

Dist Australian Postal Commission v Dao 83 FLR 14	Cons Aust Postal Commission v Dao (1985) 63 ALR 1	Cons Maguire v Simpson (1977) 139 CLR 362	Cons Evans Deakin Industries Ltd v Common- wealth (1985) 62 ALR 295	Dist Jennings Industries Ltd v Common- wealth (1984) 57 ACTR 5
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[HIGH COURT OF AUSTRALIA.]

PITCHER PLAINTIFF;

AGAINST

THE FEDERAL CAPITAL COMMISSION DEFENDANT.

Federal Capital Commission—Action—Statutory corporation for performance of Federal Government functions—Liability of Commonwealth for tortious acts of servants of Commission—Law in force in Federal Capital Territory prior to acceptance by Commonwealth—Binding on the Crown—Subject's rights in tort against Commonwealth subsequent to acceptance—Negligence—Compensation to Relatives Act 1897 (N.S.W.) (No. 31 of 1897), secs. 3, 4—Claims against the Government and Crown Suits Act 1897 (N.S.W.) (No. 30 of 1897)—Judiciary Act 1903-1927 (No. 6 of 1903—No. 9 of 1927), secs. 56, 64—Seat of Government Acceptance Act 1909 (No. 23 of 1909), sec. 6—Seat of Government (Administration) Act 1910 (No. 25 of 1910), secs. 4, 12—Seat of Government (Administration) Act 1924-1926 (No. 8 of 1924—No. 32 of 1926), secs. 5 (1), 14, 29.

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SYDNEY,
Nov. 26;
Dec. 10.
KNOX C.J.,
Higgins,
Gavan Duffy,
Powers and
Starke JJ.

Sec. 6 of the *Seat of Government Acceptance Act* 1909, which provides that, subject to that Act, all laws in force in the Federal Capital Territory immediately prior to its surrender by New South Wales and acceptance by the Commonwealth should, so far as practicable, continue in force until other provision should be made refers not only to State law but also to Federal law.

In an action brought in the High Court by him, as administrator of his wife's estate, against the Federal Capital Commission, the plaintiff claimed, as husband, compensation for the death of his wife, which resulted, he alleged, from the negligence of the defendant's servants. The defendant demurred to the claim on the ground that it was made under an Act which was not binding on the Commission, namely, the *Compensation to Relatives Act* 1897 (N.S.W.).

Held, that by virtue of sec. 6 of the *Seat of Government Acceptance Act* 1909 and the *Judiciary Act* 1903-1927 the *Compensation to Relatives Act* 1897 (N.S.W.) was binding on the Commission.

Baume v. Commonwealth, (1906) 4 C.L.R. 97, applied.

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George William Cornelius Pitcher (the administrator of the estate of Emma Susana Pitcher, deceased) brought an action in the High Court against the Federal Capital Commission, in which the statement of claim was substantially as follows :—

1. On 28th March 1927 Emma Susana Pitcher was a passenger in a motor omnibus at Eastlake, Federal Capital Territory, for reward to the defendant and was about to alight therefrom at or near Eastlake Post Office.

2. The defendant was then controlling and managing the said omnibus through its two servants in that behalf, that is to say, one Alfred Thomas Barber, the driver, and one Lawrence Stevens, the conductor, of the said omnibus.

3. The said Stevens thereupon so negligently controlled, conducted and managed the said omnibus by signalling to the said Barber to start and causing it to start before the said Emma Susana Pitcher alighted from the said omnibus, and the said Barber so negligently started the said omnibus without warning to the said Emma Susana Pitcher that she was thrown or fell from the omnibus and sustained serious injuries through part of the omnibus passing over her.

4. As a result of such injuries the said Emma Susana Pitcher died on 3rd April 1927.

5. The plaintiff as administrator of the estate of the said Emma Susana Pitcher brings the present action on behalf of himself as the husband of the deceased.

6. The plaintiff's claim is for £1,000 damages, including (a) loss of the services of his wife, (b) loss of the society of his wife and (c) funeral expenses incurred, which damages were sustained by the plaintiff by reason of the negligence of the defendant under the circumstances hereinbefore set out.

The defendant entered a defence denying negligence and the facts alleged, and also demurred to the statement of claim, the demurrer being as follows :—The defendant by protestation, not confessing or acknowledging all or any of the matters or things in the statement of claim contained to be true in such manner or form as the same are therein set forth and alleged, demurs in law to the whole of the plaintiff's claim and says that the plaintiff's claim is bad in substance

and discloses no cause of action against the defendant: The ground in law intended to be argued is that the plaintiff's claim is under and by virtue of the *Compensation to Relatives Act* 1897 (No. 31), secs. 3 and 4, and not otherwise, and the said Act is not binding on the defendant.

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Brissenden K.C. (with him *O'Sullivan*), for the defendant, in support of the demurrer. Sec. 6 of the *Seat of Government Acceptance Act* 1909 simply has the effect of adopting the statutes of New South Wales in force in the Federal Capital Territory prior to its acceptance by the Commonwealth in the form and with the meaning they had in New South Wales, and no more. It was not intended that Acts binding on the Crown so far as New South Wales was concerned should bind the Crown in its Commonwealth aspect. The *Claims against the Government and Crown Suits Act* 1897 (N.S.W.), although adopted by sec. 6 of the *Seat of Government Acceptance Act* 1909, clearly was not applicable to the Crown in its Federal capacity, and to the extent that it purported to bind the Crown was inoperative in Federal territory. The adopted Acts were to have effect only so far as they were applicable, and up to the present time there has been no attempt to alter the law in that respect. The Crown is not bound unless expressly named or by implication.

[HIGGINS J. referred to *Pirrie v. McFarlane* (1).]

The Federal Capital Commission is a corporate body constituted by sec. 5 of the *Seat of Government (Administration) Act* 1924-1926 to carry on certain functions of Government, and hence must be deemed to be the Crown (*Repatriation Commission v. Kirkland* (2)). By sec. 5 the Commission is charged with the general administration of the Act. The provision of transport in the Federal Capital Territory is a function of the Commonwealth Government transferred to a body specially organized as a Department of State to carry out (*inter alia*) that function. The question arises: Can the Commission be sued for a tort committed in the performance of a function of the Commonwealth Government?

[GAVAN DUFFY J. referred to *Mackenzie-Kennedy v. Air Council* (3).]

(1) (1925) 36 C.L.R. 170, at p. 182.

(2) (1923) 32 C.L.R. 1.

(3) (1927) 2 K.B. 517.

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[KNOX C.J. referred to *Baume v. Commonwealth* (1) ; *Buchanan v. Commonwealth* (2).]

[Counsel also referred to *Union Steamship Co. of New Zealand v. Robin* (3) ; *Farnell v. Bowman* (4).]

H. V. Evatt (with him *J. W. Bavin*), for the plaintiff. There is no identification at all as between the Commission and the Commonwealth Government so as to give the Commission any right that the Crown has (*Sydney Harbour Trust Commissioners v. Ryan* (5)). Since the decision in *Repatriation Commission v. Kirkland* (6) the matter has been dealt with in *Metropolitan Meat Industry Board v. Sheedy* (7), where the Privy Council held that a debt due to a Board constituted similarly to the Commission was not a debt due to the Crown. The powers which the Commonwealth Parliament divested itself of and vested in the Commission concerned local matters only, and do not come within the proper function of Government. Sec. 6 (1) of the *Seat of Government Acceptance Act* 1909 cannot be limited to New South Wales law, but refers to all law of any source whatsoever and includes the *Judiciary Act* 1903, which was in force in the Federal Capital Territory at the time of its acceptance by the Commonwealth (*Davidsson v. Hill* (8)). By virtue of secs. 56 and 64 of that Act this action is properly brought against the Commission irrespective of whether it is or is not carrying out functions of the Crown.

Cur. adv. vult.

Dec. 10.

The following written judgments were delivered :—

KNOX C.J. AND POWERS J. The question raised by this demurrer is whether the provisions of secs. 3 and 4 of the *New South Wales Compensation to Relatives Act* 1897 (No. 31 of 1897) are binding on the defendant. Those sections provide that when the death of a person is caused by a wrongful act, neglect or default such as would, if death had not ensued, have entitled the party injured to recover damages in respect thereof, then the person who would have been

- (1) (1906) 4 C.L.R. 97.
- (2) (1913) 16 C.L.R. 315.
- (3) (1920) A.C. 654.
- (4) (1887) 12 App. Cas. 643

- (5) (1911) 13 C.L.R. 358.
- (6) (1923) 32 C.L.R. 1.
- (7) (1927) A.C. 899.
- (8) (1901) 2 K.B. 606.

liable if death had not ensued shall be liable to an action for damages brought by the executor or administrator of the person deceased for the benefit of the wife, husband, parent and child of the person whose death had been so caused. The plaintiff alleges that the death of his wife was caused by the negligence of servants of the defendant in the control and management of a motor omnibus used in a service maintained and operated by the defendant.

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The defendant is a body corporate constituted by the *Seat of Government (Administration) Act* 1924-1926. By sec. 5 (1) of that Act the defendant is charged with the general administration of the Act (which is intitled an Act to make further provision for the Government of the Territory for the Seat of Government) and is made capable of suing and being sued. By sec. 14 powers including (a) the control and management of Crown lands, (g) forestry and afforestation, (l) such other matters as are specified in any regulation made under the Act, and (m) generally the municipal government of the Territory, are conferred on the Commission. Full power to make regulations is contained in sec. 29 of the Act. In our opinion it is clear from these and other provisions of the Act that the Federal Capital Commission is a corporation to which is handed over the administration of what is really a department of the Commonwealth Government (see *Sydney Harbour Trust Commissioners v. Wailes* (1)); and it follows, in our opinion, that it is entitled to the same privileges and immunities as the Crown, or the Executive Government of the Commonwealth, would have had in the same circumstances (see *Repatriation Commission v. Kirkland* (2)).

By sec. 6 of the *Seat of Government Acceptance Act* 1909 (No. 23 of 1909) it was provided that, subject to that Act, all laws in force in the Territory immediately before the day on which the Territory was surrendered by the State of New South Wales to, and accepted by, the Commonwealth should, so far as applicable, continue in force until other provision should be made; and by sec. 4 of the *Seat of Government (Administration) Act* 1910 (No. 25 of 1910) it was provided that where any law of the State of New South Wales continued in force in the Territory by virtue of sec. 6 above referred to, it should, subject to any ordinance made by the Governor-General,

(1) (1908) 5 C.L.R. 879, at p. 885. (2) (1923) 32 C.L.R., at p. 8.

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have effect in the Territory as if it were a law of the Territory. Sec. 8 of the Act No. 23 of 1909 above referred to provides that the High Court and the Justices thereof shall have, within the Territory, the jurisdiction which immediately before its surrender and acceptance belonged to the Supreme Court of New South Wales and the Justices thereof. (See also sec. 4 of the *Judiciary Act* 1927 (No. 9 of 1927).)

The case was argued on the assumption that within New South Wales the rights and remedies given by the *Compensation to Relatives Act* might be enforced against the State of New South Wales, or, in other words, that in New South Wales that Act should be treated as binding the Crown though not named in the Act. It was said this was the result of the New South Wales *Claims against the Colonial Government Act* 39 Vict. No. 38 as construed by the Judicial Committee in the case of *Farnell v. Bowman* (1). But it was argued that the *Compensation to Relatives Act* of the State of New South Wales, regarded solely as an Act of the State Legislature operating in New South Wales, was not and could not be binding on the Government of the Commonwealth, and that when that Act was by Federal legislation made applicable to the Federal Capital Territory it must be given the same meaning in the Territory as it had in New South Wales as an Act of the State Legislature, and consequently must be construed as not being binding in the Territory on the Commonwealth Government or on the defendant administering a department of that Government. This argument leaves out of consideration two matters of importance, namely, (1) that by sec. 4 of the Federal Act No. 25 of 1910 the Act in question is to "have effect in the Territory as if it were a law of the Territory," and (2) that the provisions of secs. 56 and 64 of the Federal *Judiciary Act* 1903-1920 relating to claims against the Commonwealth—an Act which was in force in the Territory immediately before its surrender and acceptance—are in substance not distinguishable from the provisions of the New South Wales Act on which *Farnell v. Bowman* was decided. The question must be dealt with as if there were a law of the Territory—whether a Federal statute or an ordinance made by the Governor-General under sec. 12 of the Act No. 25 of 1910—in words

identical with those of the New South Wales *Compensation to Relatives Act*, and with the provisions of secs. 56 and 64 of the *Judiciary Act*. In *Baume v. Commonwealth* (1) this Court held that those provisions of the *Judiciary Act* gave a subject the same rights of action against the Commonwealth as he would have against a subject in matters of tort as well as of contract, and that the Commonwealth was therefore responsible for the tortious acts of its servant in any case in which the relation between the Commonwealth and its servant was such that according to the ordinary principles of law the maxim *respondeat superior* would apply (per *Griffith C.J.* (2)). In the present case it is not disputed that if the Federal Capital Commission were not a body entitled to claim the immunities attaching to the Crown the maxim *respondeat superior* would apply. That being so, if the New South Wales Act be regarded as equivalent to an Act of the Federal Parliament in force in the Territory, the decision in *Baume's Case* is precisely in point.

For these reasons we are of opinion that the demurrer should be overruled.

HIGGINS J. I am of opinion that the demurrer should be overruled. But I desire to confine my judgment to the only ground of law argued—that the New South Wales Act, the *Compensation to Relatives Act* 1897, is not binding on the defendant, the Federal Capital Commission. I propose to assume—not to decide—that to sue the Commission is, in effect, to sue the Commonwealth. My view is that even if this corporation, the Commission, is such a direct activity of the Crown as that it would, at common law, be exempt from an action for tort, it is, by reason of the *Seat of Government Acceptance Act* 1909, sec. 6 (1), taken with the *Judiciary Act* 1903, secs. 56 and 64, not so exempted.

The proclamation accepting this Territory from New South Wales for the Seat of Government of the Commonwealth fixed 1st January 1911 as the date of acceptance (Act of 1909, sec. 5); and by sec. 6 it is provided that, subject to that Act, all laws in force in the Territory immediately before the proclaimed day “shall, so far as applicable, continue in force until other provision is made.” It

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(1) (1906) 4 C.L.R. 97.

(2) (1906) 4 C.L.R., at p. 110.

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follows that the New South Wales Act, the *Compensation to Relatives Act* 1897, was in force up to 1st January 1911 ; and it has continued in force thereafter. The Act of 1897 applied what is known as Lord Campbell's Act to New South Wales ; it contained the provisions which allowed actions for tort though the tort resulted in the death of the person injured, thus correcting the anomaly of the common law that an action for tort could not be brought where the injured person had died as the result of the tort : *actio personalis moritur cum persona*. This Act of New South Wales, therefore, was in force in the Territory on 28th March 1927, when (according to the statement of claim) the Commission's servants so negligently controlled the omnibus in which Mrs. Pitcher was a passenger, that she fell ; and she died on 3rd April following.

The demurrer raises the point that the New South Wales Act of 1897 is not binding on the defendant ; and there has been no other ground of law argued. Under sec. 3 of that Act, "whosoever the death of a person is caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured." In this section the Crown is not mentioned ; and, *prima facie*, the Crown is not a "person who would have been liable if death had not ensued." It is said that to sue the Commission is to sue the Commonwealth ; and to sue the Commonwealth is to sue the King, and the King can do no wrong, cannot commit a tort, and is not liable to be sued for a tort without express provision. But, in my opinion, there was such an express provision. For not only was the New South Wales Act of 1897 in force in the Territory, but there was a Commonwealth Act, the *Judiciary Act* 1903-1926, in force in the Territory. Sec. 6 (1) of the Act of 1909 not only continues New South Wales laws in force in 1910, but Commonwealth laws then in force—"all laws in force in the Territory immediately before the proclaimed day." By this *Judiciary Act* as passed in 1903, it was provided (sec. 56) that "any person making any claim against the Commonwealth, whether in contract or in tort, may in respect

of the claim bring a suit against the Commonwealth in the High Court or in the Supreme Court of the State in which the claim arose." This action is brought in the High Court; and according to *Baume v. Commonwealth* (1) the Commonwealth would, by virtue of that section (and cf. sec. 64) be liable for the conduct of its servants who were in charge of the omnibus. In other words, assuming (not deciding) that to sue the Federal Capital Commission is in effect to sue the Commonwealth, or the Crown in right of the Commonwealth, yet by the operation of sec. 6 (1) of the *Seat of Government Acceptance Act* 1909, taken with the *Judiciary Act*, secs. 56, 64, the New South Wales Act of 1897 providing for compensation to relatives is "binding on the defendant," and can be enforced against the defendant by action—although the Crown is not mentioned in the New South Wales Act.

I should explain that my desire not to be regarded as deciding whether the Federal Capital Commission comes within the rule exempting the Crown where the Crown is not expressly mentioned is due to the expressions used in the judgments in *Repatriation Commission v. Kirkland* (2). There it was held by all the four members of the Court sitting (including myself) that goods belonging to the Repatriation Commission (for returned soldiers) could not be distrained for non-payment of rent due by the returned soldier who held the goods only on a hire-purchase agreement. Personally, I was able to concur on the ground that defence is a primary and inalterable function of all Governments, and that repatriation should be regarded as a matter incidental to defence (3). I said that in England the Horse Guards, the Admiralty, the Post Office, the Judiciary, are treated as Government functions in the strict sense, but that the Mersey Docks or Board, the Ecclesiastical Commissioners and the Trinity House (for the maintenance of light-houses and beacons) are not so treated (*Gilbert v. Corporation of Trinity House* (4); and see *Coe v. Wise* (5) (Drainage Commission)). I am not sure that my learned brothers took so restricted a view as to the bodies that are entitled to the benefit of the usual rule as to

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(1) (1906) 4 C.L.R., at p. 110.

(2) (1923) 32 C.L.R. 1.

(3) (1923) 32 C.L.R., at p. 15.

(4) (1886) 17 Q.B.D. 795.

(5) (1866) L.R. 1 Q.B. 711.

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exemption of the Crown ; they seem to treat the rule as applying to the Harbour Trust and to similar public activities : and, therefore, I do not want to treat the limits of the rule as fully settled before the limits come directly in question. But, on the assumption that the Federal Capital Commission is an agent of the Government in the strict sense, and that to sue the Commission is to sue the Crown, I am of opinion that the New South Wales Act is binding on the Commission.

GAVAN DUFFY AND STARKE JJ. The question raised by this demurrer is whether the provisions of secs. 3 and 4 of the New South Wales *Compensation to Relatives Act* 1897 (No. 31 of 1897) are binding on the defendant. Those sections provide that when the death of a person is caused by a wrongful act, neglect or default such as would, if death had not ensued, have entitled the party injured to recover damages in respect thereof, then the person who would have been liable if death had not ensued shall be liable to an action for damages brought by the executor or administrator of the person deceased for the benefit of the wife, husband, parent and child of the person whose death has been so caused. The plaintiff alleges that the death of his wife was caused by the negligence of servants of the defendant in the control and management of a motor omnibus used in a service maintained and operated by the defendant.

The defendant is a body corporate constituted by the *Seat of Government (Administration) Act* 1924-1926. By sec. 5 (1) of that Act the defendant is charged with the general administration of the Act (which is intituled an Act to make further provision for the Government of the Territory for the Seat of Government), and is made capable of suing and being sued. By sec. 14 powers including (a) the control and management of Crown lands, (g) forestry and afforestation, (h) such other matters as are specified in any regulation made under the Act, and (m) generally the municipal government of the Territory, are conferred on the Commission. Full power to make regulations is contained in sec. 29 of the Act. Let us assume that by virtue of these and other provisions of the Act the Federal Capital Commission is a corporation to which is handed over the administration of what is really a department of the Commonwealth

Government (see *Sydney Harbour Trust Commissioners v. Wailes* (1)), and that it is entitled to the same privileges and immunities as the Crown, or the Executive Government of the Commonwealth, would have had in the same circumstances (see *Repatriation Commission v. Kirkland* (2)). The question for determination then is whether these privileges and immunities include exemption from the provisions of the *Compensation to Relatives Act* 1897 (No. 31 of 1897).

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By sec. 6 of the *Seat of Government Acceptance Act* 1909 (No. 23 of 1909) it was provided that subject to that Act all laws in force in the Territory immediately before the day on which the Territory was surrendered by the State of New South Wales to and accepted by the Commonwealth should, so far as applicable, continue in force until other provisions should be made; and by sec. 4 of the *Seat of Government (Administration) Act* 1910 (No. 25 of 1910) it was provided that where any law of the State of New South Wales continued in force in the Territory by virtue of sec. 6 above referred to it should subject to any ordinance made by the Governor-General have effect in the Territory as if it were a law of the Territory.

Now, secs. 56 and 64 of the Commonwealth *Judiciary Act* 1903-1927 provide that any person making any claim against the Commonwealth whether in contract or in tort may in respect to the claim bring a suit against the Commonwealth in the High Court or in the Supreme Court of the State in which the claim arose and that the rights of the parties shall as nearly as possible be the same as in a suit between subject and subject. In our opinion these provisions were laws in force in the Territory immediately before 1st January 1911, the day on which the Territory was surrendered by the State of New South Wales and accepted by the Commonwealth as a Territory pursuant to the *Seat of Government Acceptance Act* 1909 (see Act No. 23 of 1909, sec. 6). And these sections have been construed by this Court as giving to a subject the same rights of action against the Commonwealth as he would have had against a subject in an action of tort as well as of contract (*Baume v. Commonwealth* (3); see also *Farnell v. Bowman* (4)). The result is that the Commonwealth comes exactly within

(1) (1908) 5 C.L.R., at p. 885.

(2) (1923) 32 C.L.R., at p. 8.

(3) (1906) 4 C.L.R. 97.

(4) (1887) 12 App. Cas. 643.

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the category of those made liable by the provisions of the *Compensation to Relatives Act 1897* (No. 31 of 1897), namely, persons who by reason of wrongful act, neglect or default would have been liable to an action for damages at the suit of the person injured if death had not ensued. If those provisions are applied to the Commonwealth they do not deprive the Crown of any prerogative or right peculiar to it but merely subject it, along with all others guilty of a wrongful act, neglect or default, to a new form of action for the benefit of the relatives of the deceased where it would already have been liable in an action by and for the benefit of the deceased had he not died. In such a case there is no reason to exclude the liability of the Crown, and the demurrer must therefore fail. And if the Federal Capital Commission be not an organ or department of the Commonwealth Government the result is the same, for the *Seat of Government (Administration) Act 1924-1926* incorporates it and renders it liable to suit in the same manner as other parties.

The demurrer must be overruled.

Demurrer overruled.

Solicitor for the plaintiff, *E. F. Thomas*, Goulburn, by *W. H. Hill & Truman*.

Solicitor for the defendant, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

J. B.