EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2011/0065

THE ATTORNEY GENERAL OF THE VIRGIN ISLANDS

Appellant

and

DAPHNE ALVES

Respondent

Before:

The Hon. Mr. Davidson K. Baptiste — Justice of Appeal
The Hon. Mde. Louise E. Blenman — Justice of Appeal
The Hon. Mr. Don Mitchell — Justice of Appeal [Ag.]

Appearances:

Ms. Vareen Vanterpool, with her, Ms. Maya M. Barry for the Appellant
Mr. John Carrington, QC, with him, Ms. Corine George, instructed by Sabals Law for the Respondent

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2013: May 7;
November 11.

Civil appeal – Employment contract – Workers compensation – Public Authorities Protection Act – Whether the limitation defence under the Public Authorities Protection Act apply to public servants who are injured in the course of their employment due to the negligence of their employer

The respondent suffered an injury while working as a nurse at a Government-owned hospital. The Government paid for her medical expenses for three years after her accident, until 2006. In 2007, the respondent brought an action for compensation against the appellant as the representative of her employer, the Crown. The appellant in their defence pleaded that she should have brought her action before the expiry of six months from the date of her injury in accordance with section 2 of the Public Authorities Protection Act ("the Act").

The learned trial judge ultimately held that the Government was not entitled to the protection under the Act. The appellant has appealed that decision.

Held: allowing the appeal; and ordering that each party pay their own costs on appeal and in the court below, that:

1. The act of negligence complained of by the respondent which led to her cause of action was an act done by Government in the direct execution of its duties to provide hospital services under the statute. As such, the Act would apply. Pursuant to that Act, the respondent's action ought to have been commenced within the limitation period, that is, within six months next after the act, neglect or default complained of. This not being the case, the respondent's claim would be time barred.

   Section 2 of the **Public Authorities Protection Act** applied; **Frederick Charles Vincent v The Tauranga Electric-Power Board (New Zealand)** [1937] AC 196 applied; **Balteano Duffus v National Water Commission** [2007] UKPC 35 applied; **Andrew Thomas Bell v The Commissioner of Police of the British Virgin Islands** Territory of the British Virgin Islands High Court Civil Appeal BVIHCVAP2001/0004 (delivered 26th January 2004, unreported) not followed; **Attorney General of the Commonwealth of Dominica et al v Cecilia Robin** Commonwealth of Dominica High Court Civil Appeal DOMHCVAP2011/0034 (delivered 27th June 2012, unreported) not followed.

2. It matters not whether one regards a claim as based on implied contract or on tort. There is no private duty owed by the State to a Government employee which is separate from the public duties being performed by the State. As long as the Act applies, it is binding on public servants and others claiming against the Government within its terms.

JUDGMENT

[1] **MITCHELL JA [AG.]**: Daphne Alves was employed as a nurse on a written contract with the Government of the Territory of the Virgin Islands. She was working at the Government-owned Peebles Hospital on 9th April 2003, the date of the incident. While she was attending to an elderly and immobile Alzheimer patient, the bed he was lying in collapsed due to a wheel falling off one of its legs. In attempting to prevent him from being injured in the fall, she held on to him, in the process of falling tearing a disc and injuring her spine, resulting in her suffering severe chronic pain and permanent disability. She brought her action against her employer, the Crown, on 17th December 2007. The Government never denied liability for her claim; indeed, they paid her medical expenses for three years after her accident, until May 2006.

[2] Mrs. Alves brought her action for compensation against the Attorney General as the representative of her employer under the Crown Proceedings Act.[1] The only defence the Crown raised to her claim was that she should have brought her action before the expiry of six months from the date of her injury in accordance with section 2 of the Public Authorities Protection Act ("the Act")[2] and sections 2, 26 and 27 of the Crown Proceedings Act. The Attorney General's position was that Peebles Hospital was created as a public hospital by the Public Hospital Act,[3] and the government had a statutory duty to conduct and maintain the hospital at the public expense. When the matter came up for trial the only issue was the limitation issue.

[3] The learned trial judge decided that the Government's public duty under the Public Hospital Act was not engaged by the claim. That Act merely vested the land and buildings that formed the hospital in the Government and vested the management in a Board. Mrs. Alves was a public officer as defined by the Constitution of the Virgin Islands, and there was an employer/employee relationship between the Government and Mrs. Alves. The act of neglect or breach of duty alleged by Mrs. Alves was of a private rather than a public character. At the time of her injury, Mrs. Alves was acting under a private contract of employment, and the duty of care was owed to her personally and not to all the public alike. The judge, basing her decision on the authorities of Bradford Corporation v Myers,[4] Griffiths and Another v Smith and Others,[5] Firestone Tire and Rubber Co. (S.S) LDtd v Singapore Harbour Board,[6] and Andrew Thomas Bell v The Commissioner of Police of the British Virgin Islands,[7] concluded that the Government was not entitled to the protection of the Act. This Court gave leave to appeal and stayed the assessment of damages.

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[1] Cap. 21, Revised Laws of the Virgin Islands 1991.
[2] Cap. 62, Revised Laws of the Virgin Islands 1991. See para. 5 below.
[3] Cap. 195, Revised Laws of the Virgin Islands 1991.
[4] [1916] 1 AC 242.
[5] [1941] AC 170.
[6] [1952] AC 452.
[7] Territory of the British Virgin Islands High Court Civil Appeal BVIHCVAP2001/0004 (delivered 26th January 2004, unreported).

[4] The Attorney General has appealed the decision on three principal grounds. The first is that the judge erred in holding that the Public Hospital Act did not address the employment of nurses, merely vested the hospital in the Government, and the allegations in this case did not involve a duty in connection with the ownership or occupation of real property. The second is that the judge erred in finding that the management and control of the Hospital was vested in the Board of the Authority and not the Government and any public duty arising under the Public Hospital Act belonged to the Board, a separate legal entity, and not in the Crown as Mrs. Alves' employer. The third is that the judge, having found that Mrs. Alves was a public officer, erred in holding that her employment was under a private contract of employment so that Government owed a personal duty to her and her employment did not engage the Government's public duty. There is really only one issue to be determined on this appeal: does the limitation defence under the Act apply to public servants who are injured in the course of their employment due to the negligence of their employer? If the answer is yes, does Mrs. Alves' claim fail?

[5] The starting point of the discussion is section 2 of the Act. This provides:

> "2. 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 Act or Ordinance, or of any public duty or authority or of any alleged neglect or default in the execution of such act, duty, or authority, the following provisions shall have effect–
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> (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."

The effect of this section is that there is a time limit of six months for a claimant to bring a claim against any person for any alleged neglect or default in the execution of a public duty or authority or for acts done in pursuance or execution of a statute, or any public duty or authority, or of any alleged neglect or default in the execution of such act, duty, or authority. Section 2(a) of the Act mirrors the provisions of

section 1 of the Public Authorities Protection Act 1893 of the United Kingdom, so that the UK and other Commonwealth authorities based on similar provisions are good precedents for determining the issue that arises in this case.

[6] The Bradford Corporation case is the generally accepted starting point for the establishment of the principle that a public authority is not protected by the Act on each occasion that it is alleged to have caused harm to someone. Here a municipal corporation was authorised by an Act of Parliament to carry on the undertaking of a gas company. It was bound to supply gas to the inhabitants of the district. It was also empowered to sell the coke produced in the manufacture of the gas. It contracted to sell and deliver a ton of coke to the plaintiff. By the negligence of its agent, the coke was shot through the plaintiff's shop window instead of into his cellar, causing considerable loss and damage. More than six months afterwards the plaintiff commenced an action of negligence against the Corporation. The Corporation pleaded the Act as a bar to the action. The House of Lords, affirming the decision of the Court of Appeal, which in turn upheld the decision of the Divisional Court, held that the act complained of was not done in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority, and the Act did not afford a defence to the action.

[7] Lord Buckmaster LC explained:

> "In other words, it is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. It is because the act is one which is either an act in the direct execution of a 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.
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> "This distinction is well illustrated by the present case. It may be conceded that the local authority were bound properly to dispose of their residual products; but there was no obligation upon them to dispose by sale, though this was the most obvious and ordinary way. Still less was there any duty to dispose of them to the respondent. No member of the public could have complained if the respondent had not been supplied;

> nor had any member of the public the right to require the local authority to contract with him.
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> "The act complained of arose because one of the servants of the appellants, acting in the course of an errand on which they had power to send him, but on which they were not bound in the execution of any Act or in the discharge of any public duty or authority to send him, in breach of his common law duty to his fellow citizens, caused damage by his personal negligence.
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> In my opinion an action for such negligence is not within the class of action contemplated by the statute."[8]

[8] Viscount Haldane, in his judgment in the same case, explained that where proceedings are taken against any person for an act done in pursuance or execution or intended execution of any statute, or of any public duty or authority, or for any neglect or default in the execution of such statute, duty, or authority, the ordinary right of the subject to his remedy is cut down by stringent provisions as to time. And, he continues:

> "My Lords, in the case of such a restriction of ordinary rights I think that the words used must not have more read into them than they express or of necessity imply, and I do not think they can be properly extended so as to embrace an act which is not done in direct pursuance of the provisions of the statute or in the direct execution of the duty or authority. What causes of action fall within these categories it may be very difficult to say abstractly or exhaustively. It is hardly easier to define a priori the meaning of being done directly than it is to define the number of grains that will make a heap. But just as it is not difficult to tell a heap when it is seen, so it may be easy at least to say of certain acts that they are not the immediate and necessary outcome of duty or authority in a particular case."[9]

[9] And, as Lord Atkinson said in his judgment:

> "... If the sale of coke was a reasonably good and proper way of dealing with it for this end, it might well be their duty to sell it. It did not necessarily follow, however, that they were bound to deliver what they sold at the residences of the purchasers, and above all they were under no obligation whatever to sell to any particular individual or to any specified class, or to any member of any class. If the respondent had, before he made his contract, required them to sell to him, they might with

[8] See note 5 at pp. 247-248.
[9] See note 5 at p. 251.

> impunity have refused to do so. If they had agreed to sell to him but refused to deliver, they could not be compelled to deliver or to agree to deliver. If they had refused to deliver except at the purchaser's risk, they could not be compelled to deliver on any other terms.
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> One cannot find, therefore, the obligation or duty to deliver with reasonable care, for the breach of which the action is brought, except in the contract made with a particular individual, the respondent. The only duty owed by the appellants to him emerges from that contract, not from the statute. It is a duty owed to one man, not to the public. The negligence of the appellants' servants complained of was not, therefore, a neglect or default in the execution of any "public duty or authority." It was a neglect or default in the discharge of a private duty due to one individual, and arising altogether out of that individual's contract with the public authority. Into this contract both the parties to it were free to enter or to abstain from entering."[10]

[10] In **Bell v The Commissioner of Police**, a police officer in the service of the Territory of the Virgin Islands Police Force was required to take part in firearm training with a variety of powerful weapons. During the exercise he suffered injury including irreparable ear damage, forcing him into premature retirement. Some sixteen months after the injury, he filed a claim alleging that despite his requests the police force had failed to provide him with any protective equipment for his ears, and he claimed damages. The police force pleaded the limitation defence. Trying the issue as a preliminary one, the trial judge held that the limitation defence applied. On appeal to the Court of Appeal, Redhead JA delivered the judgment of the court overturning the finding. He held there was no statutory duty requiring the Commissioner's obliging his police officers to undergo firearms training. Neither could it be said he was discharging a public duty to require police officers to undergo training in firearms. The action brought by Mr. Bell was one which involved master and servant issues. Relying on the **Bradford Corporation** case,[11] he held that no one but Mr. Bell was entitled to bring this action. In any event, he held, the duties of the Commissioner as they related to Mr. Bell did not encompass a public authority, and therefore the Act was inapplicable.

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[10] See note 5 at p. 254.
[11] Para. 6 above.

[11] The case of Attorney General of the Commonwealth of Dominica et al v Cecilia Robin,[12] was another where this Court of Appeal held that the Act did not provide a limitation defence where a government employee sued the State for injuries suffered as a result of its beach of a duty of care owed to her. Here, a nurse brought a claim against the Government for failure to protect her in the performance of her duties. She had been injured while on duty at the public hospital as a result of receiving an electric shock from turning on a light switch which was hanging loose due to defective renovation work performed by a contractor doing repairs at the Dialysis Unit in which she was working. The Court held, applying the Bradford Corporation case and the Bell case, that it was not because the act out of which the action arose was within Government's power that Government enjoyed the benefit of the statute. The act complained of arose in the execution of a private obligation which the Hospital authorities owed the respondent as its employee and not in the execution of any public obligation. The Hospital, as employer of Ms. Robin owed her a duty of care personally. The act of renovating the Dialysis Unit was not an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority, and as such the limitation period of six months stipulated under the Act was inapplicable to Ms. Robin's claim.

[12] On the other hand, there are Privy Council decisions binding on this Court that go the other way. In the decision of the Privy Council from New Zealand of Frederick Charles Vincent v The Tauranga Electric-Power Board (New Zealand)[13] the appellant was a linesman in the employment of the respondent, a body corporate constituted under the Electric-Power Boards Act, 1925 of New Zealand. While working on a transformer connection he had an accident and sustained severe burns. He claimed general and special damages alternatively on (a) a breach of an implied term of his contract of employment with the respondents or (b) on a breach of a duty owed by the respondents to him as a workman in their employ.

[12] Commonwealth of Dominica High Court Civil Appeal DOMHCVAP2011/0034 (delivered 27th June 2012, unreported).
[13] [1937] AC 196.

The words of section 127 of the New Zealand Act, as referenced in the Frederick Charles Vincent case, are as follows:

> "(1) No action shall be commenced against the Board or any member thereof, or other person acting under the authority, or in the execution or intended execution, or in pursuance of this Act, for any alleged irregularity or trespass or nuisance or negligence, or for any act or omission whatever, until the expiry of one month after notice in writing specifying the cause of action, the Court in which the action is intended to be commenced, and the name and residence of the plaintiff and of his solicitor or agent in the matter has been given by the plaintiff to the defendant.
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> (2) Every such action shall be commenced within six months next after the cause of action first arose, whether the cause of action is continuing or not."

The plaintiff issued his writ admittedly more than six months after the cause of action first arose. The Privy Council held that his claim was barred for being out of time.

[13] In delivering the judgment of the Board, Lord Alness said:

> "The decision of the appeal must, in their Lordships' opinion, turn upon the proper construction to be attached to s. 127 of the Act of 1925, and its application to the facts of the case. Mr. Stabel [counsel for the appellant], in the course of a forceful and ingenious argument, invoked the assistance which he conceived that he obtained from certain decisions pronounced in England under an analogous statute – namely, the Public Authorities Protection Act, 1893. In their Lordships' judgment, these decisions, to say the least of it, fall to be handled with care, inasmuch as the wording of the two statutes differs in material particulars. Their Lordships think that they must steadily bear in mind the terms of s. 127 of the New Zealand statute."[14]

[14] And, Lord Alness continued:

> "Now, their Lordships cannot doubt that this is an action against the Board for something done or omitted to be done in the execution or intended execution of the Act. The statutory words are characterised by the utmost amplitude, and they seem to their Lordships to leave the appellant no loophole of escape. It matters not whether one regards the appellant's claim as based on implied contract or on tort. The nomenclature employed appears to their Lordships, in the circumstances, to be

[14] At p. 202.

> immaterial. The appellant, in his amended statement of claim, has chosen to christen his first cause of action as implied contract, and his second as tort: but both sound in breach of reg. 178 of the Electrical Supply Regulations, 1927. In any event, the first alternative appears to their Lordships to be difficult to maintain. Mr. Stable was constrained to admit that he was unaware of any precedent for so basing such a claim as this, and he also admitted, that, if his argument was sound, the doctrine of implied contract might, with equal force, have been invoked, and successfully invoked, in any action of damages by a workman against his employer, for breach of the Factory Acts. If Mr. Stable is right, then the supineness of learned counsel in failing sooner to discover and apply this sovereign remedy against time limitation is, to say the least of it, remarkable.
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> "On analysis, the implied contract on which the appellant founds is revealed as being one of peculiar character. It is a contract on the part of the employer, as was pointed out in the course of the argument, to observe the requirements of reg. 178 – in other words, to obey the law. But the employer has no option to do otherwise. Moreover, if Mr. Stable is right, then, as he admitted, not only is any employee of the Electric-Power Board unaffected by the statutory time limit, but, whenever the relation of master and servant exists, that limit does not apply. This, it seems to their Lordships, is a reductio ad absurdum of the argument under consideration."[15]

It is to be noted that, although section 127 of the New Zealand Act is not verbatim the language of section 2 of the Act, it shares a similar effect in stipulating a time for the commencement of any action "against the Board or any member thereof, or other person acting under the authority, or in the execution or intended execution, or in pursuance of this Act..."

[15] Then, there is the decision of the Privy Council from Jamaica in the case of Balteano Duffus v National Water Commission.[16] Mr. Duffus was employed as Director, Corporate Planning, by the National Water Commission, a statutory body established under the National Water Commission Act. The Commission's statutory function was to supervise the provision of water supply services throughout Jamaica. Mr. Duffus was subsequently notified that the Commission was rationalising its operations with the consequence that his post was abolished

[15] At pp. 203-204.
[16] [2007] UKPC 35.

and he was required to go on pre-retirement leave at the end of which he was retired from the services of the Commission. At trial, the judge rejected the defence that the action was statute barred pursuant to the Act. He did so because he found that the actions of the Commission cannot be said to have been done in execution of the purpose of the Act. The Court of Appeal overturned his decision, and the Privy Council agreed. In the words of Lord Scott of Foscote in delivering the opinion of the Privy Council:

> "Their Lordships find this an astonishing conclusion. The abolition of the post of Director, Corporate Planning, was expressed to be done "to rationalise the operations" of the Commission. The chairman's letter [to Mr. Duffus] of 28 May 1990 said that "This rationalisation exercise makes it necessary for some posts to be abolished or made redundant and for some employees to be retired". No suggestion was made at trial that this had not been the reason why the post of Director, Corporate Planning, had been abolished and why Mr Duffus had been required to take early retirement. And how can it be suggested that steps taken to improve the efficiency of the discharge by the Commission of its statutory functions are taken otherwise than in execution of its statutory purposes?"[17]

And, the Privy Council agreed with the finding of the Court of Appeal that Mr. Duffus' action against his employer, having been commenced in excess of one year after the expiry of the limitation period under the Act, was barred.

[16] Ten years ago, the Privy Council considered the applicability of the Trinidad and Tobago equivalent of section 2 of the Act to a constitutional claim. This was the case of Felix Augustus Durity v The Attorney General of Trinidad and Tobago.[18] Mr. Durity was a magistrate suspended by the Judicial and Legal Services Commission on the ground that, having granted bail to an accused man in the sum of $25,000.00 when a judge had previously ordered that the surety be a higher figure, he had failed to follow and purported to reverse a judge's decision. He was charged with having conducted himself in a manner such as to bring the judicial and legal service into disrepute. A disciplinary tribunal was appointed to make a determination on the facts, but the proceedings were held in abeyance while Mr. Durity sought leave to bring judicial review of the decision. His

[17] At para. 14.
[18] [2002] UKPC 20.

application for leave was refused, but the disciplinary proceedings did not resume because negotiations then ensued in an attempt to reach agreement between the parties. Eventually, Mr. Durity exercised his right to early retirement and the disciplinary proceedings were discontinued. Subsequently, he commenced constitutional proceedings under section 14 of the Constitution of Trinidad and Tobago claiming declarations that the decision to suspend him had contravened his rights to constitutional due process under sections 4(a)(b) and 5(2)(e)(h) of the Constitution. The Attorney General raised preliminary objections claiming that the Act applied by virtue of a provision of the State Liability and Proceedings Act which was expressly incorporated into the Constitution. The Attorney General's submission that Mr. Durity's claim was statute-barred was accepted by the judge. The Court of Appeal dismissed his appeal. The Privy Council, however, reversed the decision of the Court of Appeal and held that the Act did not apply to constitutional proceedings.[19] As Lord Nicholls of Birkenhead expressed it,[20] at the forefront of the Constitution was a resounding declaration of the fundamental human rights and freedoms. These rights and freedoms are not to be cut down by other provisions in the Constitution save by language of commensurate clarity. The Constitution itself declares that they are not to be abrogated, abridged or infringed by any law except as expressly provided in Chapter 1 of the Constitution.[21]

[17] In remitting the constitutional issue to the Court of Appeal to be properly determined, Lord Nicholls of Birkenhead described the events surrounding the repeal of the United Kingdom equivalent of the Act in this way:

> "This statutory provision, it may be noted in passing, or its equivalent in the United Kingdom legislation, had a somewhat inglorious life. The (United Kingdom) Public Authorities Protection Act 1893, until its eventual repeal by the Law Reform (Limitation of Actions, Etc) Act 1954, attracted judicial criticism, in respect of both content and drafting. Most actions against public authorities were actions for personal injuries arising out of accidents. It was seen as unfair that plaintiffs injured by a public authority should have a far shorter time in which to commence a claim than if they

[19] At para. 29.
[20] At para 30.
[21] At section 5.

had been injured by someone in the private sector: see Stubbings v Webb [1993] AC 498, 502, per Lord Griffiths. The difficulties arising in the interpretation of the Act, and deciding which types of case fell within its scope and which did not, were repeatedly the subject of critical observations by the House of Lords: see Bradford Corporation v Myers [1916] 1 AC 242, 250, 251, Griffiths v Smith [1941] AC 170, 176, 181, 184, and Firestone Tire and Rubber Co (SS) Ltd v Singapore Harbour Board [1952] AC 452, 463-464. In the result the Act was always construed restrictively, lest "what was intended as a reasonable protection for a public authority would become an engine of oppression": see Burmah Oil Co (Burma Trading) Ltd v Lord Advocate 1963 SC 410, 448 per Lord President Clyde."[22]

[18] If **Bell v Commissioner of Police**[23] and **AG of Dominica v Robin**[24] are not distinguishable from the present case on their facts, then to the extent that they appear to hold that a public servant or employee of the Government is not subject to the limitation period in the Act when suing the government for breach of their contract of employment, then those cases were decided per incuriam, the Courts being evidently unaware of the previous decisions of the Privy Council in the **Frederick Vincent**[25] and **Balteano Duffus**[26] cases. These Privy Council decisions demonstrate that even though a master and servant relationship exists between the public authority and the claiming employee, their actions are nevertheless barred by the Act if they commence their action outside of the limitation period. The **Bradford Corporation** case[27] is not authority for the holding that the Act does not apply to a person claiming whether in tort or in contract as an employee of a public authority. There is no private duty owed by the State to a Government employee which is separate from the public duties being performed by the State. It does not matter that the act complained of was an issue between the parties in respect of the claimant's employment, and that no one but the claimant could have brought the action. So long as our Parliament chooses to retain this Act, now long ago repealed in the jurisdiction from which we

[22] At para. 20.
[23] Para. 10 above.
[24] Para. 11 above.
[25] Paras. 12-14 above.
[26] Para. 15 above.
[27] Para. 6 above.

obtained it, it is binding on public servants and others claiming against the Government within the terms of the Act.

[19] Applying the above authorities to the facts in this case I conclude that the Act applied to Mrs. Alves' right to bring an action against the Government. The act of negligence out of which Mrs. Alves' action arose (the providing of a defective bed to a hospital patient) was an act performed by Government in the direct execution of its duties to provide hospital services under the statute. The maintenance of the hospital and the carrying out of the public function of providing health services is impossible without nurses. There is no significance in the fact that only Mrs. Alves could have brought the action in her case for breach of a duty of care owed to her as an employee. When a road user is injured by the negligent driving of a government employee during the performance of his duties, the duty of care is similarly owed to the injured road user personally, and only that road user can bring an action for his injury. But, if the driving by the government employee occurred while he was on duty within the meaning of section 2 of the Act, the injured person must bring his claim within the limitation period. The principle applies equally to a Crown employee suing under her contract of employment.

[20] It would be an astonishing conclusion, in the words of Lord Scott of Foscote,[28] if it were open to the Crown to admit liability to an employee injured in its employment due to its negligence, to pay compensation for a period of three years as in this case, and then to stop all payments and be allowed successfully to plead the limitation defence when the employee comes to the Court in search of relief. And, to adapt the words of Lord Alness,[29] it might be considered supine of a head of department not in every case to apply the sovereign remedy of engineering the limitation period to his department's advantage by being quick to admit liability whenever a person is injured due to the negligence of his department, thus lulling the person into a feeling of false security, only to spring the limitation period on her after the period of six months has passed without her having brought the

[28] At para. 15 above.
[29] At para. 14 above.

necessary action before the court. It would be more than unfair. The provision would not then, in the words of Lord Nicholls of Birkenhead,[30] be an exercise of a reasonable protection for a public authority, but a real engine of oppression. However, a claimant who wishes to rely on any purported waiver of the limitation defence is required to file a reply to the defence pleading those facts on which she would rely to establish a clear and unequivocal representation of waiver or any conduct by which waiver could be implied. No reply having been filed in this case the question of waiver did not arise for the consideration of the court below or for this Court.

[21] In the circumstances of this case, I would find that the Crown is entitled to the protection of the statute. I would allow the appeal and, exceptionally, in exercise of the discretion afforded me by rule 64.6 of the Civil Procedure Rules 2000, I would order each party to pay their own costs both here and in the court below.

Don Mitchell
Justice of Appeal [Ag.]

I concur.

Davidson K. Baptiste
Justice of Appeal

I concur.

Louise E. Blenman
Justice of Appeal

[30] At para. 17 above.