Human rights law

Article 11 of the Convention which is given direct effect in the UK by the Human Rights Act 1998 gives a right of association which extends to membership of and protection by trade unions. However, Art 11 does not expressly include a right to strike and the European Court of Human Rights has not implied one. Contracting states are left a choice as to how the freedom of trade unions can be safeguarded.

The partnership

A partnership is defined in s 1 of the Partnership Act 1890 as 'the relationship which subsists between persons carrying on a business in common with a view of profit'. It will be noted that there must be a business; that it must be carried on in common by the members (whether by all of them, or by one or more of them acting for the others, will depend on the agreement subsisting between them); and that there must be the intention to earn profits. An association of persons formed for the purpose, say, of promoting some educational or recreational object to which the whole of the funds of the association shall be devoted, and from which no advantage in the nature of a distribution of a profit shall accrue to the members, is not a partnership.

Sharing profits

Participation in the profits of a business may be regarded as *prima facie* evidence of a partnership, but it is not conclusive – the intention of the parties must be examined. Thus, an employee whose remuneration is based on a share of profits, or the widow or child of a deceased partner receiving an annuity in the form of a share of profits, would not legally be deemed to be partners. Neither does the common ownership of property constitute a partnership (see further Chapter 22), nor the lending of money in consideration of an agreement to pay the interest, or to repay the capital, as a share or percentage of profits as they accrue. (But in such a case the lender should take the precaution of having the agreement embodied in writing, signed by all the parties, and setting out clearly the fact that he is not to be considered a partner.)

Citation as partner

The question of citation as a partner is of great importance because the existence of a partnership, if such is proved, will involve all parties cited as partners in unlimited liability for the debts of the firm. Partners are agents for the firm, and can bind the other partners in contracts concerning the business of the firm whether they are specifically authorised to make them or not.

No formalities

Two or more persons can combine to form a partnership, which can be brought into existence in a highly formal or a very casual manner. *No legal formalities are required*, but it is desirable and usual for the rights and liabilities of the partners to be defined in a formal Deed of Partnership, or at least in a written Partnership Agreement. On the other hand, a mere oral agreement is equally binding, and in extreme cases a relationship of partnership may be inferred from the conduct of the parties. The partners are at liberty to vary the arrangements made between them and, where the conduct of the parties has for a lengthy period been inconsistent with the terms as originally agreed, it will be presumed that they intend that the new arrangements shall be binding on them. The Partnership Act 1890 makes provisions as to contribution of capital, division of profits, rights of partners to participate in active

management, and so on, but these only apply in so far as they are not varied by agreement between the partners.

Number of partners

Section 716 of the Companies Act 1985 prohibited the formation of a partnership consisting of more than 20 persons for the purpose of carrying on any business for gain. The Banking Act 1979, s 51(2) and Sch 7 applied the usual limit of 20 to banking partnerships.

Now the Regulatory Reform (Removal of 20 Member Limit in Partnerships etc.) Order 2002 applies and disapplies the above sections. It therefore removes entirely the 20-member limit from all unlimited and limited partnerships. The restriction did not apply to limited liability partnerships. The order is a Regulatory Reform Order. These orders can be used to reform any legislation, even a statute, that imposes a burden on business. There is no need for primary legislation.

Capacity to contract

There is no limitation on the activities of partners, provided that these are legal, nor is there any limit to the liability of the individual partners for the debts of the firm, each partner being liable to the full extent of his personal estate for any deficiencies of the partnership. However, provision is made for the introduction of limited partners whose liability is limited to the amount of capital they have introduced, though there must always be at least one general partner who is fully liable for the debts of the firm. Such a partnership must be registered as a limited partnership under the Limited Partnerships Act 1907 (and see below).

Partnership as a business organisation

The partnership was the normal form of business organisation for operations on a fairly large scale before the advent of the joint stock company, but it is now largely restricted to the type of enterprise requiring intimate personal collaboration between the members, or where incorporation is not possible or desirable, as among doctors, though the increasing control over companies including, in particular, private companies, may see some revival of the partnership as a more general business organisation. However, in the legal and accounting professions particularly, negligence liability is encouraging a move towards incorporation of firms to achieve limited liability or the formation of limited liability partnerships (see below).

Lack of continuity

One of the defects of the partnership is its lack of continuity. On the death of a partner the continuing partners must account to his personal representatives for the amount of his interest in the firm. This difficulty may be met to some extent by providing funds out of the proceeds of an insurance policy on the deceased partner's life, or by arranging for the balance of his capital account to be left in the business as a loan, but failing these measures the sudden withdrawal of a large amount of capital may well cause serious dislocation of the smaller business, or even end its operations. The most serious defect of a partnership, however, is the difficulty of providing additional funds for expansion, and this may induce partners to admit new members for the sake of their capital, regardless of their fitness for taking an active part in controlling the business.

Not a persona at law

A partnership firm is not a persona *at law*; a partnership is an aggregate of its members. In the matter of procedure, the Rules of the Supreme Court make it possible for the firm to sue and

be sued in its own name, but this does not confer upon it a legal personality as is possessed by a corporation. This makes the holding of property more difficult in the partnership. For example, land cannot be conveyed to the firm. Instead it is conveyed to some or all of the partners as legal owners who declare a *trust of land* for all the partners in equity.

Limited liability partnerships (LLPs)

The Limited Liability Partnerships Act 2000 creates a new kind of partnership arrangement that is of major importance to those in the professions and in business generally. Its provisions are set out below. Registration began on 1 April 2001.

Section 1

This provides that an LLP is a legal person. It is a body corporate formed by incorporation (see below). It has an unlimited capacity and is able to undertake the full range of business activities which an ordinary partnership can undertake. The matter of *ultra vires* transactions will not therefore arise. An LLP is separate and distinct from its members. However, the members may be liable to contribute to its assets if it is wound-up. The extent of that liability is set out in regulations. Since an LLP will be a corporate body partnership law will not in general apply to an LLP. The basic principles of corporate law and the Companies Act 1985 apply with appropriate modifications. Clause 14 however provides that elements of partnership law may be applied to LLPs by regulations.

Comment The new LLP is not confined to those practising a profession but is open to other persons who may wish to use it as a business organisation. The new form of limited liability partnership also addresses liability of the partners individually in terms of their private estate. The members of the new organisation will benefit from limited liability because the LLP is a separate person. Thus the LLP and not its members personally will be liable to third parties. However, under the general law a professional person owes a duty of care to a third party or may do. Therefore negligent advice given to a client will result in liability of the LLP and may result in the professional giving the advice having personal liability but the other members will not be personally liable. Where the person injured by negligent advice is not a client, then, provided there is a duty of care when the advice was given and it was in the course of business, the LLP will be liable and the professional giving the advice will be personally liable but not the other members.

This is a principal aim of LLPs, i.e. to provide protection against 'Armageddon' legal claims, as they are called, that are capable of bringing even a substantial practice to its knees in terms of insolvency as the result of a negligent act by *one* of the partners, since in the ordinary partnership liability for such acts lies also with the other partners under the rule of joint *and several* liability.

Personal liability of the partners

It should be noted that an outsider may not find it easy to establish this personal liability. There will have to be evidence that the partner concerned was not merely acting as an agent for the firm but was also assuming personal liability to the outsider, e.g. a client. This could occur where the partner (or member as they may be called) has signed letters and documents in a personal capacity and not merely as an agent in the firm's name or on behalf of the firm. There is at the moment no specific case law, though company directors

who performed a professional service on behalf of the company, e.g. a valuation have escaped personal liability for a negligent performance where it was made clear that they were acting on behalf of the company as an agent (see *Williams* v *Natural Life Health Foods Ltd* [1998] 2 All ER 577).

However, where the evidence shows that the partner or even a qualified employee has signed documents and conducted certain business apparently in a personal capacity without indicating that he or she was acting as an agent of the firm there may be personal liability (see *Merrett* v *Babb* [2001] QB 1174: a case involving an ordinary partnership that is nevertheless applicable to the LLP situation). This attempt to make an individual partner or member liable will arise crucially where the firm is insolvent and there are no liability insurance arrangements to cover the loss.

Incorporation

Section 2

This sets out the conditions to be met for the incorporation of an LLP. There must be at least two people who subscribe to a document called an 'incorporation document'. This document must be delivered to the Registrar of Companies.

The incorporation document must contain various items of information: name; whether the registered office is to be situated in England or Wales; in Wales or in Scotland; the address of the registered office; the names of the persons who are to be members on incorporation and whether some or all of them are to be designated members. Designated members are responsible for the LLP's conduct, including matters of compliance. If there are no designated partners, all partners are responsible.

Section 3

This provides that when the Registrar receives the incorporation document he will retain and register it. Once the document has been registered, the Registrar will issue a certificate that the LLP is incorporated by the name specified in the incorporation document. The certificate is evidence that all requirements have been complied with.

Membership

Section 4

This provides that the first members of an LLP are those signing the incorporation document. Following incorporation any person can become a member of an LLP by agreement with the existing members. A person may cease to be a member in accordance with any agreement with the other members.

Section 5

This deals with the relationship between the members. The rights and duties of the members of an LLP to one another and to the LLP are governed by the provisions of any agreement between the members subject to the provisions of the incorporation document. The Act does not require the members to have such an agreement and there is no requirement to publish it. There is a provision under which when an LLP comes into being it is bound by the terms of any agreement that is entered into by the persons who sign the incorporation document before incorporation. This avoids the problems presented, to some extent, in company law by pre-incorporation contracts. (But see now the Contracts (Rights of Third Parties) Act 1999 – Chapter 10.)

Section 6

Under these provisions each member of the LLP is an agent of it and may represent and act on its behalf in all its business. However, the LLP is not bound by the non-authorised acts of a member provided that the person who deals with the member knows this or is not aware that the member was a member of the LLP. A transaction entered into by a person who is no longer a member of the LLP is nevertheless valid and binding on the LLP unless the other party has been told that the person is no longer a member or the Registrar has received notice to that effect, in which case the person is deemed to know that the person he has dealt with is not a member of the LLP. Notice is constructive.

Section 7

This section is concerned with the situation in which a person ceases to be a member of an LLP or his interest in the LLP is transferred to someone else as, e.g., by assignment. A former member, the member's personal representative or trustee in bankruptcy or liquidator (in the case of a corporate member), or the trustees under a trust deed for the benefit of his creditors or assignee may receive any amount to which the former member would have been entitled but may not interfere in the management or administration of the LLP.

Section 8

Where the incorporation document states who the designated members are, they will become designated members on incorporation. Other members may become designated by agreement with the other members and may cease to be designated members in the same way. There must be at least two designated members. Every member may, however, be a designated member. An LLP may at any time notify the Registrar that all persons who may from time to time be members are to be designated members and on notification they will be. The notification will be in a form specified by the Registrar and must be signed by a designated member. A person who ceases to be a member of the LLP will also cease to be a designated member.

Designated members have additional responsibilities such as signing the accounts and delivering them to the Registrar of Companies and preparing, signing and delivering the annual return together with appointing an auditor (unless the audit exemption applies).

Registration of membership changes

Section 9

This section provides that if a person ceases to be a member or a designated member, the Registrar must be notified within 14 days and a change in the name and address of a member must be notified in 21 days. Where all the members are designated, members' notice is required only of the fact that the person who is concerned has ceased to be a member. Failure to comply with the notice requirements is a criminal offence, but it is a defence to show that all reasonable steps were taken to comply. Punishment is by fine.

Taxation

Section 10

Under this section members of an LLP carrying on business are treated for income tax and capital gains tax purposes as if they were partners even though an LLP is a body corporate. Also the property of an LLP will be treated as partnership property. This means that, like partners, members will be individually liable to tax on their shares of the profits of the LLP.

For capital gains tax purposes, the assets of the LLP are treated as partnership assets. This means that members will be individually liable for chargeable gains when LLP assets are disposed of. An acquisition or disposal will not therefore be treated as made by the LLP.

Section 11

This clause inserts a new section in the Inheritance Tax Act 1984. This provides that for the purposes of IHT the members of an LLP are treated as members of a partnership. Thus IHT will be charged in respect of members' interests in an LLP as for a partnership and business relief will be available on that basis.

Section 12

This provides for relief from stamp duty on an instrument transferring property from a partnership to a newly incorporated LLP. The relief is conditional on the membership of the partnership and the LLP being the same and on the members' interest in the property being the same.

It should be noted that s 12 of the LLP Act 2000 gives this concession for only 12 months from incorporation. This is important to those who may register an LLP for future operation of an existing business.

Regulations

Section 13

This gives regulation-making powers in regard to insolvency by incorporating with modifications various parts of the Insolvency Act 1986. This will ensure that procedures relating to company voluntary arrangements, administration, receivership and voluntary and compulsory winding up are available as suitably modified.

The section also contains regulation-making powers in regard to the insolvency and winding-up of an overseas LLP. There will be separate consultation on and before the exercise of this power.

Sections 14 to 18

These sections give general rule-making powers in regard to LLPs.

Names

Schedule to the Act

The name of an LLP must end with 'limited liability partnership' or llp or LLP. There are equivalents in Welsh where the registered office is situated in Wales. An LLP cannot have a name which is already used by a registered company nor one that the Secretary of State thinks constitutes a criminal offence or is offensive. A name may not be registered if it gives the impression that it is connected with central or local government authorities. An LLP may change its name at any time. If it has been registered in a name which is the same or similar to a registered name, the Secretary of State may direct a change within 12 months of registering the name. Where the LLP has given misleading information to obtain a sensitive name such as 'charity', the Secretary of State may direct a change within five years of it being registered and where it is misleading and likely to cause harm to the public the Secretary of State can direct a change *at any time* but the LLP may appeal to the court.

The above matters are for all practical purposes like those rules for company names.

Registered office

An LLP must have a registered office at all times and this must be situated in either England and Wales, Wales or Scotland. The details, e.g. the address of the registered office, must appear in the incorporation document. On change of address of the registered office, the Registrar must be notified on the approved form to be signed by a designated member. For the next 14 days documents may be validly served at the old address.

Disclosure and audit

The extent to which disclosure of financial and other information is required depends upon regulations (see the Limited Liability Partnerships Regulations 2001) and this is also the case with audit. However, the audit exemption for small companies is applied as appropriate (see earlier in this chapter).

The need for a membership agreement

The need for the LLP to have a carefully drafted agreement covering all eventualities cannot be over-stressed. Although the LLP regulations apply many Companies Act 1985 provisions it must be remembered that an LLP is not a species of company. Section 1(1) of the LLP Act 2000 states 'There shall be a new form of legal entity . . .'. Furthermore, the law relating to ordinary limited partnerships (see below) does not apply. Section 1(5) of the LLP Act 2000 states that in general terms and unless there is a provision in statute law to the contrary the law relating to partnerships does not apply to an LLP.

The general internal procedures of a registered company are governed by special articles or Table A which is a statutory instrument designed for companies. Ordinary partnerships are governed by more extensive fall-back provisions in the Partnership Act 1890 that apply in the absence of partnership articles. There is no equivalent support for the LLP and so an agreement is vital to determine the internal governing rules that are to apply.

Limited partnerships

It is possible for the liability of partners in certain circumstances to be limited. This is in the case of limited partnerships which are formed under the Limited Partnerships Act 1907. While this might appear attractive, limited partnerships are not commonly used in the *generality* of business (but see **Reform** below).

Limited partnerships must have one or more partners (called general partners) who are liable for all of the debts and obligations of the firm and may then have one or more persons (called limited partners) who are only liable for the debts and obligations of the firm to the stated amount of the value of capital or property contributed by them to the firm at the outset. As already noted, the Regulatory Reform (Removal of 20 Member Limit in Partnerships etc.) Order 2002 removes the 20-member limit in all limited and ordinary partnerships.

The limited partners must not then either directly or indirectly draw out or receive back any part of that contribution; if they do then they are liable for the debts of the firm up to the amount so drawn out or received back.

Limited partners must not take any part in the management of the business of the firm: if they do they can be made liable for all debts and obligations of the firm incurred while they were doing so. Any person may, subject to the general requirements as to capacity of a partner mentioned before, be a limited partner and this includes a body corporate.

In this connection, it is a not uncommon misconception that if a limited company is introduced as a partner the firm must of necessity convert into a limited partnership. This is not the case since a limited company is, like an individual, fully liable for its debts so long as it has assets to pay them. It is the liability of the members that is limited. Thus when the company's assets have been exhausted in the payment of its debts the members cannot be called upon to meet the deficit provided of course they have paid for their shares in full.

If therefore, other individuals join a limited partnership as members of a limited company, the liability of all the partners is limited and yet the partnership would comply with the law. The company as the general partner would be liable to the full extent of its assets for the debts of the firm but the individual members having paid for their shares in full would not be. This assumes that there is no fraud which might convince a court to ignore the corporate separate entity rule and make individual members liable.

The other main points to note as regards a limited partnership are:

(a) a limited partner has no power to bind the firm;
(b) any question arising as to ordinary business matters may be decided by a majority of the general partners;
(c) a new partner may be introduced without the consent of the existing limited partners; and
(d) a limited partner is not entitled to dissolve the partnership by notice.

Limited partnerships must be registered under the Act with the Registrar of Companies. If they are not so registered then every limited partner loses the benefit of that status and is deemed to be a general partner. There are forms to be filed giving the necessary details and changes in those details must also be notified to the Registrar. A certificate of registration is issued. There are various other detailed formalities that need to be followed.

Reform

The Law Commission and the Scottish Law Commission have published a joint consultation paper on the Limited Partnerships Act 1907. It can be accessed at **http://www.scot-lawcom.gov.uk**. Limited partnerships are increasingly used by institutional investors such as insurance companies and pension funds that are wholly or partially exempt from tax. These investors can invest jointly with others that are liable to tax without losing their own tax status. Limited partnerships are also used extensively by venture capitalists. The view of the Law Commissions is that current legislation requires updating to maintain the UK's competitive position in the venture capital market.

There is currently no legislation on this.

The Crown

The Crown consists of the Monarch and her Ministers, together with the central government departments staffed by civil servants, the armed forces, and the Privy Council which retains some powers, e.g. to arrange for the coronation of the Monarch. The police are not servants of the Crown.

Until 1947 the Crown was not liable for the tortious acts of its servants, and was liable only to a limited extent in contract, though the person who did the wrongful act could be sued and the Crown often stood behind him and paid the damages against him. Actions in contract could only be started by an awkward procedure known as a Petition of Right, with the consent of the Crown given on the advice of the Attorney-General.

The rather anomalous position at common law which has been outlined above arose out of the ancient maxim, 'The King can do no wrong', which was extended to cover the activities of the Departments of State and their servants. The Crown Proceedings Act 1947, and the Rules of the Supreme Court (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 (Supreme Court 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 para 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 para 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 19.

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 20). The Law Reform (Contributory Negligence) Act 1945 also applies to Crown cases (see further Chapter 21).

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 or her which was breached (see further Chapter 21). 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.

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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,