

Table of Contents

Preface.....	iii
Table of Cases.....	xix
Chapter 1 Introduction	
1.1 Scope of work.....	1
1.2 Dicey's idea of equality.....	2
1.3 History of Crown proceedings.....	4
(a) Origin of petition of right.....	4
(b) Equitable relief.....	6
(c) Contract and tort.....	6
(d) Royal fiat.....	8
(e) Statutory reform.....	8
(f) Judicial reform.....	10
1.4 Meaning of the Crown.....	11
(a) Executive branch of government.....	11
(b) Crown agency.....	13
(c) Divisibility.....	13
(d) Corporate character.....	16
1.5 Powers of the Crown.....	18
(a) Statutory powers.....	18
(b) Crown prerogative.....	19
(c) Judicial review of Crown powers.....	25
Chapter 2 Remedies	
2.1 Introduction.....	30
2.2 Damages.....	32
(a) Definition.....	32
(b) Crown liability.....	32
(c) Tortious liability.....	32
(d) Punitive damages.....	33
(e) Interest on damages.....	34
2.3 Declaration.....	37
(a) Definition.....	37
(b) Crown liability.....	37
(c) Crown proceedings statutes.....	38

(d)	Dyson procedure	38
(e)	Interlocutory declaration	39
(f)	Suspended declaration	42
(g)	Constitutional declaration.....	44
2.4	Injunction.....	45
(a)	Definition	45
(b)	Crown immunity	46
(c)	Crown servants.....	46
(d)	Lack of legal authority	48
(e)	Mandatory injunction	48
(f)	Interlocutory injunction.....	49
(g)	Constitutional injunction.....	50
(h)	Personal or official capacity	52
(i)	Justification for Crown immunity	54
2.5	Specific performance	56
(a)	Definition	56
(b)	Crown immunity	56
2.6	Mandamus.....	57
(a)	Definition	57
(b)	Crown immunity	57
(c)	Persona designata	57
(d)	Constitutional mandamus	58
(e)	Justification for Crown immunity	59
2.7	Prohibition and certiorari.....	60
(a)	Definition	60
(b)	Crown immunity	60
2.8	Habeas corpus.....	61
(a)	Definition	61
(b)	Crown liability.....	62
(c)	Constitutional guarantee.....	62
2.9	Application for judicial review	63
(a)	Definition	63
(b)	Crown immunity	63
2.10	Collateral attack.....	63
(a)	Definition of collateral attack.....	63
(b)	Collateral attack in inferior courts.....	65
(c)	Collateral attack in superior courts.....	65

(d) Collateral attack criminal proceedings	66
(e) Collateral attack in civil proceedings	67
2.11 Set-off	71
(a) Definition	71
(b) Crown immunity	71
(c) Statutory reform	72
2.12 Proceedings in rem.....	72
(a) Definition	72
(b) Crown immunity	73
2.13 Proceedings by the Crown	74

Chapter 3 Enforcement of Judgments

3.1 Execution	75
(a) Definition of execution.....	75
(b) Crown immunity	75
(c) Duty to pay judgment debts.....	76
(d) Interest on judgment debts	78
(e) Legislative nullification.....	78
(f) Justification for Crown immunity	79
3.2 Garnishment.....	80
(a) Definition of garnishment	80
(b) Crown as judgment debtor	80
(c) Crown as garnishee	81
3.3 Contempt.....	82
(a) Definition of contempt	82
(b) Crown immunity	82
(c) Justification for Crown immunity	84

Chapter 4 Procedure

4.1 General rule.....	87
4.2 Discovery	89
(a) Definition	89
(b) Crown immunity	90
(c) Statutory reform	90
(d) Designation of Crown representative	91
(e) Residual immunity	92
(f) Crown privilege.....	93
4.3 Costs	94

(a)	Definition	94
(b)	Crown immunity	94
(c)	Statutory reform	94
(d)	Advance costs.....	95
4.4	Interest	98
(a)	Prejudgment interest.....	98
(b)	Postjudgment interest.....	98
4.5	Limitation of actions.....	98
(a)	Definition	98
(b)	Crown immunity	98
(c)	Statutory reform of limitation law.....	99
(d)	Limitation periods in the provinces.....	100
(e)	Limitation periods in the federal jurisdiction.....	102
(f)	Constitutional claims.....	105
4.6	Notice requirements.....	107
(a)	Definition	107
(b)	Post-accident notice.....	108
(c)	Pre-accident notice	110
(d)	Constitutional notice	111

Chapter 5 Evidence

5.1	Definition of public interest immunity.....	114
5.2	Comparison with other privileges.....	114
5.3	Procedure	116
(a)	General.....	116
(b)	Form of claim.....	116
(c)	Claim made before trial.....	117
(d)	Claim made during trial.....	118
(e)	Representation of Crown.....	119
5.4	Judicial review	120
(a)	History.....	120
(b)	Balancing of interests.....	122
(c)	Balancing in criminal cases.....	124
(d)	Inspection	125
(e)	Disclosure.....	125
(f)	Disclosure of Crown brief.....	126
(g)	Disclosure under Canada Evidence Act	128

5.5	Class claims	129
	(a) General rule.....	129
	(b) Candour in public service.....	129
5.6	Cabinet documents.....	130
	(a) Common law	130
	(b) Canada Evidence Act, s. 39.....	132
5.7	National security	136
5.8	Oral evidence	140
5.9	Real evidence.....	142
5.10	Informer privilege.....	142
	(a) Nature of informer privilege.....	142
	(b) Scope of informer privilege.....	146
	(c) Other confidential information	148
5.11	Confidentiality laws	148
5.12	Freedom of information laws.....	149

Chapter 6 Tort: General Principles

6.1	History	152
	(a) Crown immunity	152
	(b) Early statutory reform	152
	(c) United Kingdom reform of 1947.....	154
	(d) Australia and New Zealand	156
	(e) Canada.....	156
6.2	Vicarious liability	159
	(a) Definition of vicarious liability	159
	(b) Direct liability compared.....	159
	(c) Crown servant	160
	(i) Liability for tort of Crown servant: General rule.....	160
	(ii) Definition of Crown servant	161
	(iii) Identification of Crown servant	162
	(iv) Independent contractor	163
	(v) Crown agent.....	166
	(d) Commission of tort by servant	167
	(i) Commission of tort by servant: General rule.....	167
	(ii) Statutory immunity clauses.....	167
	(iii) Enforcement of criminal law	168
	(iv) Judicial functions	169

(e)	Course of employment	171
(i)	Course of employment: General rule	171
(ii)	De facto authority	172
(iii)	Independent discretion.....	173
(f)	Policy favouring vicarious liability	175
6.3	Direct liability	176
(a)	Crown liability.....	176
(b)	Employers' duties.....	178
(c)	Occupiers' duties.....	179
(d)	Statutory duties.....	180
(e)	Other duties and reform of direct liability	182
6.4	Lack of legal authority	188
(a)	General rule.....	188
(b)	Compensation under statute	188
(c)	Compensation under prerogative.....	188
(d)	Significance of legal authority.....	189
(e)	Interpretation of statutory authority.....	190
6.5	Commission of a tort.....	194
(a)	Recognized heads of liability	194
(b)	Negligence.....	196
(c)	Misfeasance in a public office.....	197
(d)	Constitutional torts	201
6.6	Reform	206
(a)	Compensation based on invalidity.....	206
(b)	Compensation based on risk.....	213
(c)	Compensation based on entitlement.....	217
(d)	A public law of torts.....	218

Chapter 7 Tort: Negligence

7.1	Definition of negligence	221
7.2	Duty of care	223
(a)	Definition of duty of care	223
(b)	The <i>Anns/Kamloops</i> test.....	224
(i)	Description of the <i>Anns/Kamloops</i> test.....	224
(ii)	The policy/operational distinction	225
(iii)	Criticism of the <i>Anns/Kamloops</i> test.....	228
(c)	The <i>Anns/Cooper</i> test.....	231

(i)	Description of the <i>Anns/Cooper</i> test	231
(ii)	Proximity	232
(iii)	Residual policy considerations	244
7.3	Special categories of negligence	248
(a)	Introduction to special categories of negligence	248
(b)	Pure economic loss	249
(i)	Evolution of liability for pure economic loss	249
(ii)	Independent liability of statutory public authorities	251
(iii)	Negligent misrepresentation	254
(c)	Nonfeasance	256
(d)	Peculiarly governmental activity	261
(i)	Evolution of liability for peculiarly governmental activity	261
(ii)	Military activity	264
7.4	Invalidity	267
7.5	Reform	273

Chapter 8 Tort: Liability of Servants

8.1	Personal liability in general	275
8.2	State necessity	276
(a)	General rule	276
(b)	Act of state	277
8.3	Legal authority	278
8.4	Statutory immunity	279
8.5	Judicial immunity	283
(a)	Common law protection	283
(b)	Superior court judges	284
(c)	Inferior court judges	286
(d)	Statutory protection	289
8.6	Prosecutorial immunity	292
8.7	Immunity from defamation proceedings	298
(a)	Judicial proceedings	298
(b)	High executive communications	299
(c)	Critique of immunity	301

Chapter 9 Contract

9.1	Introduction	304
9.2	Private law of contract	304
9.3	Intention to create contractual relations	307

(a)	Government promises	307
(b)	Statutory provisions.....	308
(c)	Election promises	308
(d)	Policy promises	309
(e)	Tendering contracts	311
9.4	Power of Crown to make contracts	313
(a)	Power of a natural person.....	313
(b)	Statutory authority.....	315
(c)	Legislative appropriation.....	316
(d)	Constitutional limits	318
(e)	Statutory limits	320
9.5	Power of Crown servants to make contracts	322
(a)	General rules of agency.....	322
(b)	Statutory limits	323
9.6	Fettering legislative power.....	324
(a)	Direct fettering of legislative power.....	324
(b)	Indirect fettering of legislative power	325
(c)	The <i>Pacific National</i> case.....	326
(d)	Policy reasons for permitting indirect fettering	329
(e)	Conclusion on fettering legislative power	331
9.7	Liability of Crown servants	332
(a)	General rule of immunity	332
(b)	Warranty of authority	332
(c)	Agent's personal liability	333
9.8	Contracts with Crown servants	333
(a)	Application of general law of contract	333
(b)	Action for loss of services	339

Chapter 10 Restitution

10.1	Definition of restitution.....	341
10.2	Crown liability for restitution	342
10.3	Benefit to Crown.....	343
10.4	Detriment to plaintiff	345
10.5	No juristic reason for enrichment.....	347
10.6	Recovery of unauthorized taxes	348
(a)	General right of recovery	348
(b)	Uncertainty before <i>Kingstreet</i> decision	349

(c) The <i>Kingstreet</i> decision.....	352
(d) The passing-on defence.....	354
(e) Limitation periods	354

Chapter 11 Taking

11.1 Constitutional power to take property.....	357
11.2 Crown property	359
11.3 Compensation for taking.....	360
(a) No constitutional right to compensation.....	360
(b) Statutory right to compensation.....	362
11.4 Regulation of property	363
11.5 Constructive taking	364
11.6 Extinguishment of contractual rights	367

Chapter 12 Trust

12.1 Definition of trust.....	369
12.2 Crown liability as trustee	369
12.3 Political trusts	370
12.4 Crown's duties as trustee	371
12.5 Crown as fiduciary.....	372
(a) Definition of fiduciary.....	372
(b) Crown liability as fiduciary.....	373
(c) No ordinary fiduciary	374
(d) Legislation modifying fiduciary duty.....	376
(e) Conclusion on Crown as fiduciary	379

Chapter 13 Estoppel

13.1 Definition of estoppel	381
13.2 Crown bound by estoppel	382
13.3 Estoppel and statutory duties.	383
13.4 Estoppel and statutory powers	383
13.5 Res judicata.....	385

Chapter 14 Crown as Creditor

14.1 Legal proceedings by Crown	387
14.2 Prerogative of priority.....	387
14.3 Competing Crown debts	388
14.4 Statutory abolition of Crown priority.....	389
14.5 Statutory reinforcement of Crown priority	391

Chapter 15 Statutes

15.1	Subjection to common law.....	396
15.2	Subjection to statute law	396
15.3	Presumption of Crown immunity.....	397
	(a) Rule of construction	397
	(b) Rights peculiar to the Crown.....	400
	(c) Public good.....	400
	(d) Necessary implication	400
	(e) Modern version of presumption	401
15.4	Effect of Interpretation Acts	406
	(a) Codification of presumption.....	406
	(b) Reversal of presumption.....	409
15.5	Express words.....	410
15.6	Necessary implication.....	411
	(a) Exception to immunity	411
	(b) Purpose of statute	411
	(c) Other indications in statute.....	412
	(d) Displacement of prerogative	415
15.7	Benefit of statutes	417
	(a) Requirement of prejudice	417
	(b) No effect on Crown.....	418
	(c) Beneficial effect on Crown.....	418
	(d) Burden linked to benefit.....	420
15.8	Implied term of contract.....	424
15.9	Commercial activity.....	425
15.10	Incorporation by reference	427
	(a) Crown liability.....	427
	(b) Ambulatory or static.....	428
	(c) Interjurisdictional liability.....	429
15.11	Provincial Crown as defendant	429
	(a) Right-of-the-parties provision	429
	(b) Procedural rights	430
	(c) Substantive rights	430
	(d) Ambulatory effect	432
	(e) “As nearly as possible”.....	433
15.12	Federal Crown as defendant.....	435
	(a) Absence of rights-of-the-parties provision	435

(b) Proceedings in contract	435
(c) Proceedings in tort.....	435
15.13 Crown as plaintiff	437
15.14 Criminal liability	440
(a) Strict liability offences	440
(b) Mens rea offences.....	443
15.15 Crown agents and servants.....	445
(a) Requirement of prejudice	445
(b) Crown agents.....	445
(c) Crown servants.....	446
(d) Crown contractors	448
(e) Crown premises.....	449
15.16 Federal complications	450
(a) Scope of presumption.....	450
(b) Meaning of “the Crown”	452
(c) Crown bound by necessary implication	455
15.17 Reform	456
(a) Criticism of presumption.....	456
(b) Reversal of presumption.....	459

Chapter 16 Crown agents

16.1 Agent of the Crown.....	461
16.2 Crown agent at common law	463
(a) Functions test	463
(b) Control test.....	465
16.3 Crown agent by statute.....	468
(a) General rule.....	468
(b) Ultra vires activity	470
16.4 Liability of Crown agent.....	472
(a) Introduction	472
(b) Liability to be sued.....	472
(c) Liability under substantive law	474
(d) Tort.....	475
(e) Contract.....	478
(f) Crown immunities	479
16.5 Conclusion	481

Chapter 17 Federal Questions

17.1 Federalism.....	483
17.2 State immunity in international law	484
17.3 Jurisdiction of courts.....	485
(a) Crown immunity	485
(b) Suits against Crown in right of provinces	485
(c) Suits against Crown in right of Canada.....	488
(d) Suits by Crown.....	493
(e) Suits between governments.....	494
17.4 Choice of law	496
(a) Which law applies?	496
(b) Liability of Crown in right of Canada	497
(c) Crown in right of Canada as plaintiff.....	498
17.5 Federal common law.....	498
(a) Federal common law in the United States	498
(b) Federal common law in Canada	499
Chapter 18 Conclusion	
.....	501
Selected Bibliography	507
Index.....	517