CROWN LIABILITY IN TORT AND THE EXERCISE OF DISCRETIONS.

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The principles governing the liability of the central government for torts committed in its service have in Australia been created for the most part by the Judges; the statutes abolishing the Crown's original immunity left it to the Courts to apply whatever mixture of private and public law principles they have thought appropriate. Even where the statutes have been more elaborate and might have been applied by literal interpretation, the Courts have in fact presumed to treat those statutes as embodying the juristic principles in this field—(perhaps "policy" is more appropriate than "principles")—to which the Judges had become accustomed.

The first Australian statute was enacted by Queensland in 1866[1]. Considering its date, it is difficult to over-praise this legislation; it had simplicity, boldness and directness of approach; it may be doubted whether the relatively complex methods adopted in the recent English Act[2] can be regarded as superior. As to causes of action, the Queensland Act merely required the petitioner to have "any just claim or demand against the Government"[3]; as to procedure, it specified that the proceedings should be as nearly as possible as between subject and subject; as to relief it authorized the Court to give whatever remedy, including specific performance, which might be appropriate; as to execution it authorized the Treasurer to pay out of monies legally available, and in default of such payment empowered the judgment creditor to issue execution against Government property, with a small and commonsense list of exceptions[4]. The Act embodied the procedural method of a nominal defendant to appear on behalf of the Government; later legislation, such as that of Western Australia[5] and Tasmania[6], improves on this by treating the Government of the State as a legal person which is sued as such. Other States have also improved on the Queensland model by making the relevant Crown Suits legislation a permanent appropriation of monies needed to meet judgments, so that no special or annual appropriation by Parliament is necessary[7]. Professor

1. 29 *Vic. No.* 23. With minor amendments, this is still in force; see the reprint of Public Acts of Queensland, 1936, vol. 3, p. 5.
2. *Crown Proceedings Act* 1947, 10 and 11 Geo. 6, c. 44.
3. Notice the audacious abandonment of the clumsy fiction of the Crown as the embodiment of the State. N.S.W., S.A. and Tas. similarly speak of "the Government." However, the value of this is lessened by the "nominal defendant" procedure, and the Courts have continued to assume that "the Government" means "the Crown."
4. Property of the armed forces and of the Governor, Parliament House, court houses, gaols and lock-ups. In the later legislation of other States, only N.S.W. permits levying of execution.
5. *Crown Suits Act* 1947 (11 Geo. VI. No. XI.), section 5; here however the "Crown" fiction or symbol is expressly retained.
6. *Supreme Court Civil Procedure Act*, No. 58 of 1932, section 64.
7. S.A., *Supreme Court Act* 1935-36, section 77; W.A., *Crown Suits Act*, section 10 (2). Tas. and N.Z. require special appropriation, as semble does the Commonwealth—(*Judiciary Act*, section 65). Semble in N.S.W., the *Claims against the Government and Crown Suits Act* 1912, section 11, requires special appropriation, but the section is obscurely drafted. The dicta of the Supreme Court of Victoria in *Alcock v. Fergie*, (1867) 4 W.W. and A'B. (L.) 285, on an analogous question of construction, are unreliable; the Court was politically biassed. The view of Madden C.J. in *Fisher v. Queen*, (1901) 26 V.L.R., at p. 795, seems plainly right. It is suggested with respect that Prof. Friedmann in his note on this question (*Principles of Australian Administrative Law*, p. 51 and n. 45)—has paid insufficient attention to the significant difference between the expression "shall pay out of Consolidated Revenue"—(as in S.A., W.A., and Vic. *Crown Remedies and Liabilities Act* 1928, section 25)—and the

Glanville Williams's recent book on the English Act, (which surprisingly makes no use at all of the Australian and New Zealand case law on this topic), is a sufficient exposition of the difficulties and contradictions which must attend an attempt at defining in any more detail by legislation the scope of such a remedy. Western Australia and New Zealand at first attempted a more cautious and piecemeal kind of Act, and those Acts were productive of a great deal of fiddling litigation and a multitude of fine distinctions[8]; both have since been replaced by simpler legislation, though the New Zealand Act still excludes a number of liabilities which it is believed should come within the scope of such legislation[9]. In the main, the Courts have been quite successful in working out, at the invitation of the Parliaments, what is substantially an entirely new type of civil liability.

The State of Tasmania followed what appeared to be a somewhat different course, by defining Crown liability in terms which were elaborate, though not open to the same objections as the elaboration of the English Act of 1947. The Tasmanian Act of 1891 seems at first sight merely a general declaration, comparable to the Queensland provision, but itemising the main kinds of causes of action which might conceivably exist. However, on a literal interpretation this Act might have been interpreted as covering expressly some of the problems that have since arisen. It authorizes the Court to consider any claim or demand " which is founded on, or arises out of, any omission, neglect or default of the Government of this State, or any act, omission, neglect or default of any *officer*, servant or *agent* of the Government of this State." It is evident that the State Police are *officers* of the Government, and accordingly it would have been quite reasonable for the Courts to hold, simply on the Act, that the State was liable for their faults. But in *Enever v. The King*[10] the High Court restricted these words in accordance with a supposed general concept of this field; it held that the State could be held liable only if a master-servant relation existed between the Government and the officer or agent in question. It is possible that such a requirement might be spelled out of the provision in the Act that the claim or demand must be such as " would, if it were made by a subject against a subject—have been the ground of an action at law or a suit in equity between subject and subject." But this provision, it is suggested, relates properly to the nature of the harm done and not to the basis of the Crown's vicarious liability. Possibly section 5 (2) of the New Zealand Act[11] might be regarded as inferentially supporting the principle that there should be a relationship of *respondeat superior*.

On first thoughts it does not seem unreasonable that the Government's liability should be restricted to persons whom " it " controls in

expression " shall pay out of moneys made legally available "—(as in the other cases). The former type of provision could hardly be more explicitly a permanent appropriation. The latter obviously presupposes appropriation *aliunde*.

8. Discussed by Sir Charles Lowe in 1938, 11 A.L.J., at p. 406 *ff*.
9. *Crown Suits Amendment Act* 1910, section 4. The exclusion of assault, false imprisonment and malicious prosecution seems designed to settle legislatively the question of Government liability for the acts of policemen; sed quaere, could that still be tested by trespass to the person in which the gist was a *battery*? Presumably " assault " would be given its popular width of meaning.
10. (1906) 3 C.L.R. 969.
11. *Crown Suits Amendment Act* 1910.

the manner required by the master-servant relationship at Common Law. But what is " it " ? Deeper reflection suggests that the analogy between a government and a private employer is not sound, that the doctrine of *Enever v. The King* is open to question, and that the introduction of that doctrine may be due to some extent to the judicial atmosphere in which these decisions were given.

Although Queensland was first in the field with its legislation, the earliest important decisions were on the N.S.W. Act of 1876 which was almost a verbatim copy of the Queensland one. Thanks to Dicey, we tend to think of the general notion of the Rule of Law, and of a judicial attitude favourable to it, as if these had been characteristic of our system for centuries. In point of fact, a general desire to subject Government to judicial control dates back no further than the Mersey Docks cases of 1865-6[12]. In Australia, many colonial Judges continued throughout the half century a divided attitude ; they wished to uphold " The Queen's Government " and authoritarian rule, but had little liking for the increasingly democratic and radical regimes of their particular colonies[13]. On the whole, it cannot be said that they displayed any great enthusiasm for the invitation to a wide construction of Government liability which the new legislation constituted. Their desire seemed to be to continue Crown immunity in respect of the authoritarian aspects of government, and to create liability only for the kind of commercial activities of which they for the most part disapproved. Thus, in *Delacauw v. Fosbery*[14], Stephen J. held that the State was not liable for wrongful arrest by a constable on the curious ground that the officer was " a servant of Her Majesty," not of the " Government "—(meaning the Government of New South Wales). In *Davidson v. Walker*[15] plaintiff claimed in nuisance for damages caused by the building next to his premises of a police station and lock-up at which drunks and other such characters frequently had to be confined. He pointed out various ways in which a more reasonable use of the power to conduct lock-outs might have mitigated the nuisance. The Supreme Court was obviously aghast at the notion that a Common Law jury should ever be required to censor the policy of Government in a matter of this kind. If it had confined itself to asserting the necessary justification of such structures, applying cases like *Hawley v. Steele*[16], the decision would be unexceptionable. But the opinion of Stephen J. in particular, and even to some extent of A. H. Simpson J., shows a general tenderness towards executive discretion and distrust of judicial control. In *Gibson v. Young*[17] the Court denied recovery to a prisoner for injuries negligently inflicted by gaol officials. The judgment of Cohen J. sets out admirably the grounds of policy and discipline making it undesirable that persons in custody

12. *Mersey Docks v. Cameron, Mersey Docks v. Gibbs*, (1865) 11 H.L.C. 443, 686. Before then, the Courts were working towards a theory that would have made *all* public authorities immune from action ; see e.g. *Holliday* v. *St. Leonard*, (1861) 11 C.B. (N.S.) 192.
13. The activities of Boothby J. in S.A., which led to the enactment of the *Colonial Laws Validity Act* 1865, were only the most dramatic example of a colonial judge being more Westminster-minded than the Colonial Office. There were of course Judges with quite a different outlook, such as Windeyer in N.S.W. and Higinbotham in Victoria.
14. (1896) 13 W.N. (N.S.W.) 49.
15. (1901) 1 S.R. N.S.W. 196.
16. (1877) 6 Ch. D. 521.
17. (1900) 21 N.S.W.L.R. 7.

should have an action in such circumstances. It is suggested, however, that these were properly matters for the Legislature to consider when enacting protective provisions of the type common in administrative legislation. In a somewhat similar spirit, the Supreme Court of New South Wales held in *Hole v. Williams*[18] that the Government was not liable for an injury negligently caused to a pupil by a State schoolmaster, on the extraordinary ground that the master was the agent of the parents; the decision shows no comprehension at all of the profound change in educational relationships caused by compulsory education in a system controlled by a Cabinet Minister.

In several of these early New South Wales cases, there are suggestions of a doctrine that the Crown will not be liable for the wrongful exercise of functions directly conferred upon an officer of the Government, whether by Statute or by Common Law[19]. The main source of this doctrine, however, appears to be the opinion of Erle C.J. in *Tobin v. Queen*[20]. That was a petition of right claiming damages for wrongful seizure of a ship by a naval officer in purported execution of the Anti-Slavery Acts. The action was plainly incompetent on the ground of the Crown's immunity in tort, but Erle C.J. also said: "If the vessel of the suppliant had been lawfully seized, Captain Douglas would have performed a duty imposed upon him by the Statute 5 *Geo.* 4 *c.* 113 Section 43, enacting that vessels engaged in the slave-trade shall be seized by the commanders of ships of Her Majesty; and although it is admitted that he 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 nor would he have been doing an act which the Queen had commanded if the seizure had been made lawfully under the Statute." This reasoning shows a thoroughly feudal and pluralist conception of Government. When the executive government was a sort of property of the Crown and Crown servants were in the most literal sense employees of the King, such an attitude might have been appropriate. But in an era when the Crown is merely a convenient symbol for the State, and a method of relating the execution of the laws to the making of those laws and to the control of the public purse, some less naive basis of Government liability should be considered.

However, in view of the background sketched above, it is not surprising that the High Court should have formally established in *Enever's Case* the doctrine of State immunity for the acts of police officers. Griffith C.J. relied partly upon the general law of agency, partly upon the history of police control in Tasmania and partly upon the dicta in *Tobin v. The Queen*. Barton J. agreed, and quoted with approval the dicta in *Davidson v. Walker* suggesting that Crown liability should apply only to the commercial functions of Government. O'Connor J. followed the same general reasoning. It is interesting to note how he gets himself into some difficulties when trying to decide for whom or on whose behalf a constable may be said to make an arrest; he was

18. (1910) 10 S.R. N.S.W. 638.
19. E.g. in *Davidson v. Walker*, (1901) 1 S.R. N.S.W. at 206, per Stephen J.
20. (1864) 33 L.J.C.P. 199.

led to this enquiry in an attempt to distinguish the cases in which railways had been held liable for wrongful arrest of passengers by company officials under the powers given in the Railways Clauses Acts. The judgments also made some use of *Stanbury v. Exeter Corporation*[21]. That, however, was merely a case of a local authority being held free from liability for the wrongful act of an official appointed by it but acting in execution of business of the Board of Agriculture; Griffith C.J. recognized that it provided only a weak analogy. But the most interesting feature of this case was the bold attempt of counsel for the plaintiff[22] to establish a rational and comprehensive concept of State personality and liability which would include *all* the activities of the central Government—legislation, adjudication and execution. His proposal was in effect that the State Treasurer should pay for wrongs committed by policemen because even though not subject, in a crude sense, to detailed orders from the King, or the Governor, or the Governor-in-Council, they were carrying out duties of Government on behalf of the complex of authorities which control it. This conception, completely appropriate to the circumstances of modern democratic government, was to some extent beyond the comprehension of the Court and entirely beyond the reach of its imaginative sympathy. Barton J. in particular took refuge in the usual cliches on such occasions: the concept had no authority and "its establishment would be followed by consequences which would . . . involve the whole fabric of the State in confusion and disaster[23]." His Honour did not particularize the disasters in question and it is submitted with respect that they are imaginary. It is possible that like some of the earlier Judges, His Honour did not clearly distinguish in his mind between two different questions: firstly, what powers must Governments exercise free from individual claims for compensation?—secondly, when an officer of the Government, whatever his functions, exceeds the scope of Government powers, so as to inflict loss on a citizen, who should pay the damages? It is undoubtedly necessary to work out rules by which the central treasurer has to pay only for activities which are in a general sense those of the central Government. Efficient social accounting requires that independent statutory authorities with their own financial resources should be accountable for the misdeeds of their servants. But it seems a pity that the High Court did not on this occasion rise to a conception of the central Government somewhat less naive than that of Erle C.J.

The doctrine of *Enever's Case* was confirmed and applied in *Baume v. Commonwealth*[24]. This case concerned alleged wrongdoings of the Collector of Customs in Melbourne which fell into three main classes: firstly, wrongful refusal to pass entries of goods; secondly, detention of goods and documents beyond a reasonable time for assessment of value; thirdly, wrongful failure to supply copies of documents as required by the Customs Acts. The first claim failed because the Collector was given a discretion to delay passing entries until he had

21. (1905) 2 K.B. 838.
22. Nicholls. The argument is more clearly summarized by Barton J., 3 C.L.R. at p. 982, than in the report of argument. The report of argument in [1906] A.L.R. at p. 593 is no better.
23. 3 C.L.R. at p. 983.
24. (1906) 4 C.L.R. 97.

made enquiry concerning value, and there was no suggestion of abuse of this power. The Court considered that in any event the Commonwealth would not have been liable, on the ground that " when the duty prescribed by the Statute is to be performed by a designated person, and in the performance of that duty he is required to exercise independent judgment on a preliminary question of fact, the maxim respondent superior does not apply so as to make the superior liable if the officer comes to a mistaken conclusion[25]." But the Court considered that the Commonwealth would be liable for such damages as might be shown to result from the other two claims on the ground that in those cases the responsible official was " exercising a merely ministerial duty and is not charged by the Statute with an independent discretion[26]." The judgment of O'Connor J. in particular is very much affected by the ambiguity of the term " Commonwealth." Does it mean only the executive government, or does it mean all the Federal governing agencies ? In *Zachariassen v. Commonwealth*[27], on the other hand, Barton, Isaacs and Rich JJ. considered that the Commonwealth would be liable for wrongful refusal of a Customs clearance, although the giving of such a clearance requires consideration by an official of the facts creating the right. The Court seems to confuse the question of *judicial* review of the Collector's discretion with the question of the Collector's subjection to superior *administrative* orders. In *Field v. Nott*[28] a particularly unmeritorious plaintiff[29] was denied recovery against N.S.W. for the negligence of an officer of the Legal Aid Office of the Attorney General's Department. The Court considered (Evatt J. dissenting) that the officer in question was authorized only to make the necessary report to a District Court Judge as a basis for deciding whether the plaintiff should be ordered to proceed *in forma pauperis*. That was a function requiring the exercise of discretion by the official, and was also ancillary to the exercise of discretion by a Judge. Hence even if, as Dixon J. was inclined to concede, the officer had some power of acting to preserve the plaintiff's rights pending the application to proceed *in forma pauperis*, that action would itself be incidental to the exercise of discretions. It is suggested with respect that this was a case of a bad plaintiff making bad law. There was ample evidence that the Legal Aid Office acted to preserve plaintiff's rights as an ordinary service to the community, and that this service was subject to all the control of the central Executive Government which the doctrine of *Enever's Case* requires. The dissent of Evatt J. on that aspect of the case is convincing.

These cases raise some curious problems. Their basic doctrine depends upon the fiction that the King controls the executive government. Since in Australia neither he nor his representative do any such thing, the question arises—how far do the Courts take notice of the existence of the Cabinet and of Ministers ? At what stage in the hierarchy of official decision is it considered that the King is acting ? The decisions

25. *ibid.*, at p. 110.
26. *ibid.*
27. (1917) 24 C.L.R. 166.
28. (1939) 62 C.L.R. 660.
29. Her " careful reticence " about her true means, and the abstention " from every form of precipitancy " by the Legal Aid Office to which she applied, gave Sir George Rich the opportunity to pen one of his wittiest opinions.

assume rather than assert that Ministerial direction is equivalent to Crown direction. They also assume that somewhere down the scale, the exercise of a discretion will, so to speak, insulate the Crown from liability in respect of what is done, even ministerially, below the level of the discretion. Complex modern statutes such as the Customs and other taxing Acts, housing Acts, education Acts and so forth in fact display many types of provisions which are adopted not for the purpose of affecting Crown liability but in order to indicate to the public the organization of the service in question, or to ensure either civil service decision or political decision in accordance with the nature of the problem. Logically, if vesting the power of decision in a specific officer instead of in the Crown or the Executive as such is sufficient to negate Crown liability, then Crown liability should be very narrow in scope, since most statutes vest the administration of their provisions in a Minister at the highest, and it is difficult to see why the discretion of a Minister should be any different for this purpose from the discretion of a permanent civil servant; both are legally simply fellow servants of the Crown.

Hence it is suggested that while the doctrine of non-liability of the Crown for discretionary acts of servants possesses at first an attractive analogy to the position of the private master at Common Law, the truth is that no such analogy should have been followed. The problems of Government action are quite different from those of private employment and the scope and purpose of vicarious liability should be related to the characteristics of the exercise of sovereign power. Presumably the doctrine is now too well established for Australian Courts to over-rule it entirely, though they may well distinguish it. It will be interesting to see whether the English Courts apply a similar general conception to the English Act of 1947 or whether they apply that Act, as can be done, wholly by literal interpretation of its express words. It is to be hoped, however, that unlike the English text writers, they will study the Dominion cases on this subject, if only to see the range of problems and of possible solutions which may exist.