BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2007/0306

DAPHNE ALVES

Claimant

-and-

THE ATTORNEY GENERAL OF THE VIRGIN ISLANDS

Defendant

Appearances:

Mr. John Carrington of Mc W Todman & Co. for the Claimant
Mr. Baba Aziz, Attorney General (Ag.) for the Defendant

2011: January 17
2011: October 24

Public Authorities Protection –Limitation of time for bringing action – Nurse at Public Hospital injured while attending to elderly patient – Action not commenced within six months - Public Authorities Protection Act, Cap 62.

Principles of pleadings – Whether pleading of limitation defence adequate - Claimant filed no Reply to Defence – Is she barred from challenging pleadings?

On 9 April 2003, the claimant, a nurse at Peebles Hospital, was injured at her workplace when a hospital bed collapsed while she was attending to an elderly patient. On 17 December 2007 she sued the Government/Crown as her employer for damages for negligence alleging that she was an employee of the Government; she had been injured during the course of her employment and that the Government owed her a duty to take reasonable care for her safety.

The Attorney General (in his capacity as representative for the Crown under the Crown Proceedings Act, Cap 21) in his Defence admitted the negligence but denied the claimant's entitlement to damages alleging that she is not entitled to any of the relief sought by virtue of the combined effects of section 2 of the Public Authorities Protection Act, Cap. 62 and sections 2, 26 and 27 of the Crown Proceedings Act.

The claimant filed no Reply to the Defence. By affidavit, the Attorney General sought to adduce that the claimant's allegation of negligence engaged the statutory duty of the Government to conduct and maintain the hospital at the public expense pursuant to the Public Hospital Act, Cap

195 and, as such, the claim ought to have been commenced within the six month limitation period stipulated by the Public Authorities Protection Act.

At the (re)trial, the claimant argued that the limitation point was not properly pleaded as the Crown failed to raise the Public Hospital Act and specify the alleged public duty in the Defence and should not be allowed to bolster it in evidence or rely on it at trial. In any event, the claimant says that the argument was misconceived as her claim engaged the Crown's duty as employer.

The Crown argued that the limitation point was properly pleaded and that if the claimant wished to challenge the adequacy of the Defence, she should have filed a Reply and the claimant cannot at this late stage of the proceedings allege that the limitation defence has not been properly pleaded.

HELD:

1. If the claimant wished to challenge the Defence, she should have filed a Reply: The proper place for meeting the defence is the reply. See: Pleadings: Principles and Practice by Jacob and Goldrein at page 161.

2. The limitation point was properly pleaded. Limitation statutes are required by law to be pleaded, but there is no such pleading requirement for other statutes, common law or equitable principles. The Court is entitled to take judicial notice of all Acts and subsidiary legislation and they are applied when relevant to the facts and circumstances of the case without the necessity of being pleaded: Phillips v Copping [1935] 1 KB 15, Interpretation Act Cap 136 section 49, Evidence Act 2006, section 126 applied; Njie and others v Amadou Cora (The Gambia) [1997] UKPC 41 and Nathalie Creque v Cecil Penn [Privy Council Appeal No. 36 of 2005] followed.

3. The Government's public duty under the Public Hospital Act is not engaged by the claim. The Public Hospital Act merely vests the land and appurtenances thereto that form the Hospital in the Government and the management in a Board. It does not address the employment of nurses. The claimant was a public officer as defined by the Constitution of the Virgin Islands and there is an employer/employee relationship between the Government and the claimant. The act of neglect or omission of duty alleged by the claimant is of a private, rather than a public character. She acted under a private contract of employment and the duty of care was owed to her personally and not to all the public alike: Bradford Corporation v Myers [1916] A.C.242; Griffiths v. Smith [1946] KB 600; Firestone Tire and Rubber Co. (S.S.) Ltd v Singapore Harbour Board [1952] A.C.452 and Andrew Thomas Bell v The Commissioner of Police of the British Virgin Islands (Civil Appeal No. 4 of 2001) applied. The claim is therefore not statute-barred as the Government is not entitled to the Protection of the Public Authorities Protection Act..

JUDGMENT

Introduction

[1] HARIPRASHAD-CHARLES J: The claimant, Daphne Alves was employed on 17 February 2000 by the Government of the Virgin Islands ("the Government") as a nurse and was

assigned at the material time to Peebles Hospital. On 9 April 2003, she was injured at her workplace when the hospital bed collapsed. At the time, she was attending to an elderly patient suffering from Alzheimer's disease. On 17 December 2007, she sued the Attorney General of the Virgin Islands (in his capacity as legal representative of the Crown under the Crown Proceedings Act, Cap. 21) for damages as a result of the injuries which she suffered. The material pleadings were that she was an employee of the Government[1]; she was injured during the course of her employment[2] and, as her employer, the Government owed her a duty to take reasonable care for her safety.[3]

[2] In his Defence, the Attorney General admitted all the particulars of the statement of claim except Mrs. Alves' entitlement to interest at common law. The Attorney General further pleaded as follows:

> "3. The Defendant as statutory legal representative of the Crown, in right of its Government of the Virgin Islands, pleads section 2 of the Public Authorities Protection Act (Cap. 62) and sections 2.26 and 27 of the Crown Proceedings Act (Cap. 21).
>
> 4. The Defendant states, in answer to the entire claim, that the Claimant is not entitled to any of the relief sought in the statement of claim or at all by virtue of the combined effects of the above-named Acts, in that, the claim herein was filed on 17th day of December 2007, that is more than six (6) months after the neglect or failure of the Crown to, among other things, provide and maintain proper plant and equipment at Peebles Hospital and the resultant injury to the Claimant on 9th April 2003."

[3] Two issues arise out of the pleading namely:

1. Whether the Attorney General had sufficiently pleaded that Mrs. Alves' remedy was barred as a result of section 2 of the Public Authorities Protection Act ("PAPA");[4] and

[1] See Tab. 2 of Trial Bundle lodged on 18 December 2008 –and more specifically, paragraph 1 of Statement of Claim.
[2] Ibid, paragraphs 3 and 4.
[3] Ibid, paragraph 6.
[4] Cap. 62 of the laws of the Virgin Islands, 1997.

2. If that Defence was properly raised on the pleadings, whether the provisions of PAPA apply so as to bar the remedy to Mrs. Alves.

The background

[4] The facts of this claim are wholly undisputed. On 17 February 2000, Mrs. Alves commenced employment with the Government as a nurse and at the material time, she was assigned to Peebles Hospital.

[5] On 9 April 2003, she was injured whilst attending to an elderly patient suffering from Alzheimer's disease. She tried to prevent him from being injured when his bed collapsed under him.

[6] The Government has never denied liability for the claim. Indeed, they paid Mrs. Alves' medical expenses until May 2006.

[7] On 17 December 2007, Mrs. Alves commenced these present proceedings against the Attorney General for damages for the injuries she alleged that she sustained. She alleged that, as her employer, the Government owed her a duty to take reasonable care for her safety including providing and maintaining proper plant and equipment, competent employees and a safe system of work at her place of employment.

[8] On 23 January 2008, the Attorney General filed a Statement of Defence admitting the existence of a cause of action in negligence but denied that Mrs. Alves is entitled to the remedy sought since her injuries were sustained on 9 April 2003 which was outside the six-month limitation period prescribed by section 2 of the PAPA for bringing claims against public authorities.

[9] Mrs. Alves did not file a Reply to the issue of limitation raised by the Attorney General.

[10] On 17 March 2008, the Attorney General filed a Notice of Application seeking Reverse Summary Judgment on the claim. This was supported by the affidavit of Arlyn Gordon-VanSickle. Paragraphs 3 and 4 of the affidavit are relevant.

"3. That the Hospital was created as a public hospital by the Public Hospital Act (Cap 195) of the Laws of the Virgin Islands. The Government has a statutory duty under the Act to conduct and maintain the Hospital at the public expense.

4. The Respondent (Claimant)'s allegation of negligence engages this statutory duty of the Government to conduct and maintain the Hospital at the public expense, and as such the claim ought to have been commenced within the six (6) months limitation period stipulated by the Public Authorities Protection Act (Cap 62) of the Laws of the Virgin Islands …."

[11] At the hearing of the application for summary judgment, the learned Master struck out both paragraphs on the basis that there was no sufficient pleading in the Defence to support them. The Master also refused to grant reverse summary judgment against Mrs. Alves.

[12] The matter came up for trial on 13 October 2008. The Court was asked to deal with an application by Mrs. Alves filed on 8 October 2008 to strike out the following evidence in a witness statement from David Archer, Director of Human Resources :- *"4. The Claimant was assigned to the Peebles Hospital, a Public Hospital established by the Public Hospital Act Cap 195 and conducted and maintained by the Government of the Virgin Islands at the public expense".*

[13] This paragraph was struck from the witness statement by the learned trial judge on the basis that the issue of their admissibility had been previously dealt with by the Master in striking the similar words from the affidavit of Mrs. Gordon-VanSickle and the Attorney General was estopped from re-arguing the PAPA limitation issue again.

[14] On 22 October 2008, the Attorney General filed an Application seeking Leave to Appeal the two interlocutory rulings made by the learned trial judge. After the Application for Leave to Appeal was filed, the learned judge delivered judgment on the claim on 25 November 2008. She awarded damages to Mrs. Alves. The Attorney General filed a Notice of Appeal on 28 November 2008. The Grounds of Appeal were:

1. That the learned judge erred in delivering the judgment notwithstanding that the Court of Appeal had ordered a stay of proceedings on the claim; and

2. That the learned judge erred in giving judgment without consideration of the Attorney General's Defence that Mrs. Alves' claim was barred by the PAPA.

[15] On 29 September 2009, the Court of Appeal allowed the appeal on Ground 1 and remitted the matter to the High Court to be tried by another judge on the limitation issue.

Has the limitation defence been properly pleaded?

[16] Learned Counsel, Mr. Carrington appearing as Counsel for Mrs. Alves submitted that the limitation period under the PAPA arises where a claim is made against any person for any act done in pursuance or execution or intended execution of any Act or Ordinance, or of any public duty or authority.

[17] He submitted that, in the instant case, Mrs. Alves alleged that the Attorney General was in breach of its duty owed as employer.

[18] Mr. Carrington further submitted that where the Attorney General raises a limitation point, it is for him to plead and eventually prove the factual circumstances that give rise to such a Defence. He argued that it was therefore for the Attorney General to plead (and eventually lead evidence) of the Act or Ordinance, in the execution or intended execution of which the impugned act was done or the nature of the public duty in the course of which the Attorney General was acting or the specific public authority that was being exercised that gave rise to Mrs. Alves' injury.

[19] Mr. Carrington vehemently argued that the Attorney General entirely failed to plead any matters relevant to the existence of the legislation, duty or authority but simply referred to statutory provisions of the PAPA and the Crown Proceedings Act; perhaps with the expectation that the Court would infer that he was raising an issue that the Crown was acting in the execution of an Act or under a public duty.

Principles of Pleading

[20] The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the

matters in dispute between the parties.[5] A party must so state his case that his opponent will not be taken by surprise.

[21] It is an elementary rule of pleading that "when a state of facts is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation….The certainty or particularity of pleading is directed not to the disclosure of the case of the party, but to the informing the court,…and the opponent, of the specific proposition for which he contends, and a scarcely less important object is the bringing of the parties to issue on a single and certain point, avoiding the prolixity and uncertainty which would very probably arise from the stating, all steps which will lead up to that point."[6]

[22] A party may not raise any new ground of claim, or include in his pleadings, any allegation or fact inconsistent with his previous pleadings. In order to raise such a new ground of claim, or to include any such allegations, amendment of the original pleading is necessary. He must either apply for leave to amend the pleading or particulars already served, or for leave to serve further particulars.

[23] Where a party makes a radical departure from the case stated in their pleadings, amounting to a new, separate and distinct case, the party will not be entitled to succeed. In Waghorn v George Wimpey,[7] it was held, amongst other things, that this was not a case which was just a variation, modification or development of what had been averred; it was new, separate and distinct, and not merely a technicality, and constituted so radical a departure from the case as pleaded as to disentitle the plaintiff to succeed.

[24] Prior to the introduction of the Civil Procedure Rules, 2000 ("the CPR"), the most elementary principle of pleading was that one pleaded the material facts on which a party relied for his claim or defence but not the evidence by which those facts were to be proved. Furthermore, whilst the old rules did permit the pleading of law, in practice that was usually

[5] Halsbury's Laws of England 4th ed. Vol. 36: Pleading, para. 4. 'Function of pleadings'. See also the case of *Esso Petroleum Co. Ltd v Southport Corpn.* [1955] 3 All ER 864.
[6] Williams v Wilcox (1838) 8 Ad & El 314; [1835-1842] All ER Rep 25.
[7] [1970] 1 All ER 474.

only done where not to plead the law in question might take the other side by surprise. Now, to what extent do these basic tenets of the old approach to pleading still hold good?

[25] On the face of it, both of these principles are now under attack. While (by CPR 10.5(1)) a claimant must still plead "a statement of all the facts on which the claimant relies', there is no doubt that the CPR do not adhere to the strict demarcation line between facts and evidence that was embodied in the old rule and they also appear to adopt a rather more relaxed attitude to the pleading of law.

[26] In McPhilemy v Times Newspapers Ltd,[8] Lord Woolf MR gave guidance upon the statements of case under the new regime. At pages 792-793, he said:

> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of the party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader." [Emphasis added]

[27] Lord Woolf went on to observe that excessive particulars could serve to obscure, rather than clarify issues, and could lead to fruitless but expensive tactical applications. Recently, the above dictum of Lord Woolf was considered by the Court of Appeal in East Caribbean Flour Mills Ltd v Ormiston Ken Boyea.[9] The Court of Appeal emphasized that pleadings are still required to mark out the parameters of the case that is being advanced by each party so as not to take the other by surprise. They are still vital to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader and the court is obligated to look at the witness statements to see what are the issues between the parties.

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[8] [1999] 3 All ER 775. **McPhilemy** was applied by the Court of Appeal in **Tancic v Times Newspaper Ltd (2000) The Times, 12 January.**

[9] St. Vincent & the Grenadines Civil Appeal No. 12 of 2006 (judgment delivered on 16 July 2007).

[28] Mr. Carrington argued that, in the instant case, the Defence falls woefully short of letting Mrs. Alves know what case she has to meet. It simply alleged that the Attorney General will rely on certain statutory provisions. There is no plea that the Attorney General was acting in the execution of an Act or under a public duty or pursuant to a public duty in maintaining the hospital.

[29] Mr. Carrington further argued that in order to address this glaring deficiency in the pleading the Attorney General sought to give evidence that Peebles Hospital was a public hospital and that the Government was acting under a statutory duty to maintain its plant. However, the Attorney General is not entitled after close of pleadings to lead evidence to correct this vital omission from its pleaded case.

[30] Mr. Carrington submitted that the Attorney General has also sought to argue that the court should take judicial notice of the Public Hospital Act Cap 195 but this argument has also not found favour either with the Master, the trial judge or the Court of Appeal and cannot be reopened at this hearing.

[31] The Attorney General submitted that his case is properly and sufficiently pleaded and if Mrs. Alves wishes to challenge the Defence for insufficient pleadings, she needed to file a Reply.

[32] In the treatise, Pleadings: Principles and Practice by Jacob and Goldrein stated at page 161:

> "The reply is the proper place for meeting the defence … thus … in order to defeat the defence of the Limitation Act the plaintiff must specifically plead in his reply any fact upon which he relies to take the case out of the statute". In this case, the reply pleaded no matters which constituted an effective legal answer to the defence."

[33] In the present case, Mrs. Alves filed no Reply. In my opinion, she should have filed a Reply as it is the proper place for meeting the defence. It is too late in the day for her to say that the Defence is improperly pleaded.

[34] In addition, as correctly submitted by the Attorney General, it is not mandatory for the Crown to plead the Public Hospital Act and the Regulations made under the said Act to argue that Mrs. Alves' claim is statute-barred on the ground of PAPA. These are relevant statutes for purposes of the enquiry. It is trite law that apart from statutes, such as the PAPA and other limitation statutes, which are required by law to be pleaded, there is no such pleading requirement for other statutes, common law or equitable principles. They are applied, when relevant, to the facts and circumstances of the case without the necessity of being pleaded. In Phillips v Copping[10], Scrutton LJ recognized and gave effect to the Rent Restriction Act 1923 on appeal, even though it was not drawn to the attention of the Official Referee in the proceedings below. He said:

> "With regard to the defendant's counterclaim for overpayments of rent, the Rent Restriction Act, 1923, s 8 sub-s. 2, provides that "any sum paid by a tenant…which under subsection I of section fourteen of the principal Act is recoverable by the tenant…shall be recoverable at any time within six months from the date of payment but not afterwards."
>
> That provision was not called to the attention of the Official Referee, and it is said that the point cannot now be taken…….But it is the duty of the court when asked to give judgment which is contrary to a statute to take the point although the litigants may not take it."

[35] In Njie and others v Amadou Cora (The Gambia)[11], the Privy Council also recognized the jurisdiction of the Court to apply statutory provisions to the determination of cases even if the provisions are not pleaded. The Privy Council, however, determined that in applying statutory provisions to cases, the courts should give the parties the opportunity to make such observations as they may have wished to make on the provisions before applying the provisions to the determination of a case.

[36] Also, in Nathalie Creque v Cecil Penn[12], the Privy Council discussed extensively section 106 of the Land Registration Act (Cap 229). The section had been applied to the case by the Court of Appeal even though it was not raised as a Ground of Appeal. It was not applied in the court below and neither of the parties referred to it in that court.

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[10] [1935] 1 KB 15, 21.
[11] [1997] UKPC 41 at paragraphs 4-6.
[12] Privy Council Appeal No. 36 of 2005.

[37] In my view, the Attorney General has satisfied the threshold test of pleading. Paragraphs 3 and 4 of the Defence are clear. They set out the general nature of the case of the Government. I believe that by pleading section 2 of the PAPA, Mrs. Alves knew what case she had to meet. In any event, section 49 of the Interpretation Act [13] puts the matter to rest. It provides that ***"Judicial notice shall be taken of-(a) all, Acts and Subsidiary legislation."*** This provision dispenses with the need to plead and/or prove the provision of all Acts and subsidiary legislation including the Public Hospital Act and the Hospital Regulations made pursuant to the said Act.[14]

[38] Furthermore, Mrs. Alves could and should have challenged the limitation point by filing a Reply. This, she failed to do. She cannot now turn around and say that the limitation defence has not been properly pleaded.

Is claimant's remedy barred under the PAPA?

[39] The Attorney General was extremely comprehensive in his submissions. This may have been because our Court of Appeal in Andrew Thomas Bell v The Commissioner of Police of the British Virgin Islands[15] and the High Court in Loretta Frett as Executor of the Estate of Jeuel Simeon Frett v The Attorney General[16] did not find favour with the Crown's submissions in these cases on the very issue which now confronts this Court. Both Courts relied heavily on Bradford Corporation v Myers[17] which is still sound law. Regrettably, neither the Attorney General nor Mr. Carrington referred to these cases.

[40] In the instant case, the Attorney General contended that Mrs. Alves' claim is barred under the PAPA because it was instituted outside of the time limit mandated by section 2 of the said Act for bringing claims against the Crown. I reproduce hereunder this section.

> "Where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any

[13] Cap. 136 of the Laws of the Virgin Islands.
[14] See also **Firestone Tire and Rubber Co. (S.S.) Ltd v Singapore Harbour Board** [1952] AC 452 at 465-467. In that case, the Privy Council extensively examined the provisions of the Ports Ordinance to Singapore to determine whether the Public Authorities Protection Act applied.
[15] Civil Appeal No. 4 of 2001 [unreported] – Written Judgment delivered on 26 January 2004.
[16] Claim No. BVIHCV2007/0137 [unreported] – Written Ruling delivered on 20 December 2010.
[17] [1916] A.C. 242.

> Act or Ordinance, or of any public duty or authority or of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect –
>
> (a) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or, in the case of a continuance of injury or damage, within six months next after the ceasing thereof."

[41] As correctly postulated by the Attorney General, the section sets a time limit of six months for a claimant to institute a claim against any person for alleged neglect or default in the execution of a public duty or authority or for acts done in pursuance or execution of a statute.

[42] The Attorney General next submitted that the Government, as a public authority contemplated by the PAPA, is entitled to rely on limitation Acts including the PAPA if the conditions for the application of the Act/s apply. Sections 26 and 27 of the Crown Proceedings Act[18] so provide.[19]

[43] He argued that the Crown's pleading that Mrs. Alves' claim is statute-barred by the provisions of the PAPA makes it imperative for the Court to examine the Public Hospital Act[20] and its Regulations for the purpose of deciding whether the negligence of the Government had a public character in order to determine whether the limitation contained in the PAPA applied to Mrs. Alves' claim.

[44] He referred to section 3 of the Public Hospital Act which provides as follows:

> "The several buildings erected in Road Town in the Island of Tortola now generally known as the "Peebles Hospital" together with all ways, paths, walls, drains, buildings, erections, rights, easements, and appurtenances thereto respectively belonging shall be appropriated by the Government as heretofore to the reception and care of sick persons, and shall hereafter be conducted and managed at the public expense as a hospital for the purposes aforesaid in accordance with the provisions of this Act and all regulations made under the authority of section 15."

[18] Cap. 21 of the Laws of the Virgin Islands.
[19] See also **Durity v Attorney General of Trinidad and Tobago** –Privy Council Appeal No. 52 of 2000; [2003] 1 AC 405.
[20] Cap. 195.

[45] The Attorney General then argued that the name "Peebles Hospital" was given to the Hospital by the Hospital Regulations made pursuant to section 15 of the Public Hospital Act. Section 2 of the Regulations provides that "The hospital shall be known as the 'Peebles Hospital". He submitted that in Mrs. Alves'' Statement of Claim, she asserts, among other things, the following:

1. That she was employed as a nurse at the Peebles Hospital, Road Town, Tortola;
2. That on 9 April 2003 she was attending to an elderly immobile patient suffering from Alzheimer's disease by herself on surgical ward at the Peebles Hospital;
3. That she injured herself at the Peebles Hospital on the said date.

[46] The Attorney General submitted that the Crown admitted the assertions in the preceding paragraph so it was obvious that Peebles Hospital formed part of the Statement of Case of both Mrs. Alves and the Crown.

[47] He referred to Western India Match Company Limited v Lock[21]. Lord Goddard CJ held: (at page 606 paragraph 2):

> "It is beyond question that the Crown (and for this purpose the Minister and his officers must be regarded as the Crown) is a public authority, and whether a public authority is protected by the section depends on whether the act complained of arose out of the discharge of a public duty or the exercise of a public authority: see *Bradford Corporation v Myers* [1916] 1 A.C. 242.

[48] Section 2(a) of the PAPA mirrors the provisions of Section 1 of the Public Authorities Protection Act 1893 of the United Kingdom.

[49] The Attorney General then submitted that the House of Lords case of Griffiths v Smith[22] and the Privy Council case of Firestone Tire and Rubber Co. (S.S.) Ltd v Singapore

[21] [1946] KB 600
[22] [1941] A.C. 170

Harbour Board[23] are important to the issue at hand as they explained and clarified the earlier decision of Bradford Corporation.

[50] According to the Attorney General, Griffiths provides an excellent exposition of the PAPA. It was a claim for personal injury against the managers of a non-provided public elementary school, a statutory body created by the Education Acts of the United Kingdom. An invited guest had been injured as a result of the collapse of the floor at the premises where an exhibition was held. The House held as follows: (1) the managers were a public authority within the protection of the Public Authorities Protection Act, 1893; (2) the authorization of the display on the school premises was an exercise by the managers of their functions as such; (3) the neglect or default proved against the managers in respect of the floor was neglect or default in the exercise of their statutory duty; (4) the appellant was an invitee and not a mere licensee; but (5) the action failed inasmuch as it was not commenced within six months next after the neglect or default complained of.

[51] In his judgment, Viscount Simon L.C. (at page 178) stated that there are two questions to be decided as to the application of the Public Authorities Protection Act.

> "First, are the managers a public authority? Secondly, was the neglect or default proved against them neglect or default in the exercise of their statutory duty or authority? In my opinion, both these questions should be answered in the affirmative."
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> "As regards the first question, the body of managers are a statutory body created by the Education Acts for the discharge of public duties. They are not analogous to companies acting for profit…nor to voluntary charitable associations…but rather to the long list of authorities set up by Parliament for carrying out public responsibilities, which have been held protected by the Act…."
>
> Lastly, was the action of the managers in authorizing the invitations to this school-display an act done in the execution of their statutory duty or authority? It was strenuously contended for the appellants that this action was voluntary in the sense in which the sale of coke in Bradford Corporation was voluntary….But that is not the true test. The real question is whether the managers, in authorizing the issue of invitations to the display on the school premises after school hours, should be regarded as exercising the function of managing the school…"

[23] [1952] A.C. 452.

[52] The Attorney General submitted that Griffiths provided useful comments on Bradford Corporation. Viscount Maugham considered the effect of Bradford Corporation on the interpretation of that aspect of the legislation referring to acts of public duty and authority. He opined at pp. 183-185 as follows:

> "…The questions therefore for decision on this appeal as regards the claim against the managers may be stated thus: (1) Were the managers a public authority within the scope or ambit of the Public Authorities Protection Act, 1893? (2) Was the act of the managers in inviting the appellant to, come to the school premises on the occasion in question an act done in pursuance, or execution, or intended execution of any Act of Parliament or of any public duty or authority…
>
> My Lords, since the decision of this House in the Bradford Corporation case and the tacit or express approval of the cases I have referred to, it has been impossible to doubt (if it was doubtful before) that it is not essential that a public authority seeking to rely on the Act of 1893 must show that the particular act or default in question was done or committed in discharge or attempted discharge of a positive duty imposed on a public authority. It is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority or a power conferred on the public authority not being a mere incidental power, such as a power to carry on a trade. The words of the section are "public duty or authority", and the latter word must be taken to have its ordinary meaning of legal power or right, and does not imply a positive obligation…"[emphasis added]

[53] The Attorney General also referred to the Privy Council case of Firestone Tire and Rubber Co. [supra]. The Privy Council considered an action brought against the Singapore Harbour Board, which had carried on the business of wharfingers and warehousemen, pursuant to the Singapore Ports Ordinance, for damages for loss of tires that were held in their custody. It held, notwithstanding that the Board had failed to discharge the onus of disproving negligence on their part, the Board was in substance "acting in the course of exercising for the benefit of the public an authority or power conferred on them" by the said Ordinance "not being a mere subsidiary power".

[54] In Firestone, the Privy Council explained the decisions in Bradford Corporation and Griffiths and itemized the considerations which should be borne in mind in making a determination as to whether the Public Authorities Protection Act applied. Lord Tucker at pp. 464-465 referred to the following considerations:

1. "It is essential to the protection afforded by the statute that the act or default in question should be in the discharge of a *public* duty or the exercise of a *public* authority.

2. In deciding whether the duty or authority has this public quality it is sometimes relevant to consider whether it arises out of or is imposed by a contract voluntarily entered into by the public authority with an individual with whom it is under no obligation to contract.

3. The mere fact, however, that in the discharge of its duty or the exercise of its authority the public authority may have made a contract does not deprive the duty or authority of its public quality. The exercise or absence of a contract is not a decisive test.

4. Effect must be given to the word "authority". This excludes the test of obligatory, as opposed to permissive powers."

[55] The Attorney General further submitted that in Griffiths, the House of Lords recognised the relationship between the managers of a school and an invited guest to the school, as one of an inviter and invitee, which gave rise at common law to the duty of the managers to take care towards the invitee. Nevertheless, the House concluded that the neglect or default of the managers was in exercise of their statutory duty and therefore within the purview of the Public Authorities Protection Act. This principle, he says, applies a ***fortiorari*** to the present case.

[56] The Attorney General then argued that, by the combined effect of the public character of Mrs. Alves' employment and the duty of the Government under the Public Hospital Act, to conduct and manage Peebles Hospital, Mrs. Alves' specified allegations of negligence against the Government fall within the Government's power to carry out its statutory power of conducting and managing the Hospital, which led to her injuries. The PAPA therefore applied and the claim ought to have been brought within six months after the acts or omissions complained of.

[57] It is also argued on behalf of the Attorney General that, despite Mrs. Alves' reference to its contract of employment with the Government, in reality, the particulars of negligence set out in the Statement of Claim demonstrate that the claim is grounded in tort and not in

contract. It was further argued that the employment relationship in the present case is a typical example of relationship of 'proximity' or 'neighbourhood' that the law has considered necessary to impose a duty of care on the employer towards the employee. In other words, the basic obligation of the employer to take reasonable care for the safety of his employee at work arises from the relationship between him and his employee. Thus, the employer's duties are connected in some sense to what happens to the employee at work.

[58] Another authority cited by the Attorney General is the recent decision of the Privy Council in Balteano Duffus v National Water Commission.[24] In that case, it was held that the Public Authorities Protection Act (Jamaica) applied to a claim for wrongful dismissal of the appellant based on the abolition of the post of Director to rationalize the operation of the National Water Commission of Jamaica.

[59] At paragraph 14 of the Judgment Lord Scott said:

> "The trial judge rejected the defence that the action was statute barred pursuant to the Public Authorities Act. He did so because 'the actions of the Commission cannot be said to have been done in execution of the purpose of the National Water Commission Act' Their Lordships find this an astonishing conclusion".

[60] Lord Scott concluded at paragraph 15:

> "The cause of action for wrongful dismissal upon which Mr. Duffus was suing had accrued on 28th May 1990.The action had not been commenced until 9 March 1992.The interval was in excess of one year. So the action was barred by section 2(1) of the Public Authorities Act. Their Lordships agree. Nothing more needed to be said."

[61] Accordingly, says the Attorney General, Mrs. Alves' contention that the PAPA does not apply in all cases where there is in existence a contract, whether of employment (as is the case here) or otherwise is misconceived. He submitted that where the existence of a contract is correlated with a statutory or public duty, the provisions of the PAPA would

[24] [2007] UKPC 35.

apply. See: Bradford Corporation at pages 263-265. The Minister has a duty under the Public Health Act to establish and maintain health centres in the Territory out of public funds.

[62] The Attorney General finally submitted that even though, it is the relationship of employment that has given rise to the common law duty of care, for purposes of the PAPA, it is the tortious act or civil wrong of the Government (the particulars of which have been given in this case), which is the focus of the determination of whether the said Act applies. The focus is not the underlying relationship, whether of employment or otherwise, which has given rise to the tort. Indeed, it has been held that the limitation provisions of the PAPA apply to cases in which Mrs. Alves alleges that the Public Authority has committed a tortious or other civil wrong. This was made clear by Lord Millett in Blanchfield & Ors v Attorney General of Trinidad and Tobago & Anor.[25] At paragraph 22 of the judgment, Lord Millett had this to say:-

> "Since the Plaintiffs have no interest in the land the Government has no need to rely on any statute of limitation. But their lordships would observe that the Government's reliance on the Public Authority Protection Act was in any event misplaced. The Plaintiffs do not allege that the Government has committed any tortious or other civil wrong…"

[63] Based on the above contentions, the Attorney General submitted that the PAPA is directly applicable given the nature of the tortious allegation against the Government and she having been injured on 9 April 2003, He says that Mrs. Alves' claim is outside the statutory time limit of six months and consequently, the Government in entitled to the protection afforded under the PAPA. The Attorney General further contended that the conduct and management of Peebles Hospital is a statutory duty imposed on the Government by the Public Hospital Act. He also submitted that a claim for its failure or omission to act (negligence) that arose from the carrying out of that duty should have been brought within the six months statutory time limit. He concluded by saying that the public character of the employment and the actions or omissions of the Government clearly brings the claim

[25] [2002] UKPC 1.

within the contemplation of the PAPA and as such, the claim should be struck out in its entirety.

[64] Mr. Carrington submitted that any reliance on the provisions of the Public Hospital Act would be misguided as:-

- The Act does not address at all the employment of nurses;
- Section 3 merely vests the land and appurtenances thereto that form the Hospital in the Government. The allegations in the instant case do not involve duty in connection with the ownership or occupation of real property;
- Section 4 provides that the management of the hospital is by the Board of the Hospital, not by the Government;
- Section 7 vests the control of the Hospital in the Board of the Hospital, and not in the Government;
- It follows therefore that any public duty with respect to the operation of the Hospital that arises under this Act is vested in the Board of the Hospital, a separate entity, and not in the Crown as employer of Mrs. Alves.

[65] I agree with Mr. Carrington.

[66] Mr. Carrington next argued that Mrs. Alves' cause of action in these proceedings is based on the duty owed to her by her employer, the Government, to take reasonable care for her safety. Both the existence of this duty and its breach have been admitted by the Attorney General.

[67] Learned Counsel correctly, in my view, submitted that this particular duty of care owed by an employer to an employee is a personal duty and it is not delegable (i.e. the Government cannot escape liability for its non performance by claiming it had been delegated to a third party). It is an incident of the contract of employment and is owed to each employee as an individual: see Charlesworth & Percy on Negligence 8th ed. paras 10-13, 10-14, 10-06 and 10-10. In Paris v. Stepney B.C[26], Lord Simmonds observed:

[26] [1951] AC 367, 375.

> "…I will say at once that I do not dissent from the view that an employer owes a particular duty to each of his employees. His liability in tort arises from his failure to take reasonable care in regard to the particular employee…"

[68] According to Mr. Carrington, the duty in issue is therefore a personal duty of the Crown as employer of Mrs. Alves and is owed to her as an individual employee. It is based on the employment contract between them. It is not the duty of the management of the place where Mrs. Alves' employment actually took place, the Board of the Peebles Hospital in which is vested the public duty to manage the hospital, nor is it part of the duty owed to members of the public who use the facilities at the Hospital. The mere fact that the Government is a public authority is not inconsistent with its owing a private duty of care to an individual.

[69] In the instant case, there is no dispute that the Government is a public authority. The critical issue is whether the act of Mrs. Alves was one done in pursuance or execution or intended execution of any Act or Ordinance, or of any public duty or authority or of any alleged neglect or default in the execution of any such duty or authority?

[70] The act complained of is that (1) the Government, as her employer, owed her a duty to take reasonable care for her safety; (2) the Government was under a duty to provide her with a safe place to work; (3) Mrs. Alves was a "public officer" as defined by the Constitution of the Virgin Islands[27]; (4) There is thus an employer/employee relationship between the Government and Mrs. Alves. The Attorney General has admitted that at common law, an employer owes a duty to take reasonable care for the safety of his workmen and in this regard, he cited Wilsons & Clyde Coal Co. Ltd. v. English.[28]

[71] However, the Attorney General vociferously argued that notwithstanding the common law duty of the Government to Mrs. Alves as her employer, the Public Hospital Act imposed upon the Government a duty to conduct and manage Peebles Hospital at the public expense in accordance with the provisions of the said Act. He then inferred that Mrs.

[27] See also **Perch & Ors v Attorney General of Trinidad and Tobago** [2003] UKPC 17.
[28] [1937] 3 All ER 625 at 644.

Alves' allegation of negligence against the Government therefore directly engages the Government's public duty or authority. He says that the act of neglect and or omission in duty alleged by Mrs. Alves is of a public, rather than of a private, character: see Bradford Corporation, Griffiths and Firestone. Attractive though this submission is, in my opinion, it must fail.

[72] In Bradford Corporation, the appellants, a municipal corporation, were authorized by an Act of Parliament to carry on the undertaking of a gas company and were bound to supply gas to the inhabitants of the district and they were also empowered to sell the coke produced in the manufacture of the gas. The corporation contracted to sell and deliver a ton of coke to the respondent, and by negligence of their agent the coke was shot through the respondent's shop window. The respondents commenced an action in negligence against the corporation more than six months after. The Corporation pleaded s. 1 of the Public Authorities Protection Act, 1893 as a bar to the action. It was held that the act complained of was not an act done in direct execution of a statute or in discharge of a public duty or the exercise of a public authority. The Public Authorities Protection Act therefore afforded no defence to the action.

[73] At page 247 of the judgment, Lord Buckmaster confirmed the restricted interpretation to be given to the legislation. He opined:

> "In other words, it is not because the act out of which an action arises is within their power that a public authority enjoys the benefit of the statute. It is because the act is one which is either an act in the direct execution of the statute, or in the discharge of a public duty, or the exercise of a public authority. I regard these latter words as meaning a duty owed to all the public alike or an authority exercised impartially with regard to all the public. It assumes that there are duties and authorities which are not public, and that in the exercise or discharge of such duties or authorities this protection does not apply."

[74] As Mr. Carrington correctly postulated, it is of course the very antithesis of the fact that the duty in issue is owed to Mrs. Alves personally as employee, that it should be characterized as a public duty, i.e. one owed to all members of the public.

[75] The requirement of a direct connection between the public duty and the act or default complained of was further elucidated by Lord Shaw in Bradford Corporation. At page 263, this is what he said:

> "If there be a duty arising from statute or the exercise of a public function, there is a correlative right similarly arising. A municipal tramway car depends for its existence and conduct on, say, a private and many public Acts, and the corporation in running it is performing a public duty. When a citizen boards such a car, in one sense, he makes, by paying his fare, a contract; but the boarding of the car, the payment of the fare, and the charging of the corporation with the responsibility for safe carriage are all matters of right on the part of the passenger, a public right of carriage which he shares with all his fellow citizens, correlative to the public duty which the corporation owes to all….But where the right of the individual cannot be correlated with a statutory or public duty to the individual, the foundation of the relations of parties does not lie in anything but a private bargain which it was open for either the municipality or the individual citizen, consumer, or customer to enter into or decline. And an action on either side founded on the performance or non-performance of that contract is one to which the Protection Act does not apply, because the appeal, which is made to the Court of law, does not rest on statutory or public duty, but merely on a private and individual bargain."

[76] The afore-mentioned dictum is so clear that nothing more needed to be said. The cases of Griffiths and Firestone, which were very heavily relied upon by the Attorney General, do not, in my view, expound a different principle of law to that of Bradford Corporation. Those cases turn on their own peculiar facts and circumstances. In my opinion, to infer that the act of neglect and/or omission in duty alleged by Mrs. Alves is of a public, rather than a private character is an attractive argument but misconceived. I should state that neither Griffiths nor Firestone had anything to do with master and servant relationship. The Attorney General has not denied that the Government was under a duty to provide Mrs. Alves with a safe system of work at Peebles Hospital.

[77] Having regard to Mrs. Alves' claim, no-one but her is entitled to bring this action. She acted under a private contract of employment and the duty of care was owed to her personally and not to all the public alike. This principle found favour with our Court of Appeal in Andrew Thomas Bell [supra]. After referring to Bradford Corporation, Redhead JA (Ag) stated at paragraph 26:

> "The action brought by the appellant is to my mind a matter, which involves master and servant. The appellant alleges in his pleadings that the respondent failed to provide him with necessary safety equipment to protect him from injuries. As a result, he suffered injuries. Having regard to the appellant's claim, no-one but the appellant is entitled to bring this action. In any event, the duties of the Commissioner as they relate to the appellant do not encompass a public authority and therefore the Public Protection Authorities Act is inapplicable."

[78] I can do no better than to echo the sentiments of Redhead JA. In summary, the default complained of is the breach of the private duty arising under a contract of employment between the Government and Mrs. Alves and not any public duty which in the case of the hospital, could only be owed by the Board that was tasked with the management of the hospital to the public. It follows therefore that the claim does not come within the provisions of the PAPA.

[79] In my opinion, the Government is not entitled to the protection of the PAPA. I would therefore dismiss the application with costs to Mrs. Alves to be assessed if not agreed. The matter should proceed to the assessment of damages.

[80] The Court is extremely grateful to both Mr. Carrington and Mr. Aziz for their patience as they awaited the protracted delay of this judgment.

Indra Hariprashad-Charles
High Court Judge