

FOLEY'S | LIST

PLEADING A TORTIOUS CASE FOR DAMAGES AGAINST THE CROWN

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Foley's List: Personal Injury Law CPD

Pleading a tortious case for damages against the Crown***Introduction***

1. In claims for damages arising from personal injury, pleadings are often generic. In many matters, this will not present any practical problem; there may not be any controversy about the existence of a duty of care owed by the defendant, or the content of that duty, and the real issues in the proceeding may well be self-evident.
2. However, care should be taken in claims brought against the State of Victoria, both by practitioners drafting allegations on behalf of a plaintiff and by those preparing the response.
3. The purpose of this paper is to highlight the relevant case law concerning the liability of the Crown, and practical considerations to be taken into account when preparing pleadings.

Crown Proceedings Act and early authority

4. A useful starting point is s 23(1)(b) of the *Crown Proceedings Act 1958* (Vic), which is often cited in a statement of claim where the State of Victoria is a named defendant. That provision relevantly states that:

... 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.

5. The provision was necessary as, at common law, the Crown had no liability for tortious conduct of its servants or agents. In *Stockwell v State of Victoria* [2001] VSC 497, Gillard J explained at [16]:

The common law rule was that the Crown was not liable for the commission of a tort by its servants or agents. To this rule, there was one exception which concerned the taking of property by the Crown ... However, a person who was employed or engaged as an agent, by the Crown, could be sued personally for a tort. In 1955, in this State,

the Crown Proceedings Act was passed, which enabled a plaintiff, the victim of a tort, to sue the Crown by joining the State of Victoria as a defendant.

6. The relevant line of authority, however, dates back to the early 1960s. In *Hall v Whatmore* [1961] VR 225, Herring CJ and Dean J stated:

We think it is clear from s. 23 of the *Crown Proceedings Act* 1958 that before the Crown can be held liable under the section it must appear that some servant or servants of the Crown is or are liable in tort. Where, as here, the relevant tort is negligence, this means that there has been a breach by a servant or servants of the Crown of a duty owed by that servant or by those servants to the plaintiff.

7. In the same case, Hudson J made the following statements:

The liability, if any is to be imposed, must be a liability in tort and the State of Victoria is not liable in tort save to the extent set out in s. 23(1)(b) of the *Crown Proceedings Act* 1958 ...

...

... the liability that is imposed on the Crown under s. 23 cannot originate in a duty resting upon the Crown.

...

In order to succeed in his claim against the State of Victoria therefore the plaintiff must establish a breach in the course of his employment by one of the servants of the Crown of a duty owed by that servant to the plaintiff. It will not avail the plaintiff to establish some act or omission on the part of the Crown which in the case of a subject would constitute a breach by the latter of some duty resting upon him arising out of the ownership or occupation of premises or chattels alleged to be dangerous.

8. The above was helpfully subsequently summarised in *Richards v State of Victoria* [1969] VR 136. Winneke CJ, who delivered the judgment of the Full Court stated:

In proceedings in tort under the *Crown Proceedings Act* 1958, this Court has already held that the liability of the Crown is vicarious only, in the sense that liability does not arise unless it is shown that there has been a breach by a servant of the Crown of a duty owed by that servant to the plaintiff: *Hall v Whatmore*, [1961] V.R. 225. In other words, a plaintiff cannot succeed against the Crown unless the circumstances are such that the Crown servant would, if sued, be liable to him. The basal issue in such a case is, therefore, the liability of the Crown servant to the plaintiff.

9. Even where s 23(1)(b) of the *Crown Proceedings Act* is cited in a statement of claim, the alleged duty of care is often still pleaded as that owed by the State of Victoria (e.g.

as an employer of the plaintiff). *Hall* and *Richards* make it clear that the relevant duty owed to the plaintiff is that of the relevant servant or agent of the State, rather than the State itself.

A new attack on old authority

10. The line of authority originating with *Hall* was recently challenged in *Salt v State of Victoria* [2017] VSC 6. In particular, it was argued that s 25 of the *Crown Proceedings Act* removed the immunity of the Crown for personal, as opposed to vicarious, liability for torts. Section 25 relevantly states:

In any proceeding under this Part in which the State of Victoria is a party the rights of parties shall as nearly as possible be the same and judgment may be given and costs awarded on either side and every judgment order or decree shall be the subject to the same rights of re-hearing appeal and review, as in a proceeding between subject and subject.

11. It was argued on behalf of the plaintiff that the prior authorities did not consider s 25 of the *Crown Proceedings Act*, which was relevantly indistinguishable from s 64 of the *Judiciary Act 1903* (Cth). The effect of that latter provision has been held by the High Court to remove the immunity of the Commonwealth from suit in tort. It was also argued that it would create injustice to an injured plaintiff if s 25 of the *Crown Proceedings Act* were found not to remove the Crown's immunity for personal liability.
12. *Salt* was heard and determined by Keogh J, who was taken to the legislative history of the *Crown Proceedings Act* (including the 1955 predecessor to the current instrument, in which an equivalent of both ss 23 and 25 is to be found). Keogh J concluded at [24]:

Understood against the background of the historical context, the text of 23(1)(b) demonstrates that the section is directed to substantive liability of the Crown for torts. That section removes the immunity of the Crown for the negligence of its servants, agents and independent contractors. The immunity of the Crown from personal liability is not removed by s 23. Section 25 follows s 23 and deals with the different subject matter of the rights of parties in any proceeding. The text of s 25 establishes that the purpose of this provision is to deal with the historical immunity of the Crown in a proceeding, rather than substantive liability in tort.

13. He continued at [26]:

If, as is contended for the plaintiff, s 25 operates to remove the immunity of the Crown for liability including in tort, then there is nothing in the section which would limit the removal of immunity to personal liability. The removal of immunity would extend to vicarious liability, thereby leaving no work for s 23(1)(b) of the Act. I agree with the submissions of counsel for the defendant that such a result is unlikely to have been the intention of Parliament, and is to be avoided.

14. Keogh J confirmed that the previous line of authority, starting with *Hall* and including *Richards*, remained good authority. He also rejected the utility of drawing the comparison drawn between s 25 of the *Crown Proceedings Act* and s 64 of the *Judiciary Act*, stating at [38]:

I agree with the argument of counsel for the defendant that it remains uncertain whether the statutory provision which removes the immunity of the Crown for torts is s 64 of the *Judiciary Act*. In any event, the judgments in the series of cases from *Maguire* to *Blunden* make good the submissions of counsel for the defendant that the construction of s 64 depends on the specific statutory and historical context within which it sits. To the extent that the construction of s 64 of the *Judiciary Act* differs from the construction of s 25 of the Act, that difference is adequately explained by that different context.

15. Finally, Keogh J was not satisfied that there was any injustice which should impact upon the construction of ss 23 and 25 of the Crown Proceedings Act. He also observed at [41]:

I note that it is possible that the potential injustice identified by counsel for the plaintiff might be avoided or ameliorated, at least in the employment context, by the claim for damages for injury being based on a breach of contract pursuant to s 23(1)(a) of the Act. Of course, this would depend on the plaintiff being able to establish the terms of the contract of employment, the breach of which gave rise to a claim for damages for injury sustained in the course of employment.

Practical considerations

16. What must be done by a plaintiff's legal representative was helpfully summarised in *Stockwell*. Gillard J stated at [21]:

The plaintiff must plead facts which establish that an employee, agent or independent contractor of the Crown, acting in the course and scope of the employment or engagement, was liable to the plaintiff. In practical terms, this means proof of a cause of action against the employee, agent or independent contractor, and that the Crown is

vicariously liable for the tort committed by the employee, agent or independent contractor. In my opinion, it is unnecessary to identify the employee, agent or independent contractor by name, but, nevertheless, it would be necessary to adduce evidence which would enable the Court to be satisfied of the existence of such a person or body, and that he or it was acting in the course and scope of the employment or engagement at the relevant time. Of course, the best evidence is the identification of the individual or body by name.

17. For example, if an injury were suffered by a State-employed teacher, presumably there would no difficulty in naming the school principal (if that were the person against whom the relevant allegations were to be made). On the other hand, if the same teacher were injured as a result of an uncleaned spillage, it may be difficult to identify and name the precise servant or agent of the State who had the responsibility for cleaning that hazard.

18. In that respect, Gillard J continued at [23]:

If the plaintiff fails to identify such a person by name, then the plaintiff assumes a heavy burden of persuading the Court that some unidentified employee, agent or independent contractor was responsible for the damage. Each case will depend upon its own circumstances. There may be sufficient evidence to enable the Court to consider the acts or omissions of the unidentified person. But if the Court is left in the position where it is not able to identify such a person by name or office, then the plaintiff may fail because he cannot prove the liability of a Crown employee, agent or independent contractor.

19. Cases can be more complicated (or more interesting) where:

- (a) the allegations concern negligent omissions, rather than negligent acts;
- (b) allegations are made over a period of time, and in respect of more than one servant or agent of the Crown (e.g. with respect to causation of injury);
- (c) the duty of care is said to be owed by someone who is not the plaintiff's superior (e.g. with respect to content of the duty of care).

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