The private law liability of the Crown

Simon Parsons examines the Crown's liability in contract and tort

There was no effective system for Crown liability in contract (where the petition of right operated) and tort (where the fiction of the nominated defendant operated) until the Crown Proceedings Act (CPA) 1947 came into force in 1948. The purpose of the CPA was to put the Crown, in respect of contractual and tortious liability, substantially in the same position as any other corporate body or legal person.

Crown liability in contract

Section 1 of the CPA places the Crown in the same situation as other corporate defendants in respect contract liability. That said, there are special issues relating to Crown contractual liability. First, the Crown is not subject to promissory estoppel. This applies where a representation is made to a person, who acts to their detriment because of it. If the representation then turns out to be false, the person who made it is estopped from denying the representation. The reason why the Crown is not subject to this doctrine is because it needs to be free to act for the public good, and this need would be fettered if the Crown was bound by a representation about future conduct made to an individual. It should be noted that if a government department puts a contract out to tender in the area of public procurement, this may well be governed by public law. For example, in *R (London Criminal Courts Solicitors Association and Criminal Law Solicitors Association) v Lord Chancellor* [2014] EWHC 3020 (Admin), it was held that the consultation process into changes in the provision of criminal legal aid services had been procedurally flawed because of the Lord Chancellor's failure to consult on the content of two reports which had determined the number of contracts to be offered to law firms.

Second, civil servants are employed at the Crown's pleasure, and when summarily dismissed they cannot sue for breach of contract as the Crown has the prerogative power to dismiss at pleasure. Note, however, that this is the common law and does not prevent civil servants having statutory employment rights. Also, there is at common law the relationship between employer and employee, which means that other causes for complaint can be pursued by court action for breach of contract.

Third, there is the rule in *Churchward v R* (1865) LR 1 QB 173, which states that where a contract with the Crown provides that it is subject to parliament voting the monies for it, this operates a condition precedent concerning the validity of the contract. If the monies are not forthcoming, the contract is void. It should be noted that this is not a general rule, as with most contracts with the Crown there will not be a condition precedent as the funds will come from a government department's general budget provided by parliament (*New South Wales v Bardolph* (1934) 52 CLR 455).

Fourth, the Crown can, in times of war or other national emergency, rely on the defence of executive necessity to escape liability for non-performance of contract. The leading case is *Rederiaktiebolaget Amphitrite v R* [1921] 3 KB 500, where a ship was sailed to a British port during the first world war on the basis of a promise by a British Legation in Sweden that it would not be detained. It was detained, and the Swedish owners sued for breach of contract. The High Court held that there was no liability for breach of contract as the Crown could rely on executive necessity as it could not 'by contract hamper its freedom of action in matters which concern the welfare of the state' (para 530).

The Crown and the law of agency

As the Crown is a corporate sole and not a natural person, it cannot enter into contracts itself. Instead, this is done by a minister or civil servants acting on its behalf, and thus the private law of agency applies. This means that the person who entered into the contract on behalf of the Crown is not responsible for its performance as it is the Crown which is responsible as the principal. This will be the case providing the agent (a minister or an empowered civil servant) was acting within their actual, ostensible or usual authority. In *Robertson v Minister of Pensions* [1949] 1 KB 227, the appellant was informed by a letter from a civil servant at the War Office that the injuries he had suffered were attributable to military service so that he was entitled to a war pension. Subsequently, the minister of pensions (representing the Crown) reversed this decision, and this was affirmed by a pensions appeal tribunal. On appeal, it was held that the letter was binding on the minister as the appellant was entitled to rely on its content the civil servant having the authority to bind the Crown. The appellant was entitled to a pension. However, if the Crown agent's authority was limited by statute, the common law cannot give the agent authority beyond that given by the legislation. Any contract concluded on a basis beyond the statutory limit is void and the Crown agent cannot be sue for breach of warranty of authority (*Attorney-General of Celyon v Silva* [1953] AC 461). This is a matter of public policy, as if it were otherwise no one would be willing to be a Crown agent (*Dunn v MacDonald* [1897] 1 QB 401).

Crown liability in tort

The purpose of the CPA is to put the Crown in the same position, as regards tortious liability, as any other legal person. Section 2 of the CPA provides that the Crown is liable in four situations:

- Vicariously, for the torts of its employees or agents (s2 (1)).The categories of persons coming within the definition of Crown servant or employee are defined by section 2(6). 'Employees' include persons appointed directly by the Crown and who are paid out of monies voted by parliament. Thus, the Crown is not vicariously liable for the torts of police officers, or the employees of local authorities.
- In respect of those common law duties owed by an employer to its employees (direct liability) (s2 (1)).
- In respect of those common law duties owed by the owners or occupiers of property, for example, the rule in *Rylands v Fletcher* (1868) LR 3 HL 330 (direct liability) (s2(1)).
- For the tort of breach of statutory duty, in accordance with the ordinary principles of law, in circumstances where the statute also binds other persons (s2(2)).The Crown is entitled to make use of the defences normally available to any other individual sued, for example, the act of a stranger, an act of God and so on. Note that statutory liability is imposed directly on the Crown for these purposes, for example, the Occupiers' Liability Act 1957 and the Health and Safety at Work etc Act 1974.

In respect of vicarious liability, despite the aim of the Crown Prosecution Service, there are extra considerations that present themselves when considering the imposition of common law tortious liability on an employee of the Crown for the tort of

negligence (the Crown being vicariously liable). Thus, the issue of proximity has to be considered, and whether it is fair, just and reasonable to impose a private law duty of care on the employee, when taking into account all the circumstances of the case (*Caparo Industries plc v Dickman* [1990] 2 WLR 358). There is also the distinction between 'operational' and 'public policy' matters as the court will not recognise a duty of care in respect of activities carried out on behalf of the Crown falling within the sphere of policy. In *X v Bedfordshire CC* [1995] 2 AC 633*,* Lord Browne-Wilkinson said that 'a common law duty of care in relation to the taking of decisions involving policy matters cannot exist' (para *738*). Thus, in *Home Office v Dorset Yacht Co Ltd* [1970] 2 WLR 1140, the claimants sued in respect of damage caused by borstal trainees, who had escaped from Brownsea Island and damaged the claimant's boats. The House of Lords held that a duty of care was owed by the borstal officers (who were Crown employees) to the claimant. The supervisory nature of the relationship between the borstal trainees and the borstal officers created proximity between the officers and the claimant. The claimant had a cause of action against the Home Office (ie, the Crown) for being vicariously liable for the negligence of the borstal officers (where the Crown is to be sued, proceedings may be commenced against a government department). Lord Diplock made it clear that, while there might have been a duty of care at this operational level, the minister (as agent of the Crown) responsible for drawing up the policy for training borstal trainees owed the claimant no duty of care. Policy decisions are only challengeable by judicial review.

There are other considerations against imposing a duty of care on Crown employees. First, a duty will not be imposed where to do so would obstruct the employee in the discharge of their functions. Second, a duty will not be imposed where to do so would mean that the taxpayer would simply be underwriting the claimant's loss where they could have insured against it (*Rowling v Takaro Properties Ltd* [1988] 2 WLR 418). Third, the Crown is not vicariously liable for personal injury or death occurring on active service. In *Mulcahy v Ministry of Defence* [1996] 2 WLR 474, the claimant brought an action in negligence against the Ministry of Defence (MoD) (representing the Crown) after suffering damage to his hearing when a fellow soldier fired a shell from a howitzer during the first Gulf War. The court had to consider whether a duty of care existed at common law. It was held that although the instant case did contain the elements of proximity and foreseeability of damage, it was necessary to ask whether it was fair, just and reasonable to impose a duty of care in tort on one soldier to another when engaging an enemy in battle conditions. The court's opinion was that no basis existed to extend the scope of the duty of care to such situations, and therefore no duty of care existed between soldiers on active service. This is known as combat immunity. Without such a duty of care, there is no possibility of the Crown being vicariously liable. However, combat immunity is limited to combat and should not encompass failures during pre-deployment or in-theatre training, or decisions about equipment (*Smith v Ministry of Defence* [2013] UKSC 41). In *Smith*, the claimants contended that the MoD (representing the Crown) as employer had breached its common law duty of care in having failed to provide them with suitable anti-fratricide equipment to reduce the risk of death or serious injury in battle. The MoD applied to strike the claims out on the basis that they**]** were precluded by combat immunity. The Supreme Court rejected the MoD's argument by a majority, allowing the claims to proceed.

Finally, by CPA s2(5), the Crown is not vicariously liable for the wrongs of its employees who are performing judicial functions. So, in *Quinland v Governor of HM*

Swaleside Prison and others [2002] EWCA Civ 174, the Crown was not vicariously liable for wrongful imprisonment for an error made by the Registrar of Criminal Appeals concerning the length of sentence to be served by the claimant.

Where the Crown is to be sued, proceedings may be commenced against a government department. If it is unclear which government department is to be sued, proceedings may be commenced against the Attorney General.

Conclusion

The CPA introduced a better system for Crown liability in contract and tort, but the law remains complex and is in need of modern reform.

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