VICTORIA'S CROWN PROCEEDINGS ACT

By P. W. Hogg*

SCOPE OF ARTICLE

This article is a critique of Part II of the Crown Proceedings Act 1958 the statutory provisions which in Victoria permit and regulate suits agains the Crown, and which impose substantive liability on the Crown. The othe Australian States, the Commonwealth of Australia, New Zealand and th United Kingdom also have Crown proceedings statutes to accomplish thes general purposes. This article will attempt to demonstrate the defects c the Victorian statute—while not forgetting its modest virtues; comparison will be made with other statutes; and the reform of the Victorian statut will be urged.

The Victorian statute is concerned only with suits against the Crown i right of Victoria which are brought in the Victorian jurisdiction. The Crow in right of Victoria is of course also liable to be sued in the federal juris diction under the Commonwealth Judiciary Act.[1] Indeed, as will appea the Crown in right of Victoria's liability under federal law is more exte sive than its liability under Victorian law. This article, however, is confine to the Victorian law.

PROCEDURE

In Australia and New Zealand every jurisdiction, including the State c Victoria, early passed statutes abolishing the petition of right as the mea of suing the Crown and substituting simpler procedures.[2] The Victoria statute was passed in 1858, at about the same time as reforms in Sou Australia, New South Wales and Queensland. Each of these statut required that the Crown be sued by 'petition', but the statutory petitio unlike the petition of right, did not require the royal fiat. In New Sou Wales, Queensland and South Australia the statutes required the Governo on the presentation of a petition, to appoint a nominal defendant; t proceedings were then taken against the nominal defendant. To mode eyes this appears unnecessarily complicated; yet it remains today as t method of suing the Crown in those States.[3] In Victoria the statute 1858 did not require the appointment of a nominal defendant. The filing

* LL.B. (N.Z.), LL.M. (Harv.); Barrister and Solicitor; Senior Lecturer in L in Monash University.

[1] Judiciary Act 1903-69 (Cth), ss 58, 59.

[2] In chronological order: Claimants' Relief Act (No. 6 of 1853) (S.A.); Clai against the Government Act 1857, (N.S.W.); Claims against the Crown Act (No. of 1858) (Vic.); Claims against Government Act of 1866 (Qld); Crown Suits A 1881 (N.Z.); Crown Redress Act 1891 (Tas.); Crown Suits Act, 1898 (W.A Claims against the Commonwealth Act 1902 (Cth).

[3] Claims against the Government and Crown Suits Act, 1912 (N.S.W.), ss 3, Claims against Government Act of 1866 (Qld), ss 2, 5; Supreme Court Act, 1935- (S.A.), ss 74-76.

the petition in the Supreme Court commenced the suit, and the proceedings continued against the Crown itself. The statute of 1858 was re-enacted with only trivial changes in 1865, 1890, 1915 and 1928.[4] In 1955 the procedure was further simplified by the abandonment of the petition in favour of proceeding against the 'State of Victoria' by 'the procedure applicable to proceedings between subject and subject'.[5] The 1955 provision is repeated in the current statute of 1958.[6] It seems better than the provisions which may be found in most other jurisdictions. We have already noticed that in New South Wales, Queensland and South Australia the device of the nominal defendant is still employed.[7] In Tasmania and New Zealand proceedings are usually taken against the Attorney-General.[8] In the United Kingdom a particular government department is usually the appropriate defendant.[9] The naming of the State itself as defendant in Victoria (and Western Australia)[10] is a welcome recognition of the undoubted fact that the State itself is a legal person, the subject of legal rights and liabilities, which may as well be sued directly under its simplest name.[11]

The procedural differences between the various jurisdictions are not very important. They are little more than differences in the methods of initiating proceedings. After that, in every jurisdiction, the proceedings are conducted in accordance with the same procedure as applies between subject and subject, and in most jurisdictions (including Victoria) a full range of remedies is available against the Crown.[12]

TORT

At common law the Crown was, in general, immune from liability in tort. The petition of right was available for the recovery of property from

[4] Crown Remedies and Liability Statute 1865; Crown Remedies and Liability Act 1890; Crown Remedies and Liability Act 1915; Crown Remedies and Liability Act 1928.

[5] Crown Proceedings Act 1955, s. 3.

[6] Crown Proceedings Act 1958, s. 22.

[7] *Supra*, n. 3.

[8] Supreme Court Civil Procedure Act 1932 (Tas.), ss 64-6; Crown Proceedings Act 1950 (N.Z.), s. 14; but see each of these provisions for the detailed position.

[9] Crown Proceedings Act, 1947 (U.K.), s. 17, but see this provision for the detailed position.

[10] Crown Suits Act, 1947-54 (W.A.), s. 5.

[11] *Cf.* Kelsen, *General Theory of Law and State* (1945) part I, ch. 9; part II, ch. 1; *Pure Theory of Law* (2nd ed. 1960) ch. 6; Paton, *Text-Book of Jurisprudence* (3rd ed. 1964) 311; Maitland, 'The Corporation Sole' and 'The Crown as Corporation' in *Collected Essays* (1936) 73, 104; Sawer, 'Government as Personalized Legal Entity' in *Legal Personality and Political Pluralism* (1958) 158.

[12] Judiciary Act 1903-69 (Cth), s. 64; Claims against the Government and Crown Suits Act, 1912 (N.S.W.), s. 4; Claims against Government Act of 1866 (Qld), s. 5; Supreme Court Act, 1935-69 (S.A.), s. 76; Supreme Court Civil Procedure Act 1932 (Tas.), ss 64 (15), 66; Crown Proceedings Act 1958 (Vic.), s. 25; Crown Suits Act, 1947-54 (W.A.), ss 5, 9; Crown Proceedings Act 1950 (N.Z.), ss 12, 31; Crown Proceedings Act, 1947 (U.K.), s. 13 and Rules of the Supreme Court, Order 77. Injunction is not available against the Crown in Tasmania, New Zealand and the United Kingdom; and specific performance is not available against the Crown in New Zealand and the United Kingdom: Tasmania s. 69; New Zealand s. 17; United Kingdom s. 21.

the Crown; and this included some claims which would now be thought of as tortious.[13] But in the nineteenth century the courts refused to accept the petition of right as a remedy in tort generally.[14] This refusal effectively freed the Crown from most liability in tort, for no other remedy was available.

In Australia and New Zealand all but one of the colonial legislatures coupled their procedural reforms with the imposition of liability in tort on the Crown.[15] By 1902 the Crown was liable in tort in every jurisdiction but one. The exception was the State of Victoria, which did not accept liability in tort until the statute of 1955. The provisions of the statute of 1955 were repealed in 1958 and incorporated into a consolidating statute, the Crown Proceedings Act 1958, which is of course the statute now in force. The provision imposing liability in tort on the Crown is section 23(1)(b), which reads as follows:

> the Crown shall be liable for the torts of any servant or agent of the Crown or independent contractor employed by the Crown as nearly as possible in the same manner as a subject is liable for the torts of his servant or agent or of an independent contractor employed by him.

This provision imposes liability on the Crown for torts committed by its servants, agents or independent contractors. This is, of course, the way in which a master usually becomes liable in tort: when a servant[16] commits a tort in the course of his employment. In such a case the master is vicariously liable. He need not have commanded, or even authorized, the tortious act, or been at fault in any other respect. In other words, vicarious liability is a species of strict liability. Its justification is to be found, not in any real or presumed fault on the part of the master, but in a variety of policy considerations, of which perhaps the most powerful is the notion that the master should bear the risks which the conduct of his business

[13] Clode, *Petition of Right* (1887) ch. 9; Robertson, *Civil Proceedings By and Against the Crown* (1908) book iii, ch. 1.

[14] *Lord Canterbury v. R.* (1843) 12 L.J. Ch. 281; *Tobin v. R.* (1864) 16 C.B.N.S. 310, 143 E.R. 1148; *Feather v. R.* (1865) 6 B. & S. 257, 122 E.R. 1191 Clode, *op. cit.* ch. 7; Robertson, *op. cit.* 350; Holdsworth, *History of English Law* (2nd ed. 1937) ix, 43.

[15] The original statutes are collected in n. 2 *supra*.

[16] Under the general law, while a master is always vicariously liable for the torts of servants committed in the course of their employment, it is only rarely that a master is vicariously liable for the torts of persons other than servants. There are, however, some circumstances when a person is liable vicariously (in the sense defined in the following text) for the torts of (1) his agents, and (2) his independent contractors: see Atiyah, *Vicarious Liability in the Law of Torts* (1967) 31-3, 99-111, 338-40. As Atiyah points out, much of the controversy among torts lawyers as to whether and to what extent a person can be vicariously (as opposed to directly) liable for the torts of persons other than servants is semantic: as the class of 'servants' expands, so the classes of 'agents' and 'independent contractors' contract. There would not be much disagreement as to the result of actual cases. The Crown Proceedings Act 1958, s. 23(1)(b), by making the Crown liable 'as nearly as possible in the same manner as a subject is liable', makes clear that the classes of agents and independent contractors to which it refers is no wider than that for which a private employer may become vicariously liable. In the text which follows, for ease of exposition, I have dropped the references to agents and independent contractors and have referred simply to servants.

creates.[17] The 'master's tort' theory, which imputes the tort of the servant to the master, is nowadays seen by most scholars to be an unnecessary fiction.[18]

But the master's liability in tort arising out of the acts or omissions of his servants is not invariably vicarious. There are occasions when the master is directly liable for the acts of his servants. The master's duties to employ competent servants and to provide safe plant and a safe system of work are duties which the common law imposes on the master personally. Breach of any of those duties makes him directly liable to an injured servant; and this is so even if the breach of duty occurred by the act or omission of another servant.[19] The same is true of the duties which an occupier of property owes to visitors: if the property is so unsafe as to amount to a breach of the occupier's duties, the occupier is directly liable to an injured visitor; and this is so even if the property was made unsafe by the act or omission of a servant.[20] Another head of direct liability is often created by a statute which imposes a duty upon the master: the master will be directly liable to anyone injured by a breach of the statutory duty, even if the breach occurred by the act or omission of a servant.[21] On these occasions of direct liability, the master's liability in tort does not depend upon the commission of a tort by a servant acting in the course of his employment. It depends upon the breach of a duty owed to the plaintiff by the master himself, and it is immaterial whether or not a servant also committed a tort.

For most purposes it is not important to distinguish a master's 'direct' liability in tort from his 'vicarious' liability. But section 23(1)(b) of the Crown Proceedings Act 1958, by imposing liability only for the 'torts' of Crown servants, is apt only to impose vicarious liability.[22] It is not apt to impose direct liability, for that is not a liability for the torts of servants; it is a liability for the torts of the master, even if they are committed by the acts or omissions of his servants.

The form of section 23(1)(b) suggests that the draftsman may have been influenced by the United Kingdom Crown proceedings statute, which was passed in 1947;[23] before 1947 the Crown in right of the United Kingdom

[17] A discussion of the various theories which have been advanced in justification of vicarious liability, including references to the literature, may be found in Atiyah, *op. cit.* ch. 1; see also Fleming, *The Law of Torts* (3rd ed. 1965), ch. 17.

[18] Atiyah, *op. cit.* 6-7, 281-2; Fleming, *op. cit.* 337-8. The principal modern supporter of the master's tort theory is Glanville Williams: see his article 'Vicarious Liability: Tort of the Master or of the Servant?' (1956) 72 *Law Quarterly Review* 522. His view is repeated in *Crown Proceedings* (1948) 43, where he has to face the difficulty that the United Kingdom Parliament disagrees with him: see Street, *Governmental Liability* (1953) 36-7.

[19] Fleming, *op. cit.* ch. 20. Of course, if the servant himself committed a tort, the master will be liable vicariously for the servant's tort, as well as directly for his own.

[20] Fleming, *op. cit.* ch. 19, and see the comment in the previous note.

[21] Fleming, *op. cit.* 461-2. I assume, of course, that breach of the particular statutory duty gives rise to civil liability.

[22] *Hall v. Whatmore* [1961] V.R. 225, 226, 228; *Richards v. Victoria* [1969] V.R. 136, 138.

[23] Crown Proceedings Act, 1947 (U.K.); *cf.* Crown Proceedings Act 1950 (N.Z.).

could be sued only by petition of right (or, in some cases, by an action against the Attorney-General),[24] and it was immune from liability in tort. Section 2(1)(a) of the United Kingdom statute imposes liability on the Crown 'in respect of torts committed by its servants or agents'. This provision, like Victoria's section 23(1)(b), is apt to impose only vicarious liability on the Crown. But the United Kingdom statute goes on to specifically impose direct liability in respect of the breach of employers' duties, occupiers' duties and statutory duties.[25] This method of drafting is explicable by the history of the United Kingdom statute.[26] Before 1947 the Crown's immunity in tort had been mitigated by the Crown, as a matter of grace, 'standing behind' any servant who committed a tort in the course of his employment. If the injured person were successful in suing the servant, the Crown would satisfy the judgment. In most cases no litigation was actually necessary, because the Crown's law officers would usually agree to a settlement where they were persuaded that the plaintiff had a good case against the servant who injured him. In *Adams v. Naylor* (1946),[27] an action was brought against a Crown servant, who had been nominated by the Crown to defend the action, to recover damages arising out of an accident which had occurred to two boys who were playing in an area of sand hills which had been mined during the war and which still contained mines. The boys had entered the mined area at a point where the fence and warning notice had been submerged by sand. A mine exploded, killing one boy and injuring the other. The action for damages failed by reason of a statutory bar, but the House of Lords pointed out, *obiter,* that it would also have failed at common law. The minefield was in the occupation of the Crown, not the nominated Crown servant; and no-one other than the occupier owed any duty of care to persons injured there. Since the Crown was not and could not be the defendant in the action, there was no-one who could be held liable to the plaintiffs. The same difficulty defeated the plaintiff in *Royster v. Cavey* (1947),[28] an action by a woman who was injured in a munitions factory occupied by the Crown. Her action failed because the Crown servant who had been nominated by the Crown to be the defendant in the action had had nothing to do with the plaintiff's accident, and was not the occupier of the factory; the defendant therefore owed the plaintiff no duty of care and no statutory duty.

Adams v. Naylor and *Royster v. Cavey* demonstrated a serious defect in the Crown's practice of standing behind its servants: the practice provided no machinery for the recovery of damages from the Crown in circumstances where a private employer would be liable directly rather than vicariously. These two cases gave the final impetus to reform by statute in the United Kingdom. The method of reform, as we have noticed, was

[24] *Dyson v. Attorney-General* [1911] 1 K.B. 410; [1912] 1 Ch. 158; n. 53 *infra.*
[25] United Kingdom, s. 6; *cf.* New Zealand, s. 2.
[26] It is recounted in Williams, *Crown Proceedings* (1948) 17-9, to which I am indebted for the account which follows.
[27] [1946] A.C. 543.
[28] [1947] K.B. 204.

first, to give legislative force to the practice before the statute by making the Crown liable 'in respect of torts committed by its servants or agents', and, secondly, to deal with the difficulties which arose in *Adams v. Naylor* and *Royster v. Cavey* by providing for specific heads of direct liability.[29]

The United Kingdom statute, which was substantially copied by New Zealand in 1950, is defective in that it leaves a residue of common law immunity. The heads of direct liability for which it provides, namely, breach of employers' duties, occupiers' duties and statutory duties, are, to be sure, the most important heads of direct liability, but they are not exhaustive. A school authority has been held directly liable for not exercising proper care and supervision in allowing a small child to stray out onto a busy street, where the child caused an accident;[30] a hospital authority has been held directly liable for the death of a patient caused by lack of a proper system of drug administration;[31] and a harbour authority has been held directly liable for failure to remove a snag in the harbour.[32] In each of these circumstances, if the Crown were the defendant, the United Kingdom statute would leave it free from liability. This is also true of the New Zealand statute, whose provisions imposing liability in tort are the same as those of the United Kingdom statute.[33] It is also true of the Victorian statute, but the defect in the Victorian statute is much more serious, because the statute does not even include the common heads of direct liability. It does not mention liability for breach of employers' duties, occupiers' duties or statutory duties—or any other head of direct liability. The State of Victoria is not directly liable at all under the Crown Proceedings Act 1958.[34] The plaintiffs in *Adams v. Naylor* and *Royster v. Cavey* would still be unsuccessful in Victoria.

That there is a need to impose direct liability in tort on the Crown, and not to confine it within the most common heads of liability, has been demonstrated in some recent cases. In the Scottish case of *Keatings v. Secretary of State for Scotland* (1961)[35] the pursuer was a prisoner in gaol who sought damages from the Crown. His injury had occurred in the gaol, when he fell off a platform, upon which he had been standing preparing a ceiling for painting; the platform had been shaken when another prisoner, who

[29] United Kingdom, s. 6; *cf.* New Zealand, s. 2.

[30] *Carmarthenshire County Council v. Lewis* [1955] A.C. 549; cited Atiyah, *op. cit.* 5. In the Court of Appeal the school authority was held vicariously liable for the negligence of a teacher; but the House of Lords, while affirming liability, exonerated the teacher. *Cf. Dorset Yacht Co. Ltd. v. Home Office* [1969] 2 Q.B. 412.

[31] *Collins v. Hertfordshire County Council* [1947] K.B. 598. It was held that vicarious liability for the negligence of the authority's servants was a possible, but separate, head of liability.

[32] *R. v. Williams* (1884) 9 App. Cas. 418. The harbour master, against whom negligence was also alleged, was absolved from blame.

[33] In *R. v. Williams, loc. cit.*, the Crown in right of New Zealand was in fact the defendant, and it was held liable; but the case was decided under the Crown Suits Act 1881 (N.Z.), a less complex statute which was—at least in this respect—a better statute than the Crown Proceedings Act 1950 (N.Z.) which is virtually a copy of the Crown Proceedings Act, 1947 (U.K.).

[34] *Supra*, n. 22 and accompanying text.

[35] [1961] S.L.T. 63.

had been working beside the pursuer, climbed off the platform. The pursuer was unable to bring his claim within any of the four permitted heads of liability in the United Kingdom statute: (1) the Crown was not vicariously liable for the negligence of the other prisoner, because a prisoner is not a 'servant or agent' of the Crown; (2) the Crown owed no employers' duties to the pursuer, for the same reason; (3) the Crown owed no occupiers' duties to the pursuer, because, the court held, such duties did not attach to chattels such as the platform;[36] and (4) no statutory duty was applicable. The detailed wording of the United Kingdom statute precluded the court from deciding that the Crown was under a duty to its prisoners to provide a safe system of work and safe equipment. And yet there is surely a sufficient analogy between a prisoner who is assigned work by the prison authorities and a private workman to make it at least arguable that the Crown itself should owe some duties of care to its prisoners. *Hall v. Whatmore* (1960)[37] was an action against the State of Victoria by a prisoner in gaol who had caught his arm in a machine in the gaol's machine shop. In that case the plaintiff alleged that the State of Victoria was in breach of a duty of care owed to him. The Victorian Full Court had to dispose of this allegation by pointing out that the Victorian statute imposed no direct liability in tort on the Crown. The State itself therefore could owe no duties of care to a prisoner (or anyone else, for that matter). The State could only be liable vicariously, that is to say, when one of its servants committed a tort in the course of his employment.[38]

Richards v. Victoria (1968)[39] is another recent case in which the Victorian Full Court has re-affirmed the absence of any direct governmental liability in tort under Victorian law. This was an action by a schoolboy who was injured in a fight with another schoolboy during an arithmetic lesson in a State high school. He alleged negligence on the part of the arithmetic teacher, the headmaster and the Director of Education; and he alleged that the Crown was vicariously liable for the negligence of each of these Crown servants. We have already noticed that there is one decision—it is a decision of the House of Lords—holding a school authority directly liable in negligence for not exercising proper care and supervision over its pupils.[40] If the Crown in right of Victoria were not immune from direct liability, the plaintiff in *Richards v. Victoria* might have been able to secure a similar result. As it was, he did not attempt to establish direct liability on the part of the Crown, and the Full Court pointed out that any such attempt would have been unsuccessful.[41]

[36] This holding seems to be wrong; occupiers' duties have often been held applicable to chattels: see Fleming, *op. cit.* 407.

[37] [1961] V.R. 225.

[38] *Ibid.* 226, 228. Accord, *Morgan v. Attorney-General* [1965] N.Z.L.R. 134 where a prisoner in gaol recovered damages from the Crown in right of New Zealand, because he was able to establish negligence on the part of the prison officers for which the Crown was vicariously liable.

[39] [1969] V.R. 136.

[40] *Supra*, n. 30 and accompanying text.

[41] [1969] V.R. 136, 138.

It is possible that the Crown in right of Victoria is directly liable for breach of statutory duty. In order to hold the Crown liable for breach of statutory duty in any jurisdiction it is necessary for a plaintiff to establish: (1) that the statute imposing the duty confers a private right of action on the plaintiff,[42] and (2) that the statute binds the Crown.[43] If both these hurdles of construction can be surmounted in a particular case, it is submitted that even the Crown in right of Victoria will be liable to the plaintiff. The liability will be direct, not vicarious, for I am postulating a case where the statutory duty rests on the Crown itself, not a servant. But the liability for breach of statutory duty, according to the conventional doctrine, is derived from the statute which imposes the duty.[44] Therefore the plaintiff does not need to rely on the Crown proceedings statute as the source of the Crown's liability, and he is not troubled by the lacunae in that statute.[45]

It is surprising that the United Kingdom did not look to the early Australian statutes as models for its statute. It is even more surprising that Victoria did not do so. With the exception of Tasmania, whose statute is complex and contains serious difficulties of interpretation,[46] each Australian jurisdiction has a statute which, in short, simple terms, succeeds in imposing comprehensive liability in tort on the Crown, direct as well as vicarious. New South Wales and Queensland, for example, may be sued by '[a]ny person having or deeming himself to have any just claim or demand [whatever] against the Government'.[47] In *Farnell v. Bowman* (1881)[48] the Privy

[42] A statute imposing safety standards upon an employer or other person who would in any case be under a common law duty of care is usually construed as conferring a private right of action, but other kinds of statutes are seldom so construed: see *e.g. O'Connor v. S. P. Bray Ltd.* (1937) 56 C.L.R. 464, 477-8; *Cutler v. Wandsworth Stadium Ltd.* [1949] A.C. 398.

[43] The Crown is not bound by statutes, except by express words or necessary implication: *Province of Bombay v. Municipal Corporation of Bombay* [1947] A.C. 8.

[44] See *Martin v. Western District of the Australasian Coal and Shale Employees' Federation* (1934) 34 S.R. (N.S.W.) 593; *Whittaker v. Rozelle Wood Products Ltd.* (1936) 36 S.R. (N.S.W.) 204; *O'Connor v. S. P. Bray Ltd.* (1937) 56 C.L.R. 464, 477-8; Williams, 'The Effect of Penal Legislation in the Law of Tort' (1960) 23 *Modern Law Review* 233; Fricke, 'The Juridical Nature of the Action Upon the Statute' (1960) 76 *Law Quarterly Review* 240; Alexander, 'Legislation and the Standard of Care in Negligence' (1964) 42 *Canadian Bar Review* 243. In the United States the 'prevailing theory' is that liability is imposed not by the statute but by the courts; Fleming, *op. cit.* 127. The above references make clear, however, that this theory has not won and is not likely to win acceptance in Australia, New Zealand or the United Kingdom, where the role of the courts in making new law is conceived more narrowly.

[45] It is possible that the plaintiff in Victoria might have procedural difficulties, because the Crown Proceedings Act 1958 affords no procedure for suing the Crown in a cause of action arising independently of that statute: see s. 22(2); *cf.* Supreme Court Civil Procedure Act 1932 (Tas.), s. 65. It is submitted that Victoria's s. 22(2) should be generously construed so as to afford a procedure for suit on a cause of action arising under another statute.

[46] Supreme Court Civil Procedure Act 1932 (Tas.), s. 64.

[47] Claims against the Government and Crown Suits Act, 1912 (N.S.W.), s. 3; Claims against Government Act of 1866 (Qld), s. 2. The word 'whatever' in square brackets appears only in the New South Wales provision.

[48] (1887) 12 App. Cas. 643.

Council held that this formula was sufficient to impose liability in tort on the Crown. Obviously, there is no room for nice distinctions between direct and vicarious liability; and indeed, the simplicity and generality of the language has proved to be exactly what was needed to subject the Crown to the full range of civil liability, not only in tort, but also in other areas of the law. The same comment may be made about the South Australian and Western Australian statutes, which are also short and simple, although their language is different.[49] The Commonwealth Judiciary Act, which imposes liability on the Commonwealth and the States in the federal jurisdiction, speaks in terms of 'any claim against [the Commonwealth or a State], whether in contract or in tort'.[50] This wording subjects the Commonwealth and the States (including Victoria of course) to direct as well as vicarious liability in tort.[51]

With this rich fund of legislative precedent available to him, it is unlikely that the draftsman of the Victorian statute was instructed to impose comprehensive liability in tort on the State, but was unable to find the appropriate language. The only alternative conclusion is that a deliberate decision was taken by the Victorian government to accept only vicarious liability, and to leave itself immune from direct liability. But what considerations could possibly justify such a decision? Every other jurisdiction in Australia imposes direct liability in tort on the Crown. The United Kingdom and New Zealand statutes also impose direct liability (albeit imperfectly), and indeed the need to impose direct liability was a prime consideration in reforming the law of the United Kingdom. The only benefit which flows to the Victorian government from its refusal to go as far as every other comparable jurisdiction is a trivial saving to the consolidated revenue. But the saving is bought at the price of injustice to individuals who are injured by governmental acts or omissions in circumstances which would make a private master directly liable; and legal advice and judicial decrees have to be given in accordance with technical distinctions which have nothing to do with the merits of an injured man's case.

[49] Supreme Court Act, 1935-69 (S.A.), s. 74; Crown Suits Act, 1947-54 (W.A.), s. 5.

[50] Judiciary Act 1903-69 (Cth), ss 56-9. Section 59 does not include the word 'whether in contract or in tort'. The presence of these words in the other section raises the question whether the express mention of contract and tort excludes other causes of action, *e.g.* for breach of trust. The weight of authority at present is that other causes of action are excluded: *Washington v. Commonwealth* (1939) 39 S.R. (N.S.W.) 133, 141; *Froelich v. Howard* [1965] Argus L.R. 1117, 1119; but, with respect, it seems to me that the words 'any claim' should be regarded as dominant and comprehensive.

[51] As to direct liability, see *Shaw Savill & Albion Co. Ltd. v. Commonwealth* (1940) 66 C.L.R. 344, 360; *Carpenter's Investment Trading Co. Ltd. v. Commonwealth* (1952) 69 W.N. (N.S.W.) 175; *Parker v. Commonwealth* (1965) 112 C.L.R. 295, 300 (the *dictum* at 301, which read by itself might suggest the contrary, addressed solely to the basis of vicarious liability).

CONTRACT, QUASI-CONTRACT, TRUST AND PROPERTY LAW

At common law the Crown was liable for breach of contract. In the nineteenth century the courts extended the petition of right to breaches of contract, even when unliquidated damages were sought.[52] When equitable remedies were sought, a bill in equity against the Attorney-General was available.[53] The Victorian Crown proceedings statute, like the statutes of the other jurisdictions, simply preserves the Crown's liability in contract. Section 23(1)(a) of the Victorian statute provides:

> the Crown shall be liable in respect of any contract made on its behalf in the same manner as a subject is liable in respect of his contracts.

This provision gives rise to no special difficulty with respect to the Crown's liability in contract. But it will be observed that it imposes liability only 'in respect of any contract made on its behalf'. We have already considered paragraph (b) of section 23(1), and we have noticed that it imposes liability only 'for the torts of any servant or agent of the Crown or independent contractor employed by the Crown'. There are no other provisions of the Act imposing liability in respect of causes of action other than in contract and tort. In this respect, the Victorian statute is again unique. The Crown proceedings statutes of the other Australian jurisdictions either impose liability in broad general terms which are apt to include all causes of action,[54] or they specify in detail all foreseeable causes of action which might be relied upon against the Crown.[55]

So far as quasi-contract is concerned, judicial legislation seems to have filled the gap left by the Victorian statute. In the nineteenth century the courts interpreted the first Victorian Crown proceedings statute (1858), which allowed claims against the Crown only if 'the same shall be founded on and arise out of some contract entered into on behalf of Her Majesty',[56] as allowing claims in quasi-contract.[57] This interpretation was more plausible then, when quasi-contractual claims were regarded as depending upon

[52] *Thomas v. R.* (1874) L.R. 10 Q.B. 31; *Windsor & Annapolis Ry. Co. v. R.* (1886) 11 App. Cas. 607.

[53] *Dyson v. Attorney-General* [1911] 1 K.B. 400; [1912] 1 Ch. 158. There is doubt as to the respective spheres of the petition of right and the bill in equity against the Attorney-General: see de Smith, *Judicial Review of Administrative Action* (2nd ed. 1968) 498; Street, *Governmental Liability* (1953) 131; Williams, *Crown Proceedings* (1948) 90; Zamir, *The Declaratory Judgment* (1962) 21.

[54] Judiciary Act 1903-69 (Cth), ss 56-9 (but see n. 49 *supra*, for a possible limitation on Crown liability under ss 56-8, but not s. 59); Claims against the Government and Crown Suits Act, 1912 (N.S.W.), s. 3; Claims against Government Act of 1866 (Qld), s. 2; Supreme Court Act, 1935-69 (S.A.), s. 74; Crown Suits Act, 1947-54 (W.A.), s. 5.

[55] Supreme Court Civil Procedure Act 1932 (Tas.), s. 64. *Cf.* Crown Proceedings Act 1950 (N.Z.), ss 3, 6; Crown Proceedings Act, 1947 (U.K.), ss 1, 2. The United Kingdom statute, while still superior in this respect to the Victorian statute, is defective in that it ties the scope of liability to the scope of the petition of right; and the scope of the petition of right is still a matter of controversy: see Street, *Governmental Liability* (1953) 125-7; Williams, *Crown Proceedings* (1948) 11-5.

[56] Claims against the Crown Act (No. 49 of 1858), s. 8.

[57] *Lorimer v. R.* (1862) 1 W.W. (L.) 244; *Stevenson v. R.* (1865) 2 W.W. & a'B. (L.) 176; the latter case interpreting the Crown Remedies and Liability Statute 1865, s. 27.

a fictional 'implied contract', than it is now, when the fiction is generally discarded. But as recently as 1955 Fullagar J. referred to the old Victorian cases with approval, and said that the word 'contract' in the Commonwealth Judiciary Act should be construed as including quasi-contract.[58] It is submitted that the courts would and should continue to interpret the word 'contract' in section 23(1)(a) in the same way. The interpretation has been well established for more than a century; in successive re-enactments of the Victorian statute[59] no attempt has been made to disturb it; and it has the desirable effect of widening the scope of the statute.

But if the words of section 23(1)(a) can be interpreted as including quasi-contract, they cannot be interpreted as extending beyond contract and quasi-contract. Therefore the Victorian Act does not enable the Crown to be sued for breach of trust, or for breach of other proprietary rights which are neither contractual nor quasi-contractual. Once again, it is pertinent to ask whether this is simply the result of bad drafting, or whether it represents a deliberate decision to retain Crown immunity. The former alternative—bad drafting—seems incredible, considering that the Crown proceedings statute of every other jurisdiction avoids the trap. The latter alternative—a deliberate decision—is open to the same criticism as the decision to restrict Victoria's tortious liability. It places Victoria behind every other comparable jurisdiction; it creates injustice by denying remedy to a subject who suffers loss in circumstances in which a remedy would be available against a fellow-subject; and it benefits the Crown only by saving a trivial amount of the consolidated revenue.

CONCLUSION

It may be surmised that the Crown in right of Victoria would not rely on the legal immunities which it has retained in cases where relief would be available if both parties were subjects; presumably, it would make an *ex gratia* payment to the aggrieved subject. But if this is so, it is still not satisfactory that relief should be available only as a matter of grace. It should be available as a matter of legal right. So long as relief is a matter of grace, there is no court with jurisdiction to make findings of fact and law when these are disputed. There is no guarantee that a change of government—or even a change in the personnel of the ministry—may not bring a discontinuance of the benevolent practice. And finally, it is not consonant with modern conceptions, either of the responsibilities of government or of the dignity of the individual, that a person seeking relief from the Crown should have to come as a suppliant, instead of as a plaintiff

[58] *Antill Ranger & Co. Pty. Ltd. v. Commissioner for Motor Transport* (1952) 93 C.L.R. 83, 103; to the same effect, *Daly v. Victoria* (1920) 28 C.L.R. 395, 399 and *cf.* n. 50 *supra*.

[59] *Supra*, n. 4.