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

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV2013/0006

BETWEEN:

ARINNA NAZLI

Respondent/Claimant

AND

MOUNT ST. JOHN'S MEDICAL CENTRE BOARD
URETHA GASPER

Applicants/Defendants

Before:

Master Charlesworth Tabor (Ag.)

Appearances:

Ms. C. Debra Burnette for the Claimant
Miss C. Kamilah Roberts for the Defendants

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2013: June 19, August 28
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Civil Procedure Rules 2000 (CPR 2000) – application to strike out statement of claim under CPR 26.3 (1) (c) – limitation of time for bringing action under section 2 (a) of the Public Authorities Protection Act, Cap. 352 of the Laws of Antigua and Barbuda – action in contract and negligence – personal injuries to patient – date when time begins to run – statutory duty or authority.

RULING

[1] **TABOR, M (Ag.)**: This is an application by the defendants filed on 13th February, 2013 for an order pursuant to Rule 26.3 (1) of the Civil Procedure Rules (CPR) 2000 to strike out the claim form and statement of claim of the claimant filed on 4th January, 2013. Affidavits in support of this application were filed on the same date by Mr. Milton Pringle,

Chairman of the Mount St. John's Medical Centre Board; and Ms. Uretha Gasper, nurse and certified midwife at Mount St. John's Medical Centre.

[2] The defendants filed submissions in support of the application to strike out the statement of claim on 9th April, 2013; while the claimant filed submissions in response on 23rd May, 2013.

[3] The ground of the application to strike out is that the action is an abuse of the process of the court in that it is statute barred having being filed after the expiry of the six month limitation period stipulated by section 2 (a) of the Public Authorities Protection Act, Cap. 352 of the Laws of Antigua and Barbuda (PAPA).

Issues

[4] The issues which fall to be determined by the court are:

(a) Whether the Mount St. John's Medical Centre Board is "a public authority" within the meaning of PAPA?
(b) Is the act complained of by the claimant an act done pursuant to or in execution of any Act or public duty by the defendants?
(c) Whether the Mount St. John's Medical Centre Board is entitled to protection under PAPA?

Background Facts

[5] The first defendant, Mount St. John's Medical Centre Board, was incorporated in 2009 to be responsible for the administration, management and organization of the Mount St. John's Hospital. The second defendant is and was at all material times a nurse and midwife of the first defendant assigned to manage the claimant and the delivery of the claimant's first baby.

[6] The claimant was born on 28th January, 1982 and is a self-employed tutor offering after school lessons to students. On 11th April, 2012 the claimant was admitted to the Obstetrics and Gynecology Department of the Hospital at 39 weeks gestation to deliver her first baby. For the services provided by the first defendant to facilitate the delivery, the claimant agreed to and paid for the same between 23rd February, 2012 and 1st May, 2012.

[7] An implied term of the agreement between the claimant and the first defendant and its servants or agent was the duty to exercise all reasonable care, skill and competence in managing the claimant and the delivery of her baby. The claimant is alleging breach of this agreement as a result of personal injuries which she suffered arising from the negligence of the second defendant on 12th April, 2012.

[8] The claimant has identified the following as the particulars of the breach of the agreement:

(1) Failure to establish a proper Obstetrics and Gynecology Department to provide obstetrics services to the claimant.
(2) Failure to establish any or any proper protocols for the management of the claimant during the delivery of her first baby.
(3) Failure to ensure that the second defendant was adequately supervised whilst she was managing the claimant.
(4) Failure to ensure that the claimant was properly managed by the second defendant or another servant or agent of the first defendant.
(5) Failure to ensure that the claimant was medically examined by an Obstetrician and/or Gynecologist having undergone an episiotomy at the hands of the second defendant.

[9] The claimant has identified the following as the particulars of negligence:

(1) Failing to take any or any proper or effective measures whether by way of examination, tests or otherwise to ensure that the claimant's cervix had dilated sufficiently before delivery.
(2) Failing to perform an episiotomy with the standard of care, skill and competence expected of a nurse/midwife.
(3) Wounding the claimant.
(4) Failing to take proper care of and/or to assist in postpartum care of the claimant.
(5) Failing to exercise any standard of care in suturing the wound created by the negligently performed episiotomy.
(6) So far as the same may be necessary, the claimant will rely on the doctrine of *res ipsa loquitor*.

[10] The claimant has identified the following as the particulars of her injuries:

(1) Wounding of the labia in the performance of medio-lateral episiotomy.
(2) Dehiscence of a left medio-lateral episiotomy.
(3) Bacterial vaginitis.
(4) Severe scarring and disfiguration of the labia.
(5) Severe pelvic pain and difficulty with ambulation.
(6) Immobility.
(7) Muscle atrophy.
(8) Post-traumatic stress disorder.
(9) Inability to care for and bond with her first newborn baby.

[11] As a result of the foregoing, the claimant is asking the court for the following relief:

(1) Damages for breach of contract.
(2) Damages for personal injuries caused by the negligence of the defendants.
(3) Special damages in the sum of $23,713.00.
(4) Interest pursuant to section 27 of the Eastern Caribbean Supreme Court Act, Cap. 143.

(5) Such further or other relief as this Honourable Court deems just.
(6) Costs.

Principles Governing CPR 26.3 (1) - Applications to Strike Out a Claim

[12] The power of the court to strike out a statement of case is provided for by Rule 26.3 (1) of the CPR 2000 which states as follows:

> "In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –
> (a) .....
> (b) the statement of case or part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
> (c) the statement of case or part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or
> (d) the statement of case or part to be struck out is prolix or does not comply with the requirements of Part 8 or 10".

[13] The striking out of a statement of case or defence is a draconian step which a court would only take in exceptional circumstances. In **Baldwin Spencer v The Attorney General of Antigua and Barbuda et al (Civil Appeal No. 20A of 1997)** Dennis Byron CJ (Ag.), as he then was, restated the seminal test that should be applied by the court on an application to strike out when he said:

> "This summary procedure should only be used in clear obvious cases, when it can be seen on the face of it, that a claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court.... Striking out has been described as 'the nuclear power' in the court's arsenal and should not be the first and primary response of the court".

[14] In his judgment in the interlocutory appeal in **Tawney Assets Limited v East Pine Management et al (BVI High Court Civil Appeal No. 7 of 2012)** Mitchell JA (Ag.) in underscoring the need why the court should proceed cautiously when dealing with an application to strike out noted that:

> "The exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. The court must therefore be persuaded either that a party is unable to prove allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial".

[15] In **Citco Global Custody NV v Y2K Finance Inc. (BVI High Court Civil Appeal No. 22 of 2008)** Edwards JA in dealing with an application to strike out noted that:

> "Striking out under the English CPR, r 3.4 (2) (a) which is the equivalent of our CPR 26.3 (1) (b), is appropriate in the following instances: where the claim sets out no facts indicating what the claim is about or if it is incoherent and makes no sense, or if the facts it states, even if true, do not disclose a legally recognizable claim.

Also, in **Ian Peters v Robert George Spencer (Antigua and Barbuda High Court Civil Appeal No. 16 of 2009)**, Pereira CJ (Ag.), as she then was, indicated that a statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be determined at trial by hearing oral evidence.

Applicants/Defendants' Submissions

[16] Learned Counsel for the defendant, Miss Kamilah Roberts, noted that the application before the court was primarily concerned with the application and interpretation of the Public Authorities Protection Act, Cap. 352 of the Laws of Antigua and Barbuda. She further noted that Section 2 of the Act states that:

> "Where any action, prosecution or other proceedings is commenced against any person for any act done in pursuance or execution or intended execution of any Act or of any public duty or authority or 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 case of a continuance of injury or damage, within six months next after the ceasing thereof".

Learned Counsel also observed that the Antigua and Barbuda PAPA reproduces the provisions of the English Public Authorities Act, 1893 which is also similar to Public Authorities protection legislation in other West Indian jurisdictions. Consequently, English case law on the old PAPA and case law of other Caribbean jurisdictions would be instructive in considering the issues to be determined in the present case.

[17] With respect to the issue as to whether Mount St. John's Medical Centre Board is a public authority, learned Counsel made lengthy submissions on this point. In determining whether a particular body is to be classified as a public authority, learned Counsel cited the case of **Littlewood v George Wimpey & Co. Ltd. and British Overseas Airways Corporation [1953] 1 WLR 426** where Parker J declared that:

> "in determining whether the corporation is or is not a public authority, I must consider the duties imposed as opposed to the powers given, the degree, if any of public control; and to whose benefit any profit is going to accrue".

Parker J also cited with approval the judgment of Lord Porter in **Griffiths v Smith [1941] AC 170** where he stated:

"a distinction must be drawn between a body carrying out transactions for private profit and those working for the benefit of the public. Profit they may undoubtedly make for the public benefit …… but they must not be a trading corporation making profit for their corporators".

[18] Learned Counsel has pointed out that the Mount St. John's Medical Centre Board was established by the Mount St. John's Medical Centre Act, No. 2 of 2009 (MSJMC Act) which repealed the Antigua and Barbuda Hospitals Board Act, 1999. Under the MSJMC Act, Counsel has highlighted the following to underscore the control of the Board by the Government, primarily through the Minister of Health:

(1) The members of the MSJMC Board are appointed by the Minister responsible for Health.
(2) The remuneration of the members of the Board is determined by Cabinet.
(3) The Minister of Health is empowered to revoke the appointment of members of the Board and all resignation of Board members must be addressed to the Minister.
(4) The Minister of Health is empowered to grant leave of absence to a Board member.
(5) The composition of the Board and any changes in membership must be published in the Gazette and in at least one newspaper circulating in Antigua.
(6) A copy of the minutes of each Board meeting must be forwarded to the Minister of Health within five days after confirmation of the minutes by the Board.

[19] With respect to the functions and duties of the Board, learned Counsel highlighted Section 9 (1) of the Act which states that the Board shall be responsible for the overall organization and management of the hospital to the standards of international health care accreditation agencies as may be specified by the Minister in Regulations made under the Act. Also, Section 9 (3) mandates, inter alia, that the Board shall:

(1) administer the hospital generally in an efficient manner to promote the welfare of the patients of the hospital;
(2) make available at the hospital modern methods of treatment of the sick and infirm;
(3) co-ordinate the administration and operation of the hospital; and
(4) make recommendations to the Minister on the development of the hospital and the hospital service in Antigua and Barbuda.

[20] With respect to the funding of the MSJMC Board, learned Counsel pointed out that pursuant to section 17 of the MSJMC Act that the funds and resources of the Board shall consist of fees and other charges for hospital services, monies borrowed by the Board, money or other property received by way of grants, gifts or bequests to the hospital and monies appropriated by the Legislature for the purposes of the hospital. Learned Counsel

has opined that the MSJMC Act clearly vests the ultimate financial control of the MSJMC in the government and the government is the primary source of funding for its operations.

[21] In turning to the issue whether the act complained of by the claimant was done in pursuance or execution of a public duty or intended execution of an Act, learned Counsel has noted that judicial guidance in case law can be gleaned from the Privy Council decision of **Firestone Tire and Rubber Co. Ltd. v Singapore Harbour Board [1952] AC 452**. In that case, Lord Tucker cited with approval a passage from **Griffiths v Smith [1941] AC 465** when he stated:

> "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".

Learned Counsel has noted that in the present case the Board is statutorily tasked with the responsibility for the administration, management and organization of the MSJMC. She further reiterated that under section 9 of the MSJMC Act, the Board is responsible for the administration of the hospital in an efficient manner to promote the welfare of patients, making available at the hospital modern methods of treatment of the sick and infirm and the co-ordination of the administration and operation of the hospital.

[22] Learned Counsel has argued that the complaint of the claimant that the defendants have acted in breach of contract in the management and supervision of the second defendant's negligent performance of an episiotomy, are all acts that were done in direct execution by the defendants of the public duty under the MSJMC Act. She noted that the provision of medical treatment to the claimant cannot be viewed as an incidental or subsidiary act. In borrowing the words from **Millen v University Hospital of the West Indies Board of Management (1986) 44 WIR** Leaned Counsel submitted that:

> "… the Board of management was charged with the duty of operating a hospital and providing treatment to its patients. It was in the provision of these services that the neglect complained of occurred, and it is very clear that the hospital was doing what it was charged with doing, caring for the sick. This was no side-wind or extra-curricular activity, but the very object for which it had been clothed with statutory powers".

In the **Millen** case, the act complained of by the claimant was the failure of the hospital to remove a suture at the appropriate time during the claimant's pregnancy or after the claimant gave birth.

[23] With respect to the claimant's assertion in paragraph 3 of her affidavit filed on 1st March, 2013 that the defendants are not entitled to the protection of the PAPA because of the breach of contract and breach of duty of care owed to her personally, learned Counsel submitted that this categorization of the duty owed by the defendants to the claimant is flawed. She noted that the first defendant owes a duty to the public at large to provide medical treatment at the MSJMC, and that as part of the execution of this public duty the

defendant may enter into contractual or other relationships with individual members of the public. However, she stated that this does not negate the fact that the first defendant would be acting in pursuance or execution of the MSJMC Act or in pursuance or execution of a public duty, since the duty owed to the claimant does not arise merely as a result of a contract between the parties, but is grounded in the statutory or public duty owed by the defendant to the claimant.

[24] Learned Counsel submitted that the act complained of by the claimant was an act that was done in pursuance or execution of a public duty or intended execution of the MSJMC Act and as such falls within the scope of the PAPA.

[25] With respect to the action of the second defendant, learned Counsel went on to submit that the second defendant is an employee of the first defendant and the performance of an episiotomy was an act performed in the ordinary course of the second defendant's duty as a nurse and midwife at the hospital. Learned Counsel further noted that the second defendant was acting as a servant or agent of the first defendant in the execution or intended execution of a public duty and as such is entitled to the protection of the PAPA. In support of this contention learned Counsel cited the case of **Nelson v Cookson [1940] 1 KB 103** where Atkinson J stated:

> "It has been recognized as law for a long time that if some duty or act is done in pursuance of a public authority and is being carried out by a public authority through a servant or agent, that servant or agent has the same right to the benefit of this section as the public authority would have".

[26] Now to the issue of when does time start to run. In this regard, learned Counsel contended that the episiotomy which is the basis of the claimant's complaint was performed on 12th April, 2012 and the claimant was discharged from the hospital on 14th April, 2012 and ceased to be a patient of the hospital from that date. Subsequently, the claimant visited a private doctor on or around 26th April, 2012 when she was informed that there had been a dehiscence of the left medio lateral episiotomy. Learned Counsel submitted that for the purposes of the PAPA the six (6) month period would have started to run from 12th April, 2012 i.e., the date of the act complained of.

[27] With respect to the claimant's assertion in paragraph 6 of her affidavit filed on 1st March, 2013 that her injuries are continuing and that the pain and suffering have not ceased, learned Counsel has noted that the law is clear on the point that "continuance of injury or damage" in the PAPA means the continuance of the act which caused the damage. In that regard, learned Counsel referred to the English Court of Appeal decision of **Freeborn v Leeming [1926] 1 KB 160** where the court applied the authority of **Carey v Bermondsey Borough Council (1903) 67 JP 447** in holding that the date from which the limitation period must run is the date of the act, neglect or default complained of and not the date on which the damage or injury ceased.

[28] In the case at bar, learned Counsel has opined that there has been no continuance of the alleged act of negligence or alleged breach of contract. She noted that the claimant's claim

relates to medical treatment received at MSJMC in April, 2012 and in particular the performance of an episiotomy on 12th April, 2012. Counsel has submitted, therefore, that the claim should have been initiated within six (6) months of the date of the negligent act complained of i.e., on or before 12th October, 2012. She noted that the claim was filed on 4th January, 2013 and is therefore statute barred under the provisions of the PAPA.

Respondent/Claimant's Submissions

[29] Learned Counsel for the claimant, Ms. C. Debra Burnette, noted that the PAPA which was passed in Antigua and Barbuda in 1916 is modeled from the now repealed English Public Authorities Protection Act, 1893. She further noted that the *locus classicus* in this area is the English case of **Bradford Corporation v Meyers [1916] AC 242** which is still good law and has been applied in several cases in the Eastern Caribbean Supreme Court jurisdiction. Learned Counsel stated that the principles emanating from the **Bradford Corporation** case are as follows:

(1) That the act complained of must be an act done in direct execution of a public duty.
(2) Is the act complained of one which is public and/or an obligation of the body carrying out the said act?
(3) Was the act complained of done for the benefit of the public and can the public complain if the said act was not done or was done negligently.

Learned Counsel has submitted that to properly consider whether the defendant hospital falls within the protection of the PAPA on the facts of the case, the court must follow the principles laid down in the **Bradford Corporation** case.

[30] Learned Counsel has noted that the claimant contracted with the first defendant to deliver her baby and not for an episiotomy which the second defendant, a servant of the first defendant, performed. The performance of the episiotomy was negligently done and the claimant asserts that this was a breach of her contractual relationship with the first defendant and an act of negligence. Learned Counsel has therefore submitted that the performance of the episiotomy is not an act done in the direct execution of the duties of the defendants under the MSJMC Act when the principles of **Bradford Corporation** are applied.

[31] The MSJMC Act, Counsel contends, only gives authority for the establishment of an obstetrics and gynaecology department. She submitted that there was no obligation by the defendants to perform an episiotomy and that once they carried out this act they were under a duty to exercise a duty of care. She further submitted that the performance of the episiotomy is not one which is public in its nature and certainly is not one of which the public can complain for non-performance by the defendants. It is the view of Counsel that this is the test which has been laid down, followed and applied in several cases in our jurisdiction.

[32] A look at those cases would be instructive. In the case of the **Attorney General of Antigua v Williams (1993) 45 WIR 169**, the respondent's motor ca r was damaged by a cattle reared at the livestock station operated by the Government when it wandered onto the highway. Sir Vincent Floissac CJ held that in engaging in the enterprise of rearing cattle at the station, the Government was merely exercising a power and was not executing a public duty and as a result could not rely on the six month limitation period. The case was therefore decided against the Government.

[33] In the case of **Andrew Thomas Bell v Commissioner of Police of the BVI, Civil Appeal No. 4 of 2001**, a police officer whose hearing was affected as a result of training in the use of firearms brought a claim against the Commissioner of Police for damages. Redhead JA applying the principles of **Bradford Corporation** held that the Commissioner of Police was not entitled to protection under the PAPA since there is nothing in the Police Act which mandated the Commissioner of Police to issue arms to Police Officers, even though the use of firearms is contemplated by section 10 (1) of the Police Act. In other words, there was no statutory duty placed on the Commissioner of Police to require police officers to undergo training in firearms.

[34] **Bradford Corporation** was also applied by Mitchell JA in the case of the **Attorney General of the Commonwealth of Dominica et al v Cecelia Robin HCVAP 2011/0034**. In this case the respondent, a nurse, suffered various injuries whilst on duty at the hospital as a result of receiving an electric shock when she turned on a light which was hanging loose due to renovation work. It was held that the act complained of arose out of a private obligation which the hospital owed to the respondent and not in the execution of any public obligation. In fact Mitchell JA noted:

> "Unlike the duty which the Hospital Authority may owe to its patients, the duty which it owes to its employees is owed to the employees personally. No member of the public could complain if the Authority did not employ nurses, but any affected member of the public could complain if the Authority refused to accept certain type or class of patient".

[35] Learned Counsel paid some attention to the Jamaican Court of Appeal case of **Millen v University of the West Indies Board of Management (1986) 44 WIR 274** since she noted that the defendant's application rests on that case. She opined that while the Jamaican court did not follow **Bradford Corporation**, its decision is not binding on our courts. Learned Counsel is of the firm view that in our jurisdiction **Bradford Corporation** is applied. She cited the case of **Daphne Alves v Attorney General of the Virgin Islands BVIHCV 2007/0306** where Hariprashad J applied **Bradford Corporation** and noted that it was "still sound law" as did Redhead JA in **Andrew Thomas Bell**. Learned Counsel has noted that in all the cases cited from our jurisdiction, the court has consistently guided itself by the decisive tests laid down in **Bradford Corporation** and our Court of Appeal has adopted the same which now forms part of our body of precedents.

[36] Finally, learned Counsel submitted that there is nothing in the MSJMC Act which mandates the Board or its employees to perform an episiotomy, and this is the central question which

must be asked and determined by the court. She further submitted that since the act complained of is not one which is caught by section 2 of the PAPA, then the defendants are not entitled to protection under the said Act. She therefore urged the court to dismiss the application with costs to the claimant to be assessed.

Analysis and Conclusion

[37] While Counsel on both sides have advanced opposing views, and this is expected as part of the nature of litigation, there is one issue on which they are in complete agreement (although stated in different terms) and that is that the central issue for the court's determination is whether the defendant is entitled to the protection of the PAPA.

[38] However, before addressing that issue, I wish to revisit the cases from our jurisdiction that were cited by Counsel for the claimant. These cases are:

(1) **Attorney General of Antigua v Williams (1993) 45 WIR 169**;
(2) **Andrew Thomas Bell v Commissioner of Police of the BVI, Civil Appeal No. 4 of 2001**;
(3) **Attorney General of the Commonwealth of Dominica et al v Cecelia Robin HCVAP 2011/0034**; and
(4) **Daphne Alves v Attorney General of the Virgin Islands BVIHCV 2007/0306**.

In all of these cases consideration was given to the principles established **in Bradford Corporation** and the cases were decided on their particular facts. In the case of the **Attorney General of Antigua v Williams (1993) 45 WIR 169**, it was held that the act by the government in rearing cattle at the paddock was not in execution of a public duty but was merely the exercise of a power. In the case of **Andrew Thomas Bell v Commissioner of Police of the BVI, Civil Appeal No. 4 of 2001**, it was held as well that the Commissioner of Police in requiring police officers to undergo firearms training was not acting in the direct execution of a statute or discharging a public duty. Redhead J also noted *obiter* that the matter is one involving master and servant. In both the cases of the **Attorney General of the Commonwealth of Dominica et al v Cecelia Robin HCVAP 2011/0034** and **Daphne Alves v Attorney General of the Virgin Islands BVIHCV 2007/0306**, the court held that the default complained of is a breach of the private duty arising under the contract of employment between the parties and the government. As a consequence the claims did not fall within the provisions of the PAPA.

[39] I will now give some attention to the Jamaican case of **Millen v University Hospital of the West Indies Board of Management (1986) 44 WIR** since this case is factually similar to the case at bar; and while Counsel for the defendant feels that this case is instructive, Counsel for the claimant is of the view that it failed to follow the principles of **Bradford Corporation** and should not be accorded any significance. I do not share this view of Counsel for the claimant since **Bradford Corporation** was considered in **Millen** in the same way it was considered in the cases cited from our jurisdiction. Neither do I share the view that the Jamaican Court of Appeal considered itself not bound by the decision of the

House of Lords in **Bradford Corporatiion**. Learned Counsel seems to have arrived at that view based on Carberry JA's obiter dicta that "it is probably safe to say that the **Bradford Corporation** case has posed such difficulty that it has more often been distinguished than followed".

[40] In the **Millen** case the claimant who was a patient of the University Hospital was fitted with a Shirodka suture to facilitate her pregnancy and allow her to carry her baby to full term. This type of suture would be removed at least two weeks before delivery, but where the patient was unsure of her dates the suture would be removed or cut just before delivery. The claimant gave birth and was discharged from the hospital, however, after experiencing pain and discomfort she visited a private doctor and the remains of suture was found which was believed to be the cause of her problems. The claimant sued the hospital for negligence for failure to remove the suture before delivery and also for negligence for failure to remove the suture after birth. While the hospital was seen to be negligent in its post-natal care of the claimant, the appeal was dismissed since the hospital was entitled to the protection of the PAPA in respect of the negligence of its employees.

[41] In turning now to the case at bar, even before addressing the issue as to whether the MSJMC is entitled to protection under the PAPA, it must be determined first whether the MSJMC is a public authority.

[42] While the PAPA does not provide a definition of a public authority, there is much guidance from the case law to assist in the determination as to whether a body should be deemed a public authority. In that regard, learned counsel for the defendant cited the case of **Littlewood v George Wimpey & Co. Ltd. and British Overseas Airways Corporation [1953] 1 WLR 426,** where Parker J provided useful guidance on the determination of a public authority. This case went on appeal to the Court of Appeal and to the House of Lords and Parker J's decision that the British Overseas Airways Corporation was a public authority was accepted. In applying Parker J's "test or definition" to the present case; it is clear from the MSJMC Act that the duties imposed on the Board, the control exercised over the Board by the government through the Minister of Health and the fact that any profits earned would be applied towards the operation of the MSJMC; that the MSJMC is indeed a public authority. I should note that learned Counsel for the defendant went to great lengths in her submissions to try to establish that the MSJMC is a public corporation. However, I do not think that this is an issue that was in any doubt and it certainly was not challenged by Counsel for the claimant.

[43] As I have indicated earlier, the central issue to be determined by the court is whether the defendant is entitled to the protection of the PAPA. It is well established that the PAPA does not protect every act done by a public authority. To determine whether a public authority is entitled to protection, one has to ascertain whether the act complained of by a claimant was done in pursuance or execution or intended execution of any Act or of any public duty or authority.

[44] Again, to determine this issue, one has to resort to the case law for judicial guidance. In this regard, I will do no more than to take note of the submission of learned Counsel for the

defendant when she cited the case of **Firestone Tire and Rubber Co. Ltd. v Singapore Harbour Board [1952] AC 452** (supra, paragraph 17) and the passage cited by Lord Tucker from **Griffiths v Smith** and I reiterate "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". Applying this test to the case at bar, what then would be the position?

[45] In the case at bar, the MSJMC Act gave the Board the responsibility for the overall organization and management of the hospital and that the Board should administer the hospital in an efficient manner to promote the welfare of its patients and make available modern methods of treatment of the sick and infirm. It is the position of learned Counsel for the defendant, therefore, that the Board is under a statutory duty to provide medical care to members of the public. While Counsel for the claimant does not dispute the fact that the Board has a statutory duty to provide medical care to the public, it is their position that the Board had no authority under the Act to perform an episiotomy since the Act only gave authority for the establishment of an Obstetrics and Gynaecology Department. I find this argument by Counsel for the claimant extremely difficult to accept. Along with the Obstetrics and Gynaecology Department, the Act also provides for the establishment of a Medical Department, Surgical Department, Paediatrics Department, Emergency Medicine Department, Diagnostic Medicine Department and an Anaesthesiology Department. If the argument by Counsel for the claimant is accepted, it would mean that any medical treatment or procedure given under any of these Departments would not be undertaken in pursuance or execution of any public duty or authority of the MSJMC Act.

[46] To take the argument of Counsel for the claimant to its logical conclusion, it would mean that all possible treatment and procedures that would be available in each Department would have to be specified within the MSJMC Act in order to be categorized as an act done in pursuance or execution or intended execution of any Act or of any public duty or authority. For example, in the case of the Obstetrics and Gynaecology Department, specifying the innumerable types of treatment and procedures in both specialties would make that approach very impractical. The Obstetrics and Gynaecology Department, like the other Departments of the MSJMC, were established to provide medical treatment to members of the public. The act complained of by the claimant was therefore an act which was done by the defendant in direct execution of the public duty under the MSJMC Act. In that regard, I do not think that the performance of an episiotomy could be seen as an incidental or subsidiary act. In fact, to borrow the words of Carberry JA in **Millen,** the performance of the episiotomy by the MSJMC "was no side-wind or extra-curricular activity, but the very object for which it had been clothed with statutory powers." Learned Counsel has opined that the MSJMC has the power to deliver the claimant's baby, but it did not have the power to perform an episiotomy. This position is logically flawed since the delivery of a baby or the performance of an episiotomy by the Obstetrics and Gynaecology Department of the MSJMC are all acts done in pursuance of the public duty of the MSJMC to provide health care services to the public. Put another way, the implication of Counsel's argument would be that the sole purpose of the Obstetrics and Gynaecology Department would be the delivery of babies.

[47] Learned Counsel for the claimant has also advanced the argument that the defendants are not entitled to the protection of the PAPA since the complaint of the breach of contract and breach of duty of care was owed to the claimant personally. However, Counsel for the defendant has submitted that this categorization of the duty owed by the defendants to the claimant is flawed. It is her contention as was established in **Bradford Corporation** that the duty owed to the claimant did not arise solely from a private bargain between the parties but is directly correlated to the statutory or public duty owed by the defendant to all its patients. The statement by Lord Shaw of Dunfermline in **Bradford Corporation** reinforces this point when he noted:

> "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 matter 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. Similarly, when a municipality, by virtue of private and public statutes, carries on a gas undertaking, the public duty of manufacture and supply finds its correlative in the right of the consumer, a public right which he has in common with all his fellow householders, to supply and to service. In both of these cases, accordingly, the Public Authorities Protection Act applies".

[48] I am satisfied that the act complained of by the claimant was an act done in the direct execution of the duties of the defendant under the MSJMC Act and therefore would be entitled to protection pursuant to section 2 of the PAPA.

[49] It would perhaps be a mute point at this stage that the second defendant, as an employee of the first defendant and performing an act in the course of her employment as a nurse, would also benefit from the protection of the first defendant under the PAPA. However, to put this proposition beyond doubt, it is instructive to quote Atkinson J in **Nelson v Cookson [1940] 1 KB 100** when he stated:

> "it has been recognized as law for a long time that if some duty or act is done in pursuance of a public authority and is being carried out by a public authority through a servant or agent, that servant or agent has the same right to the benefit of this section as the public authority would have".

[50] Although it has been established that the defendant is protected under the PAPA, it is still useful to consider the third issue raised by the defendant i.e., at what date does time begin to run. It is the contention of the claimant that her claim being one in contract and negligence for personal injuries, that the claim must be brought within three (3) years when the cause of action arose. However, that would be the case had the defendants not been entitled to protection under the PAPA. Pursuant to section 2 (a) of the PAPA:

"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 case of a continuance of injury or damage, within six months after the ceasing thereof".

It is the view of Counsel for the defendant that the claimant's claim arose out of the episiotomy that was done on 12th April, 2012. This being the case the claim should have been commenced within six (6) months of that date, that is to say, on or before the 12th October, 2012. Instead, the claim was filed on 4th January, 2013 and is thus statute barred in accordance with section 2 (a) of the PAPA. I am of the opinion that this view of Counsel for the defendant is correct.

Order

[51] In the circumstances and for the reasons outlined in the foregoing, the court orders as follows:

(1) The statement of claim is struck out as an abuse of the process of the court as the claim is statute barred having being filed after the six months limitation period pursuant to section 2 (a) of the Public Authorities Protection Act, Cap. 352 of the Laws of Antigua and Barbuda.

(2) Costs to be assessed, if not agreed.

[52] The court is grateful for the helpful written and oral submissions and authorities of learned Counsel on each side.

Charlesworth Tabor
Master (Ag.)