Tracey Carver, QLD

State instrumentalities: personal and vicarious liability in tort

RESI Corporation v Sinclair [2002] NSWCA 123, Supreme Court of New South Wales, Court of Appeal, 7 May 2002

Given the current trend towards the commercial corporatisation of government activities and services, the New South Wales Court of Appeal's decision[1] in *RESI Corporation v Sinclair*, and its implications for Crown agents' personal and vicarious liability in tort, will be of increasing relevance to practitioners.

THE FACTS

The respondent (Sinclair) contracted asbestosis as a result of his employment at a South Australian power station between 1944 and 1950. During that time, the station was operated by the Electricity Trust of South Australia (the trust), a statutory authority established under the *Electricity Trust of South Australia Act* 1946 (SA)[2] (the Act). The trust's function was the generation, transmission and supply of electricity within and beyond the state.[3]

Sinclair subsequently commenced proceedings for damages against the appellant (RESI), a statutory corporation[4] that had succeeded to the trust's liabilities, in the New South Wales Dust Diseases Tribunal (the tribunal). Sinclair claimed that his asbestosis was caused by the trust's failure to provide a safe system of work in breach of a duty of care owed to him in tort. RESI sought an order setting aside the tribunal's proceedings and a declaration that the tribunal did not have jurisdiction over RESI on the basis that, as a statutory corporation, it held Crown immunity from suit for tortious liability.

At first instance[5], Duck J held that RESI was prima facie entitled to immunity, but s5 *Crown Proceedings Act* 1992 (SA) removed that immunity in relation to civil proceedings brought in New South Wales.

THE DECISION

The Court of Appeal[6] considered that two aspects of Crown immunity have historically shielded the Crown against civil liability and were therefore relevant in this case, namely that the Crown cannot:

- Be sued in its own courts; or
- Do no wrong.

The court held that whilst the first aspect went to the tribunal's jurisdiction to hear proceedings brought against the Crown, it did not operate to protect RESI from liability in the present proceedings. In reaching this conclusion the court considered that although ss 6 and 15 of the Act (providing respectively for the appointment of trust members by the Governor and the holding by the trust of its assets for the Crown), *prima facie* entitled the trust (and RESI as successor to its liabilities) to Crown immunity, s5 indicated a manifest intention that the trust be capable of being sued by stating that 'the trust shall be a body corporate … and … shall have power in its corporate name, to … be a party to any legal proceedings'. This displaced the notion of the Crown not being capable of being sued in its own courts.

In relation to the second aspect, which operated as a defence, the court recognised that the maxim did not apply to individual Crown servants, who were liable for torts committed in the course of their employment with the Crown. Therefore, as the trust, being a body corporate, could sue and be sued in its own name, it was considered similar to a Crown servant and therefore liable for torts committed directly by the trust through its members.

The passing of the *Crown Proceedings Act* 1992 (SA)[7] did not affect the trust's liability in the present case and consequently, RESI was liable and the appeal was dismissed. ▶

Tracey Carver is an Associate Lecturer at the Faculty of Law, Queensland University of Technology.
PHONE 07 3864 4341
EMAIL tcarver@qut.edu.au

In addition, the court held, in obiter, that the trust (and RESI), as Crown agents, were capable of being vicariously liable for torts committed by their employees during the course of their employment.[8] This is because the statutory provisions contemplated that the trust[9] (and RESI) should have, under their sole control and direction, their own employees who were therefore not servants of the Crown. PL

Endnotes:

1. Heydon and Hodgson JJ.A and Ipp A.J.A.
2. Section 5(1), *Electricity Trust of South Australia Act* 1946 (SA).
3. Section 36(1), *Electricity Trust of South Australia Act* 1946 (SA).
4. The RESI Corporation was established pursuant to s 8 *Electricity Corporations Act* 1994 (SA) and was originally called the ETSA Corporation.
5. DDT 163/01.
6. [2002] NSWCA 123 per Hodgson J.A. (Heydon J.A. and Ipp A.J.A. agreeing).
7. See ss 4(1) and 5(1) *Crown Proceedings Act* 1992 (SA).
8. At [55], [57-58] and [61]. The trust's vicarious liability would have also, in an appropriate case, passed to RESI.
9. Section 17 *Electricity Trust of South Australia Act* 1946 (SA) provided that the trust may appoint such employees as it required, on terms determined by the trust, and such employees shall not be subject to the *Public Service Act*.

TRACEY CARVER, QLD

Misnomer of title in civil proceedings

Brookfield v Davey Products Pty Ltd [2002] FCA 889, Federal Court of Australia, South Australia, 24 July 2002

In *Brookfield v Davey Products Pty Ltd*, Mansfield J considered an application for an order to amend a Federal Court judgment. A respondent to proceedings sought the order, in connection with the judgment's attempted enforcement, in circumstances where the respondent, in whose favour the judgement had been granted, had changed their name during trial without amending the proceedings.

The case, therefore, provides a timely reminder to legal practitioners of the importance of keeping the particulars of proceedings, and any documents lodged in relation to them, current, and the additional cost and procedural difficulties which may arise from a failure to do so.

Tracey Carver is an Associate Lecturer at the Faculty of Law, Queensland University of Technology.
PHONE 07 3864 4341
EMAIL tcarver@qut.edu.au

BACKGROUND

During December 1997, in proceedings commenced in 1993 by the first applicant (Brookfield) against the first respondent Davey Products Pty Ltd (Davey), Brookfield was ordered to pay Davey's costs totalling $380,493.82. However, on 6 March 1995 upon the sale of Davey's business, Davey had changed its name to 'Yevad Products Pty Ltd' (Yevad), and the purchaser, Domali Pty Ltd, was renamed 'Davey Products Pty Ltd'. Despite the name change, at all times during the proceedings the first respondent was described as 'Davey Products Pty Ltd'.

In July 2001, in connection with the enforcement of the costs order payable to them (with interest), Davey/Yevad issued a bankruptcy notice against Brookfield. However, in April 2002, Brookfield applied[1] to have the bankruptcy notice set aside on grounds that the party applying for the bankruptcy notice was not the same party as named in the judgment.[2] In his application, Brookfield described Davey/Yevad as 'Yevad Products Pty Ltd (formerly Davey Products Pty Ltd)'.

THE PRESENT APPLICATION

Davey/Yevad made its application to the Federal Court in order to avoid the complications caused by Brookfield's