. It is discussed in Part 14 Section 31.

