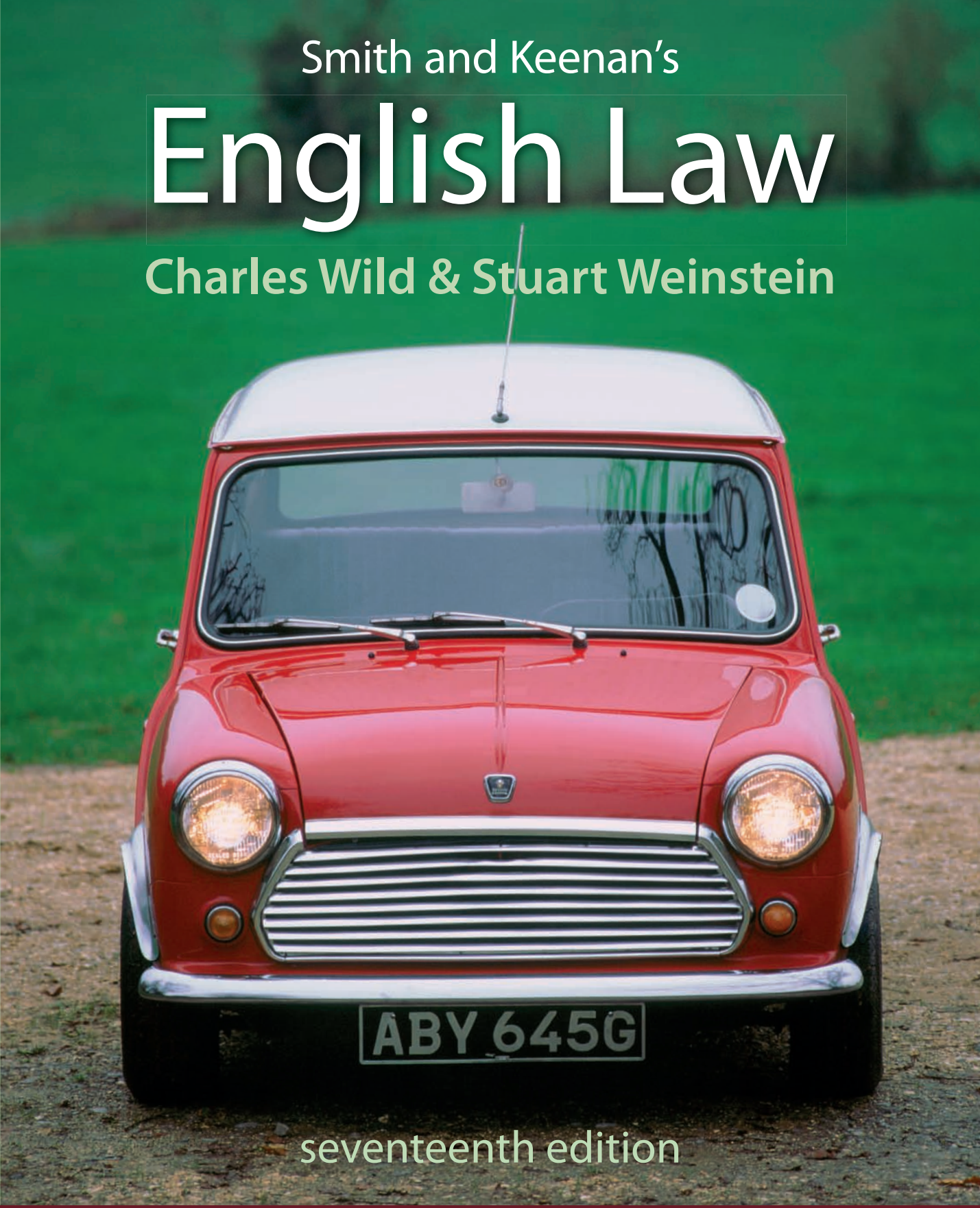
Smith and Keenan's

English Law

Charles Wild & Stuart Weinstein



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(Crown Proceedings) Act 1947, which were required to support the Act in the matter of procedure, came into force together on 1 January 1948, to rectify the matter.

The general effect of this legislation is to abolish the rule that the Crown is immune from legal process, though s 40 preserves the immunity of the Monarch in a personal capacity from any liability in law, and to place the Crown as regards civil proceedings in the same position as a subject. Proceedings by Petition of Right are abolished, and all claims which might before the Act have been enforced by Petition of Right can be brought by ordinary action in accordance with the Act.

Contractual claims

The Crown is now liable in contract where a Petition of Right could have been brought before, and also in tort. Regarding contractual claims, there are some limitations upon the rights of the other party, viz.:

Executive necessity

In *Rederiaktiebolaget Amphitrite* v *R* [1921] 3 KB 500, a neutral shipowner's vessel was detained in England, although the British Legation in Stockholm had given an undertaking that it would not be. The basis of Rowlatt, J's decision for the Crown was that the Government cannot by contract hamper its freedom of action in matters which concern the welfare of the state. This statement has been regarded as much too wide and is probably of very limited application.

The main result of the ruling of Rowlatt, J is that contracts with the government normally contain cancellation clauses which provide for compensation. In practice, the Crown does not invoke the *Amphitrite* rule to avoid liability for such compensation.

Parliamentary funds

In *Churchward* v *R* [1865] 1 QB 173, a contract to carry mail for 11 years was terminated by the Crown in the fourth year. Shee, J, in deciding for the Crown, held that it was a condition precedent of the contract that Parliament would allocate funds and if they chose not to there was no claim. This decision came under criticism in subsequent cases and the better view is that it is limited to cases where Parliament has *expressly* refused to grant the necessary funds.

This rule does, of course, cause hardship to contractors with the government but it must be continued if the control of Parliament over public expenditure is to be maintained.

Freedom to legislate

In *Reilly* v *R* [1934] AC 176, a barrister who was employed by the Canadian Government had his contract terminated by legislation. The Privy Council found for the Crown on the ground that the Crown cannot by contract restrict its right to legislate.

Contracts of employment

Here the position is as follows:

(a) Military personnel. Military employees cannot successfully claim against the Crown for breach of contract (*Dickson* v *Combermere* (1863) 3 F & F 527) nor can they claim arrears of pay (*Leaman* v *R* [1920] 3 KB 663). Thus, although they have a statutory right to claim unfair dismissal (see below) they cannot bring a claim for wrongful dismissal which is based on breach of contract.

(b) Civil servants. It was the position *at common law* that civil servants were dismissible at pleasure (*Shenton* v *Smith* [1895] AC 229) but could claim arrears of pay (*Kodeeswaran* v *Attorney-General of Ceylon* [1970] 2 WLR 456). The general rule that those in Crown service might be dismissed at the Crown's pleasure could be varied by legislation. A well-known example is the provision under which judges of the High Court and the Court of Appeal hold their offices during good behaviour (Senior Courts Act 1981, s 11(3)).

However, in *R* v *Lord Chancellor's Department, ex parte Nangle* [1991] IRLR 343 a Divisional Court of Queen's Bench held that a civil servant is employed under a contract of service based upon the Civil Service Pay and Conditions of Service Code. This sets out conditions regarding, e.g., pay, pensions, holidays and so forth. Admittedly paragraph 14 of the Code says that a civil servant does not have a contract of employment enforceable in the courts but the court held in this case that paragraph 14 must be seen in context. It could not be said that all the carefully prepared terms and conditions of service in the Code were to be regarded as purely voluntary. Mr Nangle could sue for damages for breach of contract if, as he alleged, his employers, the Crown, had failed to follow a code of practice when transferring him to another department with a loss of a salary increment following allegations that he had assaulted and sexually harassed a female colleague. Section 191 of the Employment Rights Act 1996 extends most of the *statutory employment rights* to those in Crown employment including the right to claim unfair dismissal. They are not, however, covered by the provision relating to minimum periods of notice (because of the rule that employment by the Crown is terminable at will) and redundancy (although redundancy payments are made to civil servants as appropriate). The legislation relating to sex, racial and disability discrimination is applied to Crown servants.

The armed forces enjoy, by reason of s 192 of the Employment Rights Act 1996, the employment rights relating to a written statement of employment particulars, itemised pay statements, remuneration while on medical suspension, time off for ante-natal care, maternity leave, written statement of reasons for dismissal, unfair dismissal and the ability to complain to an employment tribunal. However, members of the armed forces are required to exhaust internal grievance procedures before going to a tribunal. In addition, ss 21–27 of the Armed Forces Act 1996 enable service men and women to complain to an employment tribunal in regard to sex and racial discrimination or equality of treatment provided the appropriate services' redress of complaints procedures have been followed first. These are provided for by s 20 of the Armed Forces Act 1996. These matters are further considered in Chapter 35.

Actions in tort will lie against the Crown for the torts of its servants or agents committed in the course of their employment; for breach of duty owed at common law by an employer to his servants; for breach of the duties attaching to the ownership, occupation, possession or control of property; and for breach of statutory duties, e.g. breaches of the duty of fencing dangerous machines under factory legislation.

The law as to indemnity and contribution under the Civil Liability (Contribution) Act 1978 applies to Crown cases so, if the Crown is a joint tortfeasor, it can claim a contribution from fellow wrongdoers, which may, under s 2(2) of the 1978 Act be a complete indemnity, so that where the Crown is led into publishing a libel, it may claim an indemnity against the party responsible (see further Chapter 25). The Law Reform (Contributory Negligence) Act 1945 also applies to Crown cases (see further Chapter 26).

Under s 10 of the Crown Proceedings Act 1947 both the Crown and any member of the armed forces were immune from liability in tort in respect of the death of, or personal injury to, another member of the armed forces on duty, provided that the death or injury arose out of service which ranked for the purpose of pension. This section was repealed in regard to acts or omissions causing injury after 15 May 1987 (see Crown Proceedings (Armed Forces) Act 1987). It follows that any claim by members of the armed forces for injury or death occurring between 1947 and 1987 is barred. In this connection, claims relating to injury for exposure to asbestos dust during that period have come before the courts alleging that Art 6 (fair trial) and Art 2 (right to life) of the Human Rights Convention were infringed by s 10 of the 1947 Act. The House of Lords ruled that there was no infringement of the Convention since s 10 created an issue of procedure not substantive law to which the Convention could be applied (see *Matthews* v *Ministry of Defence* [2003] 2 WLR 435). However, this does not mean that service men and women will necessarily win a claim against the Crown. Thus in an action against the Crown for injury caused by negligence the person making the claim will, as a civilian would, have to prove that there was a duty of care owed to him which was breached (see further Chapter 26). Thus

in *Mulcahy* v *Ministry of Defence* (1996) *The Times*, 27 February the claimant was a soldier serving in the Gulf War who suffered damage to his hearing when a fellow soldier fired a shell from a howitzer. He lost the case because the Court of Appeal decided that there was no duty of care between service personnel in battle conditions.

Actions under the Act may be brought in the High Court or a County Court, and under ss 17 and 18 of the 1947 Act the Treasury is required to publish a list of authorised government departments for the purposes of the Act, and of their solicitors. Actions by the Crown will be brought by the authorised department in its own name, or by the Attorney-General. Actions against the Crown are to be brought against the appropriate department, or, where there is doubt as to the department responsible or appropriate, against the Attorney-General.

In any civil proceedings by or against the Crown, the court can make such orders as it can make in proceedings between subjects, except that no injunction or order for specific performance can normally be granted against the Crown (but see below). The court can, in lieu thereof, make an order declaratory of the rights of the parties in the hope that the Crown will abide by it. No order for the recovery of land, or delivery up of property, can be made against the Crown, but the court may instead make an order that the claimant is entitled as against the Crown to land or to other property or to possession thereof. No execution or attachment will issue to enforce payment by the Crown of any money or costs. The procedure is for the successful party to apply for a certificate in the prescribed form giving particulars of the order. This is served on the solicitor for the department concerned, which is then required to pay the sum due with interest if any. The above exceptions show that, in spite of the Act, the rights of the subject against the Crown are still somewhat imperfect.

However, injunctions can be granted against officers of the Crown personally, even though acting in their official capacity. Thus, in *M* v *Home Office* [1993] 3 WLR 433, a mandatory injunction was issued against the Home Secretary for contempt of court, to achieve the return to this country of a person deported while his case for political asylum was still under review by the court.

Following the decisions of the House of Lords in *M* v *Home Office* (see above) and *Factortame* v *Secretary of State for Transport (No 2)* (1991) 1 All ER 70 it would appear that while a permanent injunction cannot be granted against the Crown, injunctive relief by way of interim relief can be given, e.g. to suspend the operation of legislation said to be inconsistent with Community law.

For historic, constitutional and procedural reasons also, the Crown cannot be prosecuted for crime. Once again a nominated defendant is put forward; e.g. for a road traffic offence, such as using a lorry with a defective tyre, the principal transport officer of the Department concerned would probably be nominated. Unfortunately, this practice results in the officer concerned acquiring a long record of motoring convictions in a personal capacity. Accordingly, in *Barnett* v *French* [1981] 1 WLR 848, the Court of Appeal suggested the use of the name 'John Doe' for the nominated defendant who, for the purpose of criminal records, would be shown as having a date of birth 'circa 1657'. The name 'John Doe' was used in civil actions from about that time onwards as part of a very elaborate procedure to prove the title to land. The procedure is no longer in use.

The general rule that statutes do not bind the Crown unless by express words or necessary implication is contained in s 40 of the 1947 Act. It produced an absurd result when it was decided that public health and hygiene legislation did not apply to National Health Service hospital kitchens. This anomaly was abolished by the National Health Service (Amendment) Act 1986 though the general immunity in other areas given by s 40 was preserved.

Crown privilege in civil proceedings

As we have seen, either party to a civil action can, amongst other things, ask the court to order the other party to produce any relevant documents for inspection: a process called disclosure (see Chapter 9). Under s 28 of the Crown Proceedings Act 1947, this right lies against the Crown though

the Crown could refuse to obey the order if production of the document(s) would be injurious to the public interest. It had been felt for some time that Ministers whose departments were involved in civil litigation had abused this right. Undoubtedly, some claimants failed in an action against the Crown because even the judge could not obtain access to documents necessary to support the claim. As a result of a number of cases of this kind, the House of Lords decided, in *Conway* v *Rimmer* [1968] 1 All ER 874, that even though a Minister certifies that production of a particular document would be against the public interest, the judge may nevertheless see it and decide whether the Minister's view is correct. If the judge cannot accept the Minister's decision, he may overrule him and order disclosure of the document to the party concerned. Thus the decision of the Minister is no longer conclusive though it is unlikely that a judge would order disclosure if there was a danger of real prejudice to the national interest.

However, despite *dicta* in *Conway* v *Rimmer* that claims to privilege on grounds of confidentiality could not expect sympathetic treatment, the courts vary in their interpretation of this view.

Norwich Pharmacal Co v *Commissioners of Customs and Excise*, 1973 – Crown or public interest privilege: documents **(51)**

Alfred Crompton Amusement Machines v *Customs and Excise Commissioners (No 2)*, 1973 – Non-disclosure of documents: privilege **(52)**

Privilege in civil proceedings – the public interest ground

Privilege extends beyond cases against the Crown. Thus in *D* v *NSPCC* [1977] 1 All ER 589 the House of Lords held that the NSPCC or a local authority is entitled to privilege from disclosing the names of its informants in relation to child neglect or ill-treatment.

The House of Lords decided in *British Steel Corporation* v *Granada Television* [1980] 3 WLR 774 that the information media and their journalists do not have immunity from the obligation to disclose their sources of information when disclosure is necessary in the interests of justice. Their Lordships went on to say, however, that the remedy is equitable and may be withheld in the public interest.

Public interest privilege has really replaced the older Crown privilege. However, the latter has been included as a separate head of privilege to show the historical development.

Legal professional privilege

Two kinds of legal professional privilege protect some communications from disclosure to other parties to legal proceedings as follows:

- ***legal advice privilege*** which protects communications between solicitor and client where the purpose is to obtain legal advice regardless of whether litigation is pending or in contemplation; and
- ***litigation privilege*** which protects communications between solicitor and client and a third party where the primary purpose for which the document was brought into existence was, from the beginning, its use in pending or contemplated litigation.

Legal advice privilege was affirmed by the House of Lords in *R* v *Special Commissioner, ex parte Morgan Grenfell & Co Ltd* [2002] STC 786. Their Lordships ruled that documents in the taxpayer's possession but prepared for the purpose of seeking legal advice from solicitors on tax matters were subject to legal professional privilege and need not be disclosed to an inspector of taxes whether they were in possession of the solicitor or the client.

The privilege is confined to lawyers and so whether communications between accountants and their clients is privileged presents a difficulty. However, in such a case the client may be able to claim successfully the right to privacy in Art 8 of the Human Rights Convention in order to justify refusal to produce tax advice given to the client by accountants to the tax authorities under a Revenue notice to do so.

Some difficulties have arisen in connection with legal advice given by lawyers in the presentation of legal advice to a public or other inquiry where litigation is not necessarily in view. However, in *Three Rivers DC* v *Bank of England* [2005] 1 AC 610 the House of Lords affirmed that such advice did come within legal advice privilege. The case arose from legal advice given in an inquiry into the collapse of the Bank of Credit and Commerce International.

Part 2 EUROPEAN UNION LAW