ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 305 OF 1998

BETWEEN:

RICHARD MAC LEISH
ROXANNE MAC LEISH
DARYL MACLEISH (A Minor by Roxanne Macleish, his Next Friend)
CAMELITA DURRANT

Plaintiffs

and

DONALD JOHN
THE ATTORNEY GENERAL

Defendant

Appearances:
Nicole Sylvester for the Plaintiff
Samuel Commissiong for the Defendant

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2001: May 24, July 31
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JUDGMENT

[1] MITCHELL, J: This was a running down action. One of the issues before the court was the application of the Public Officers Protection Act, Cap 209 of the law of St Vincent and the Grenadines.

[2] The pleadings reveal that the Plaintiffs claim that on Sunday 12 January 1997 the 2nd Plaintiff drove the car of her husband, the 1st Plaintiff, out of a side street onto the main street when she had the green light, and that the 1st Defendant, driving an ambulance belonging to the government of St Vincent and the Grenadines, represented by the 2nd Defendant, ran the red light on the main street, and collided with her, causing damage to the vehicle of the 1st Defendant and injuries

to the other Plaintiffs who were occupants of the car. The Defendants deny liability, and counterclaim for the alleged negligence of the 2nd Plaintiff in driving the car out onto the main street against the traffic lights.

[3] The case was commenced by the issue of a specially endorsed writ on 16 July 1998. The defence and counterclaim was filed on 1 October 1998. On 15 March 2001, the Master held a Case Management Conference and ordered there to be inspection and exchange of documents on or before 30 March, the Plaintiff to file an agreed bundle on or before 6 April 2001, and she set trial for 24 May. The case duly came up for hearing on 24 May, and the evidence was concluded the same day.

[4] The facts as I find them are that on the day in question, Sunday 12 January 1997, the government ambulance driven by the 1st Defendant was speeding down the left-hand lane of Halifax Street, a main street in the City of Kingstown. The 1st Defendant was hurrying the ambulance to the jetty in Kingstown to pick up a patient for the hospital arriving by ferry from Bequia. At the same time, the 2nd Plaintiff was emerging on the left from the intersection of Egmont Street and Halifax Street. She had previously been checking her post box at the rear of the main Post Office on Halifax Street. The 2nd Plaintiff was driving the car of the 1st Plaintiff with the 3rd and 4th Plaintiffs as her passengers. The intersection was on the left of Halifax Street, the main road. Egmont Street at that intersection is a cul-de-sac, and we may assume normally has very little traffic. This was a Sunday, and we can expect that a driver on the main road would anticipate even less traffic than on a normal workday would be likely to come out of the cul-de-sac onto the main road. The intersection is a tight and dangerous one. It is necessary for the person exiting the cul-de-sac to come some distance out into the main street before he or she can see if there is traffic coming on the main street. If a vehicle is speeding down the main street in the left hand lane, someone exiting the cul-de-sac will not see it until it is too late. We may assume that that is the reason why there are traffic lights at that intersection. The driver of the ambulance, knowing

that it was a Sunday when there would be few cars on the road, knowing that it was a cul-de-sac with little or no traffic use, and being in a hurry to pick up a patient, took a chance and ran the red light. The fact that he was driving an ambulance, even if he had had on his siren, which he did not, did not give him any extra right or excuse to take risks. The law is well settled that if an emergency vehicle infringes the traffic regulations during an emergency, it is still necessary for the driver to ensure that no damage is thereby caused to other users of the road. He is obliged to drive with due care and attention. In this case, the 1st Defendant failed to discharge the duty of care he owed to the Plaintiffs. The accident was entirely due to the 1st Defendant running the stoplight at high speed.

[5] At the conclusion of the evidence for the defence, counsel for the Defendants rose to make his closing argument. He submitted that the case should be dismissed because there was no evidence that the requirements of the Public Officers Protection Act had been complied with. He produced authority for his submission. He relied on Castillo v Corozal Town Board [1983] 37 All ER 86 and Brian v Lindo (1986) WIR 294. Counsel for the Plaintiffs replied by submitting that the failure of the Defendants to have taken the statutory point on a preliminary basis, and their having proceeded to file a Defence, amounted to a waiver by them of the statutory defence. She had no authority for this submission, other than referring the court to an oral, unreported decision of the Court of Appeal in the St Vincent case of Felix Rodgers v Attorney General. I was not satisfied with a reference to an oral decision of the Court of Appeal, as it was not clear on what basis the Court of Appeal had come to its ruling in the cited case. I, therefore, adjourned further addresses to 23 July to permit both counsel to find and submit written authority on whether and in what circumstances a defendant can be considered to have waived the statutory defence. The length of the adjournment was due to the imminent intervention of the Criminal Assizes. In mid-July, during the Assizes, counsel for the Plaintiff sent in a letter to the court to the effect that she was on maternity leave, and would not be able to attend court for the balance of July. Being concerned that the Criminal Assizes would go right up

to the end of the last week in the term, making 23 July an impossible date, and Carnival having forced a break in the Assizes thus freeing up the date of 11 July, and not considering it in anyone's interest for the matter to be adjourned further to the September sitting of the court, I, therefore, during the week of 2 July directed my clerk to inform both counsel's chambers that I proposed to bring forward the adjourned addresses to 11 July, and that if they had any further authorities they were to exchange them and to lodge a copy of any additional submissions with the court, and to appear in court instead on 11 July. On 11 July, counsel for the Defendants appeared, but not counsel for the Plaintiff, nor anyone holding for her, though the clerk of the court informed me that her chambers had been advised that the matter had been brought forward to that date. Counsel for the Defendants advised that counsel for the Plaintiffs had supplied him with, and had lodged with the court, copies of her submissions on the Public Officers Protection Act point together with several authorities. He had also lodged his submissions. He quite correctly did not consider that in the absence of counsel for the Plaintiffs he should make any further oral representations. In pursuit of the overriding objective of the rules of court of dealing justly with the case, I did not consider it proper to adjourn the matter for further argument, and reserved my judgment which I now deliver.

[6] What exactly is the statutory defence? The Public Officers Protection Act, Cap 209 provides at sections 3, 4, and 5 that:

> 3. No action shall be brought against any public officer for anything done, or purporting to be done, in the exercise of his office unless and until two calendar months after notice in writing has been delivered to him or left at his usual place of residence with some person there, by the party who intends to bring such action or his legal practitioner or agent, and in every such notice shall be clearly and explicitly stated:
>
> the cause of action;
>
> the name and address of the person who is bringing the action; and

the name and address of his legal practitioner or agent, if any,

and no evidence of the cause of such action shall be produced except in so far as the cause of action has been spelt out in the notice.

4. Every action as set out in section 3 shall be brought within twelve calendar months next after the cause of action stated in the notice arose and no such action shall be maintainable after the expiry of the said period.

5. In every proceeding for an action as referred to in section 3, it shall be incumbent upon the party bringing the action to prove:

(a) that the notice as required under section 3 has been given;

(b) that the action has been brought within the time specified in section 4; and

(c) the cause of action,

and upon the failure to establish any of the same, the action shall be dismissed or otherwise terminated and a verdict shall be given against the person who brought the action, with or without costs.

The Act makes provision for two important matters. Section 3 makes provision for a mandatory condition precedent to the institution of a suit against a public authority, namely the delivery of the notice in writing in the terms stipulated. Compliance with that condition precedent is wholly within the control of the would-be-plaintiff. This measure is obviously designed to protect the public interest. Section 5 gives teeth to section 3. It provides for proof at the trial that such notice was given in the terms required, and in the time specified in section 4, in default whereof the action shall be dismissed and a verdict shall be given against the person who brought the action, with or without costs. That provision is also mandatory. Proof would include admissions in the pleadings. In our case there is no such admission.

[7] Counsel for the Plaintiffs submitted that the driving at a speed in excess of the speed limit brought the act of the 1st Plaintiff outside the protection of the Act. She also submitted that the Defendants must be deemed to have waived the statutory defence. The 4 authorities relied upon by the Plaintiffs were:

> PSC and the Attorney General v Ira Davis et al, Civil Appeal No 6 of 1981 (Antigua), an unreported decision of the Court of Appeal in 1984;
> PSC and Attorney General v Darnell Shillingford, Civil Appeal No 10 of 1988 (Dominica), an unreported decision of the Court of Appeal in 1991;
> Felix DaSilva v Attorney-General, High Court No 356 of 1989 (St Vincent), an unreported decision of Joseph J in the High Court in 1991;
> Felix Rodgers v Attorney-General, Civil Appeal No 4 of 1997 (St Vincent), an oral judgment of the Court of Appeal.

The first 3 cases revolved around acts of the Public Service Commission. The decisions in question set out reasons why the courts concerned did not consider that the Public Officers Protection Act applied to the Public Service Commission in those particular cases. None of these 3 decisions dealt with the issue before the court, i.e., the circumstances in which the trial court should find that the Defendants should be deemed to have waived the statutory defence. In the 4th case, the decision of the Court of Appeal referred to was oral. I was not made aware of the basis on which the Court ruled in this last case. In any event, being oral, this decision does not establish a precedent. Neither counsel was able to produce any further written authority dealing with the issue of waiver of the statutory defence, other than those that have been referred to above. I must, therefore, decide the matter on general principles, aided by whatever authority has been produced.

[8] The Court of Appeal of Belize came in 1983 to deal with the statutory defence in the case of Castillo [supra]. That was a case where a truck driver employed by

the respondent public authority negligently drove a motor truck belonging to the respondent into a motor car belonging to the appellant, causing considerable damage. The appellant as plaintiff brought an action in negligence claiming damages for loss suffered against the respondent as 1st defendant and the driver as 2nd defendant. The action was brought shortly before the period of one year had elapsed. The defence and counterclaim made no mention of the Public Authorities Protection Ordinance of Belize, nor did it in any way purport to invoke any of its provisions. At the conclusion of the case for the appellant, as plaintiff, counsel for the 1st respondent applied to have the action against the 1st respondent dismissed, relying on section 3 of the Act. The appellant had given no notice to the 1st respondent, and it followed that no evidence had been or could have been adduced on behalf of the appellant. The trial judge accepted the submissions on behalf of the 1st respondent and dismissed the 1st respondent from the action. The case continued against the driver alone. The trial judge found against the driver. The appellant driver appealed against the dismissal of the claim against the 1st respondent. It was held by the Court of Appeal, quoting from the headnote, that

> When proceedings are instituted against a public authority and the plaintiff fails to prove at the hearing that he has given notice of the proceedings under section 3(1) of the Public Authorities Protection Ordinance (as is required by section 3(2)) the trial judge has no discretion in the matter and is bound to enter judgment for the defence with costs. The defence is not required to plead the Ordinance.

Having read the judgment, the provision in Belize appears to be substantially similar to the provision in St Vincent and the Grenadines. The decision of the Court of Appeal in Castillo's case is persuasive authority upon which this court can rely.

[9] The case of Bryan v Lindo [supra] comes from the Court of Appeal of Jamaica. It arose from the deliberate shooting of the plaintiff by the defendant, a private in the Jamaica Defence Force assisting the police during a state of emergency, as a result of the defendant being encouraged to do so by police officers. The action was brought against the defendant alone. The plaintiff did not join the Attorney-General nor did he argue that the government was vicariously liable for the defendant's act, probably out of a mistaken concern that this would prevent the defendant praying in aid the Public Authorities Protection Act. The action was not instituted within the one-year period of limitation under the Act. The defendant in his defence pleaded this failure. The trial judge found that the defendant in shooting the plaintiff had not been acting in execution of his duties and could not claim the protection of the Act; and he awarded the plaintiff damages. The trial judge also stated that if the Attorney-General had been sued, he would have been held liable. The defendant appealed to the Court of Appeal. The Court of Appeal dismissed the appeal, and confirmed that the Attorney-General would have been held liable if he had been sued. This authority does not really assist the court with the real issue of waiver presently before the court.

[10] In our case, section 3 of the Act was not complied with, making compliance with section 5 impossible. The authorities establish that section 5 is not a matter for pleading by the defence. It is a matter for evidence at the trial. Proof has to be provided at the trial in the same way as proof of any fact in issue relevant to the action has to be given. The onus is on the Plaintiffs to provide the proof. The Plaintiffs argue that it is incumbent on the Defendants to make an application at an early stage to have the matter dismissed, and not to wait to bring up the defence at the conclusion of the case. That defence could then be admitted or refuted by the Plaintiffs. This was not done in this case. An interlocutory summons for dismissal of the writ for non-compliance with the provisions of the Act would have succeeded. This goes to the question of the incurring of unnecessary costs. This is a matter that can be cured by an order as to costs. It does not go to an admission by the Defendants.

[11] In this case, the 1st Defendant as driver of the government ambulance was clearly a public authority for the purposes of the Act. I find that the act of the 1st Defendant, which is complained of, in driving the government ambulance to pick up a patient, was one that fell within the protection of the Act. The fact that he was driving at a speed in excess of the speed limit and running a red traffic light does not make his driving in the circumstances of this case any the less an act done in the exercise of his office. The time period indicated in the Act ran from the date of the accident, the 12 January 1997. The Plaintiffs were required to issue their writ no earlier than two calendar months after serving the requisite notice on the Defendants. There is no suggestion that they served any notice. No evidence was given of the requisite serving of the notice on the Defendants. In any event, they were required to issue their writ within 12 calendar months after the cause of action arose, i.e. by 31 January 1998. The writ was instead issued some 4 months after the limitation period had expired. The Plaintiffs could produce no authority of any court, and more particularly of our Court of Appeal, to the effect that the events that had unfolded in the conduct of their case by the Defendants amounted to a waiver by them of their rights under the Act. The Defendants are entitled to the protection of the Act.

[12] In the circumstances, the action of the Plaintiffs is dismissed. The counterclaim of the Defendants is also dismissed. Because of the waste of time incurred by the Defendants in allowing the matter to proceed to trial, instead of having raised the statutory defence as an interlocutory issue, in exercise of the court's discretion as to costs, I make no order as to costs.

I D MITCHELL, QC
High Court Judge