EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

SKBHCVAP2015/0006

BETWEEN:

[1] HAZELINE MAYNARD
[2] DONASHA WATTLEY
as Administratrices of the Estate of
Terrene Johnson, deceased

Appellants

and

[1] THE SAINT CHRISTOPHER AND NEVIS SOLID WASTE MANAGEMENT CORPORATION
[2] OLIVER MAYNARD

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal

On written submissions:

Mr. Arudranauth Gossai and Ms. Liska Hutchinson of Gonsalves Parry for the Appellants
No submissions filed by the Respondents

2015: October 1.

Interlocutory appeal – Limitation period – Fatal accident – Public Authorities Protection Act (Cap. 5.13) – Limitation privilege contained in s. 2 of Public Authorities Protection Act – Whether privilege of 6 month limitation period contained in s. 2 of Public Authorities Protection Act applies to and is thus enjoyed by 1st respondent established pursuant to Solid Waste Management Act (Act No. 11 of 2009) – Whether learned master erred in finding that appellant's claim statute barred pursuant to s. 2 of Public Authorities Protection Act – Whether it was open to learned master to conclude without benefit of evidence that at time of accident nature of function being carried out was garbage collection and that deceased was injured in course of 1st respondent carrying out its public duty conferred by the Saint Christopher and Nevis Solid Waste Management Corporation Act (Cap. 11.05) –

Whether claims made under Fatal Accidents Act caught by time limitation contained in s. 2 of Public Authorities Protection Act notwithstanding express time limitation contained in Fatal Accidents Act

The appellants are the personal representatives of the deceased Terrene Johnson ("the Deceased"). They brought a claim for damages for the benefit of the dependants of the deceased pursuant to the Fatal Accidents Act[1] ("the FAA") and for the benefit of the estate of the Deceased, pursuant to the Law Reform (Miscellaneous Provisions) Act.[2] The claim was brought more than six months but less than twelve months after the accident and death of the Deceased. The appellants' averred in their statement of claim that on 13th November 2012, the Deceased died as the result of a motor vehicle accident that occurred on the same date, which accident was as a result of the negligent driving by the second respondent of a vehicle owned by the first respondent ("the Corporation"). The second respondent was said to be an employee of the Corporation. The Corporation is a statutory corporation established under the Saint Christopher and Nevis Solid Waste Management Corporation Act[3] and which was continued as a body corporate under a later enactment, namely, the Solid Waste Management Act[4] ("the SWMA"). It was further averred in the statement of claim that the Deceased, who was employed as a loader by the Corporation, was travelling along the road on the Corporation's motor lorry which was being driven by the second respondent who so negligently drove or managed the said lorry along the road that he caused or permitted it to skid and overturn, thereby fatally injuring the Deceased. The claim was commenced on 12th November 2013, just one day before the first anniversary of the accident and the death of the Deceased.

The Corporation filed a defence to the claim on 16th December 2013, in which it stated that the claim was statute barred pursuant to section 2 of the Public Authorities Protection Act[5] ("the PAPA"). Section 2(1)(a) of the PAPA states that: '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 of any public duty or authority or of any alleged neglect or default in the execution of any such act, duty or authority … 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.' The appellants filed a reply to the Corporation's defence on 31st December 2013 and the second respondent filed his defence to the claim on 16th January 2014. It was not until 11th July 2014 that the Corporation applied by way of interlocutory application for various declarations, one being a declaration that the action was an abuse of process as it was statute barred pursuant to section 2 of the PAPA. Additionally, the Corporation sought an order striking out the claim as an abuse of process pursuant to CPR 26.3(1)(c) and/or the Court's inherent jurisdiction apparently on the basis that the claim was statute barred under section 2 of the PAPA.

[1] Cap. 23.10, Revised Laws of Saint Christopher and Nevis 2009.
[2] Cap. 5.08, Revised Laws of Saint Christopher and Nevis 2009.
[3] Cap. 11.05, Revised Laws of Saint Christopher and Nevis 2009.
[4] Act No. 11 of 2009, Laws of Saint Christopher and Nevis.
[5] Cap. 5.13, Revised Laws of Saint Christopher and Nevis 2009.

The matter came on for hearing before the learned master well before it was ready for trial, most probably before a case management conference was held.

The learned master found that the Corporation was a public authority within the meaning of the PAPA and the act complained of was done in pursuance or execution of an act or of a public duty by the respondents and this entitled them to the protection contained in the PAPA. The learned master further found that the Corporation was carrying out its public duty through the second respondent, its servant, and thus, the second respondent was also covered by section 2 of the PAPA. She also found that the appellants' FAA claim fell within the description of claims to which the PAPA applies. The learned master went on to strike out the claim not only as against the Corporation but also as against the second respondent, notwithstanding that no relief had been sought by him, on the basis that the second respondent was also protected by section 2 of the PAPA.

The appellants appealed the learned master's decision. The main issues which arose on appeal were: (1) whether the privilege of the six month limitation period contained in section 2 of the PAPA applied to and is thus a privilege enjoyed by the Corporation established pursuant to the SWMA; (2) whether it was open to the learned master to conclude without the benefit of evidence that, 'at the time the accident occurred … the nature of the function being carried out … was garbage collection' and that the Deceased was injured in the course of the Corporation carrying out 'its public duty conferred by the [Saint Christopher and Nevis Solid Waste Management Corporation Act]'; and (3) whether claims made under the FAA, notwithstanding the express time limitation contained therein, are nevertheless caught by the time limitation contained under section 2 of the PAPA.

Held: allowing the appeal, and ordering that the decision of the learned master be set aside in its entirety and that the first respondent bears the costs of the appeal fixed in the sum of $1,500.00, that

1. The learned master erred in finding that a body that is not the servant or agent of the Crown can still be deemed a public authority for the purposes of the PAPA. The entire object of the protection afforded by the PAPA is the Crown. In particular, section 26 of the **Crown Proceedings Act** expressly states that the Crown enjoys the privilege of the time limitation contained in section 2 of the PAPA. The immunities and privileges granted by the PAPA are the Crown's, enjoyed through its servants or agents. In addition to determining whether the Corporation may be classified as a public authority, the learned master ought to have also determined whether the Corporation, particularly since it has all the legal characteristics of a corporation sole, is the servant or agent of the Crown and thus attracts the immunities and privileges of the Crown, or, whether it is, in effect, its own master and therefore would not ordinarily attract such immunities and privileges unless expressly bestowed. Section 14 of the SWMA expressly states that the Corporation is not a servant or agent of the Crown and that it does not enjoy any status, immunity or privilege of the Crown. Therefore, the learned master ought to have found that the Corporation, even if classified as a public authority, was expressly exempted from the time limitation privilege contained in

section 2 of the PAPA by virtue of the express provisions of section 14 of the SWMA.

Tamlin v Hannaford [1949] 2 All ER 327 applied; **Griffith (Brent) v Guyana Revenue Authority and Another** (2006) 69 WIR 320 applied.

2. Whether or not the Corporation, through its employee, the second respondent, was engaged in the performance of any public or statutory duty of the Corporation was a matter which could have only been determined at trial on the evidence adduced and not at the stage the matter was at before the learned master. Accordingly, it was not open to the learned master to conclude, without any evidence, that at the time the accident occurred, the nature of the function being carried out was garbage collection and that the Deceased was injured in the course of the Corporation carrying out its public duty conferred by the **Saint Christopher and Nevis Solid Waste Management Corporation Act**. On the state of the pleaded cases these were findings which could only be reached following a trial on those issues.

3. The PAPA refers, in substance, to an action in the nature of an indemnity – in essence, an action personal to the person damaged or injured by the wrongful act, neglect or default of the public authority. The learned master failed to recognise that the claim under the FAA was not a claim devolving to the estate of the Deceased, but rather, it was a new right of action vested in a class of persons therein set out, for their benefit under the FAA, and to which the time limitation set under the PAPA did not apply. Therefore, section 2 of the PAPA is not applicable to the claim under the FAA and the action having been brought later than six months but less than twelve months after the accident and the death of the Deceased, is maintainable. The intention of Parliament based on the provisions and tenor of the FAA, was that this right of action, to be exercised within twelve months after the death of the deceased, was not to be governed or circumscribed by the limitation contained in the PAPA but rather, is to be governed only by its own limiting provisions attached to the right of action thereby granted. It could not have been in the contemplation of Parliament to create a specific right which could be exercised within a twelve month period only to have the same right defeated by a more general limitation provision in another statute such as the PAPA.

British Electric Railway Company, Limited v Violet Gentile [1914] AC 1034 applied; **Whittington v The County of Middlesex** [1948] OR 419-428 applied; **Tardif (Estate of) v Wong** [2002] ABCA 121 applied.

JUDGMENT

[1] **PEREIRA CJ:** This interlocutory appeal arises from the judgment of the master delivered on 3rd February 2015 wherein the learned master ordered that the claim

brought by the appellants as Administratrices of the Estate of Terrene Johnson, ("the Deceased") against the respondents be struck out as being time barred pursuant to section 2 of the **Public Authorities Protection Act**[6] ("the PAPA"), the claim having been brought after six months from the date of the alleged wrongful act or default.

The proceedings before the master

[2] The appellants, who are the personal representatives of the deceased, brought a claim for damages for the benefit of the dependants of the deceased pursuant to the **Fatal Accidents Act**[7] ("the FAA") and for the benefit of the estate of the Deceased, pursuant to the **Law Reform (Miscellaneous Provisions) Act**.[8] The claim was brought more than six months but less than twelve months after the accident and death of the Deceased. It was averred in the appellants' statement of claim that on 13th November 2012, the Deceased died as the result of a motor vehicle accident that occurred at Bourryeau Village in St. Kitts on the said 13th November 2012 as the result of the negligent driving by the second respondent of a vehicle owned by the first respondent ("the Corporation"). The second respondent is said to be an employee of the Corporation.

[3] The Corporation (the second defendant below) is a statutory corporation established under the **Saint Christopher and Nevis Solid Waste Management Corporation Act**.[9] The Corporation was continued as a body corporate under a later enactment, namely, the **Solid Waste Management Act**[10] ("the SWMA").

[4] The statement of claim also averred that the Deceased, who was employed as a loader by the Corporation, was travelling along the road on the Corporation's motor lorry which was being driven by the second respondent who so negligently

[6] Cap. 5.13, Revised Laws of Saint Christopher and Nevis 2009.
[7] Cap. 23.10, Revised Laws of Saint Christopher and Nevis 2009.
[8] Cap. 5.08, Revised Laws of Saint Christopher and Nevis 2009.
[9] Cap. 11.05, Revised Laws of Saint Christopher and Nevis 2009.
[10] Act No. 11 of 2009, Laws of Saint Christopher and Nevis.

drove or managed the said lorry along the road that he caused or permitted the lorry to skid and overturn thereby fatally injuring the Deceased.

[5] The appellants obtained a grant of Letters of Administration on 1st July 2013. The claim was commenced on 12th November 2013 which is essentially one day shy of the first anniversary of the accident and death of the Deceased.

[6] The Corporation filed a defence to the claim on 16th December 2013. In that defence it raised the time limitation defence in reliance on section 2 of the PAPA. The appellants filed a reply to the Corporation's defence on 31st December 2013. The second respondent filed his defence on 16th January 2014. It was not until 11th July 2014 that the Corporation applied by way of interlocutory application for various declarations, one being a declaration that the action was an abuse of process as it was statute barred pursuant to section 2 of the PAPA. Additionally, the Corporation sought an order striking out the claim as an abuse of process pursuant to CPR 26.3(1)(c) and/or the Court's inherent jurisdiction. The abuse of process seemingly relied upon is grounded only on the basis of the declaration sought as to the claim being statute barred under section 2 of the PAPA. No other basis is put forward in the application. It is not clear from the record whether any case management directions were given in respect of the claim, but the Corporation's application came on before the master seemingly before a case management conference was held, as there is no evidence of any case management directions being given. Given the stage of the pleaded cases, the matter was certainly not ready for trial.

The master's findings

[7] In her written judgment the learned master found that:

(a) The Corporation is a public authority within the meaning of the PAPA;[11]

[11] See para. 28 of the learned master's judgment.

(b) The act complained of by the appellants was done in pursuance or execution of an act or of a public duty by the respondents and this entitled them to the protection contained in the PAPA. In this regard, the learned master, after setting out the averments made by the appellants in their statement of claim, stated at paragraph 33:

> "It is therefore not disputed that the deceased and the 1st defendant were acting in the course of their employment with the 2nd defendant at the time the accident occurred and that the nature of the function being carried out by the 2nd defendant, through its servants, was garbage collection. The deceased was injured in the course of the 2nd defendant, carrying out its public duty conferred by the **Solid Waste Act**. The duty of waste disposal and management cannot be viewed as an incidental to the powers and duties conferred on the 2nd defendant by the Solid Waste Act. The act of the 2nd defendant therefore falls within the acts covered by section 2 of the **PAPA**."

(c) The Corporation was carrying out its public duty through the second respondent, its servant, and thus, the second respondent was also covered by section 2 of the PAPA.[12]

(d) The appellants' FAA claim falls within the description of claims to which the PAPA applies. In this regard, the learned master had this to say at paragraphs 62 to 64:

> "[62] I find that the claim commenced by the claimants under the **FAA** is an action "commenced against a person for an act done in pursuance or execution of any Act or any public duty or authority or of any alleged neglect or default in the execution of any such act, duty or authority" and consequently the claim falls within the ambit of claims covered under section 2 of the **PAPA**.
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> "[63] The provisions of the **PAPA** are "general and far reaching and there is no hint of any exception with respect to proceedings"[25] [*McCardie J in Venn v Tedesco [1926] 2 KB 227 [at] 229*] under the **FAA**. The evident hardship created by the PAPA can only be alleviated through the actions of Parliament.
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> "[64] A claim which falls within the scope of actions covered by the **PAPA** must be commenced within 6 months of the act or

[12] See para. 35 of the learned master's judgment.

> neglect complained of. In this case the claimants' claim was commenced more than six (6) months after the death of the deceased and consequently is barred by virtue of section 2 of the **PAPA**."

[8] The learned master went on to strike out the claim not only as against the Corporation but also as against the second respondent, notwithstanding that no relief had been sought by him. This, she said, was on the basis that the second respondent was also protected by section 2 of the PAPA. No mention whatsoever was made of the claim made under the **Law Reform (Miscellaneous Provisions) Act**. It can only be assumed that the claim under this enactment was without more, struck out along with the claim under the FAA.

The appeal

[9] The appellants have put forward some ten grounds of appeal detailing the ways in which they say the learned master erred. These grounds, however, can be conveniently collapsed into three main issues which may be stated this way:

(i) Whether the privilege of the six month limitation period contained in section 2 of the PAPA applies to and is thus a privilege enjoyed by the Corporation established pursuant to the SWMA.

(ii) Whether it was open to the learned master to conclude without the benefit of evidence that, 'at the time the accident occurred … the nature of the function being carried out … was garbage collection' and that the Deceased was injured in the course of the Corporation carrying out 'its public duty conferred by the [Saint Christopher and Nevis Solid Waste Management Corporation Act]';[13]

(iii) Whether claims made under the FAA, notwithstanding the express time limitation contained therein, are nevertheless caught by the time limitation contained under section 2 of the PAPA.

[13] See para. 33 of the learned master's judgment.

Despite service of the notice of appeal on the second respondent on 9th April 2015 and on the first respondent, on 7th July 2015, and the filing and service of a notice of objection by the first respondent, no submissions have been received from the respondents pursuant to CPR 62.10(4). I propose to address the above three issues in turn.

PAPA – the six month limitation privilege

[10] An appropriate starting point for this discussion is by reciting section 2 of the PAPA and then juxtapose it with the relevant sections of the SWMA. Section 2(1)(a) of the PAPA states:

> "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 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 case of a continuance of injury or damage, within six months next after the ceasing thereof." (Emphasis added).

Section 14 of the SWMA states:

> "14. **The Corporation** shall not be regarded as the servant or agent of the State or as **enjoying any status, immunity or privilege of the State**, except that as agent of the State it shall be exempt from tax, duty, rate, levy or other charge, and the Corporation's property shall not be regarded as property of, or property held on behalf of, the State." (Emphasis added).

[11] The PAPA does not contain a specific definition of public authority. Whether a person falls to be categorised as a public authority is to be ascertained, as the case law has established, by a consideration of the duties imposed as opposed to the powers given, the degree, if any, of public control, and whether it is for the benefit of the public rather than for private profit.[14]

[14] See: Littlewood v George Wimpey & Co. Ld. and British Overseas Airways Corporation [1953] 1 WLR 426; Millen v University Hospital of the West Indies Board of Management (1986) 44 WIR 274.

[12] The learned master, after having considered the duties imposed by the SWMA and its purposes, concluded that the Corporation would be considered a public authority. Indeed the learned master opined at paragraph 25 that a body that is not the servant or agent of the Crown can still be deemed a public authority for the purposes of the PAPA. I do not agree with this statement. The entire object of the protection is the Crown. The immunities and privileges granted are the Crown's, enjoyed through its servants or agents. In **Tamlin v Hannaford**,[15] Denning LJ put it this way:

> "The protection of the interests of all these – taxpayer, user and beneficiary – is entrusted by Parliament to the Minister of Transport. He is given powers over this corporation which are as great as those possessed by a man who holds all the shares in a private company, subject, however, as such a man is not, to a duty to account to Parliament for his stewardship. … These are great powers, but still we cannot regard the corporation as being his agent, any more than a company is the agent of the shareholders or even of a sole shareholder. In the eye of the law the corporation is its own master and is answerable as fully as any other person or corporation. **It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not Crown property**. It is as much bound by Acts of Parliament as any other subject of the King. **It is, of course, a public authority and its purposes no doubt, are public purposes, but it is not a government department nor do its powers fall within the province of government**.
>
> "**When Parliament intends that a new corporation should act on behalf of the Crown, it, as a rule, says so expressly** …"[16] (Emphasis added).

I adopt this dictum which is quite apt to the circumstances of this case.

[13] Lord Denning's dictum in **Tamlin** was referred to with approval in more recent times by the Caribbean Court of Justice in **Griffith (Brent) v Guyana Revenue Authority and Another**[17] where Nelson J, in reliance on **Tamlin**, said at paragraph 40 of his judgment:

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[15] [1949] 2 All ER 327.
[16] At pp. 328-329.
[17] (2006) 69 WIR 320.

> "Thus it is clear that the Revenue Authority is a public authority. … However, the Revenue Authority does not by virtue of that status become synonymous with the Government or with a Government Department. Nor do the employees of the Revenue Authority become public officers, or even public servants."

[14] It is quite arguable, given the duties and purposes of the Corporation under the SWMA, that it is a public authority. But that is not the end of the matter. It must then be determined whether that public authority, particularly one which has all the legal characteristics of a corporation sole, is a servant or agent of the Crown and thus attracts the immunities and privileges of the Crown, or, whether it is, in effect, its own master and therefore would not ordinarily attract such immunities and privileges unless expressly bestowed. In the present case the exercise is simple. The language of section 14 of the SWMA is clear. It expressly states that the Corporation is not a servant or agent of the Crown. It also expressly states that the Corporation does not enjoy 'any status, immunity or privilege of the Crown.' It cannot be doubted that the Crown enjoys the privilege of the time limitation contained in the PAPA. This is expressly stated in section 26 of the **Crown Proceedings Act**[18] which states:

> "Nothing in this Act shall prejudice the right of the Crown to rely upon the law relating to the limitation of time for bringing proceedings against **public authorities**." (Emphasis added).

[15] The learned master was therefore required not only to find whether the Corporation may be classified as a public authority but was further required to consider whether this particular public authority, namely the Corporation, had the benefit of the time limitation privilege contained in section 2 of the PAPA. Adopting the dictum of Lord Denning in **Tamlin**, it would be safe to say that the Corporation, given its full corporate personality provided under the SWMA would not ordinarily enjoy the privileges and immunities of the Crown as if it was a servant or agent of the Crown when it was in all legal respects created as its own master. But the positon here is even stronger, for the very enactment establishing

[18] Cap. 5.06, Revised Laws of Saint Christopher and Nevis 2009.

the Corporation goes further in making it plain that those privileges and immunities accorded to the Crown are not to be enjoyed by the Corporation.

[16] The learned master was not at liberty to disregard the expressed and unambiguous language of section 14 of the SWMA and give the Corporation an immunity or privilege under section 2 the PAPA which protects public authorities such as a governmental department or a public officer from action unless brought within six months and which Parliament had seen fit to expressly take away. The language of section 14 of SWMA, according it its ordinary meaning, is unambiguous and must be applied. Section 14 expressly exempts the Corporation from taking the benefit of the time limitation privilege which the Crown and thus its servants or agents (be it a public authority or other person performing a public duty) would ordinarily enjoy under section 2 of the PAPA. Accordingly, the learned master, in my view, ought to have found that the Corporation, even if classified as a public authority was expressly exempted from the time limitation privilege contained in section 2 of the PAPA by virtue of the express provisions of section 14 of the SWMA. Indeed, the express exemption aside, it was also quite arguable that the Corporation, given its legal status as a corporation sole, does not attract the benefit of the time limitation under section 2 of the PAPA. Her conclusion that the time limitation contained in section 2 of the PAPA applied to the Corporation was accordingly, in my view a premature finding and was in error and ought not to stand.

The public duty being carried out by the Corporation

[17] This point can be dealt with shortly. All that the learned master had before her were the parties' respective pleaded cases. There were no witness statements or any evidence by way of affidavit or otherwise addressing the issue as to the duties or acts of a public or statutory nature being performed at the time of the accident. Assessing the averments as pleaded, it was certainly arguable that at the time of the accident the Corporation through its employee, the second respondent, was not engaged in the performance of any public or statutory duty of the Corporation.

Whether or not this was so was a matter which could only be determined at trial on the evidence adduced and not at this stage. Accordingly, as counsel for the appellants contend, it was premature and thus not open to the learned master to conclude at the stage that the matter had reached, and without a shred of evidence, that at the time the accident occurred the nature of the function being carried out was garbage collection and that the Deceased was injured in the course of the Corporation carrying out its public duty conferred by the **Saint Christopher and Nevis Solid Waste Management Corporation Act**. On the state of the pleaded cases these were findings which could only be reached following a trial on those issues. These findings by the learned master should accordingly be set aside.

FAA claims and PAPA

[18] Although my conclusion on the first issue would render this issue for all practical purposes moot, I nevertheless consider it useful to address this issue as there appears to be a dearth of authority in this jurisdiction dealing with the interplay between a claim brought under the FAA and the effect, if any, on such a claim brought against a public authority which may enjoy the time limitation protection contained in the PAPA. The learned master was clearly not persuaded by the Privy Council decision in **British Electric Railway Company, Limited v Violet Gentile**[19] which counsel for the appellants urged upon her as binding authority for saying that the time limitation in section 2 of the PAPA does not trump and must give way to the time limitation contained within the provisions of the FAA itself. She concluded[20] that **Gentile** was decided on its own peculiar facts and on the peculiar wording of the limitation statute there being considered, which was section 60 of the **Consolidated Railway Company's Act**, 1896 of British Columbia ("CRCA").

[19] [1914] AC 1034.
[20] At para. 44 of her judgment.

[19] In **Gentile**, the Privy Council was dealing with an appeal from British Columbia. A claim in negligence was brought on behalf of the parents of a deceased man pursuant to the **Families Compensation Act** against the railway company after one of its tram cars knocked down and instantly killed the man. The action was commenced more than six months but less than twelve months after the accident and the man's death. The railway company argued that the claim was time barred by virtue of the six month time limitation contained in section 60 of the CRCA which was in these terms:

> "**All actions or suits for indemnity for any damage or injury sustained** by reason of the tramway or railway, or the works or operations of the company, **shall be commenced within six months next after the time when such supposed damage is sustained**, or, if there is continuance of damage, within six months next after the doing or committing of such damage ceases, and not afterwards, and the defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act."[21] (Emphasis added).

The **Families Compensation Act** provided that actions thereunder shall be commenced within twelve calendar months of the death of the deceased. The Privy Council held that the cause of action under the **Families Compensation Act** was a different cause of action from that which the deceased person would have had if he had lived, and was not one to which the limitation section in the CRCA applied and that the action was accordingly maintainable.

[20] Lord Dunedin, in delivering the opinion of the Board in **Gentile** opined that the **Families Compensation Act** was in all material respects the same as the FAA (known as **Lord Campbell's Act**). In speaking of **Lord Campbell's Act**, at pages 1039-1040 he had this to say:

> "As early as 1852, in the case of *Blake v. Midland Ry. Co.* (1) [*18 Q.B. 93, at p. 110*], Coleridge J., giving the judgment of the Court, said: 'But it will be evident that this Act does not transfer this right of action' (of the deceased) 'to his representative, but gives to the representative a totally new right of action, on different principles.' '[I]n the case of *Seward v. Vera Cruz (Owners of)* (3) [*10 App. Cas. 59, at pp. 67 and 70*] Lord

[21] British Electric Railway Company, Limited v Violet Gentile [1914] AC 1034 at 1038-1039.

> Selborne L.C. said: 'Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation of the maxim 'actio personalis moritur cum persona,' **because the action is given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children**, no doubt suing in point of form in the name of his executor.' '[A] totally new action is given against the person who would have been responsible to the deceased if the deceased had lived; an action which, as pointed out in *Pym v. Great Northern Ry. Co.* (2) [*4 B. & S. 396, at p. 406*], is new in its species, new in its quality, new in its principle, in every way new.'[22]" (Emphasis added).

[21] The Board went on further to state[23] that they did not agree with the reasoning of or the result arrived at in the case of **Markey and Another v The Tolworth Joint Isolation Hospital District Board**[24] which they considered to be directly in conflict with the law as laid down in the **Vera Cruz** case.[25] In **Markey's** case an action under the UK FAA of 1846, was brought against the defendants, a statutory body formed to provide, maintain and manage a hospital to recover damages for the death of a patient in the hospital caused by the negligent act of a nurse in the defendants' employ. The writ was issued more than six months but less than twelve months after the death of the deceased. The Queen's Bench Division of the Court held that the cause of action arose upon the death of the deceased, and that the action not having been brought within six months after his death, the defendants were entitled to the protection of the PAPA 1893 and the action was not maintainable.

[22] Accordingly the Board in **Gentile** ruled, as Lord Dunedin stated, that the FAA gave a new cause of action 'because the action is given in substance not to the person representing in point of estate the deceased man, … but to his wife and children'. It is clear that the **Markey** line of cases treated the cause of action as that which belonged to the deceased without recognising the separate cause of action vested

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[22] Per Lord Blackburn in Mary Seward v The Owner of the "Vera Cruz" (1884) 10 App. Cas. 59.
[23] At pp. 1040-1041 of the Gentile opinion.
[24] [1900] 2 QB 454. See also: Venn v Tedesco [1926] 2 KB 227.
[25] Mary Seward v The Owner of the "Vera Cruz" (1884) 10 App. Cas. 59.

by the FAA to that class of persons such as a widow and children under the FAA. It is on this basis that the Board disagreed with the reasoning and conclusion in **Markey** and thus in finding that the PAPA did not apply to a claim under the FAA.

[23] Their Lordships went on to say however, that although the action under **Lord Campbell's Act** and the **Families Compensation Act** is not an action of indemnity for negligence, nevertheless it is an action which can only exist if certain preconditions are fulfilled:

> "The first is that the death shall have been caused by wrongful act, neglect, or default of the defendants. … The second is that the default is such 'as would if death had not ensued have entitled the party injured to maintain an action and recover damages in respect thereof."

They pointed out further that 'the punctum temporis at which the test is to be taken is at the moment of death, with the idea fictionally that death has not taken place. At that moment, however, the test is absolute.'[26]

[24] What I derive from the **Gentile** decision is that the Board, although treating specifically with the limitation in the CRCA, was there expounding a principle of more general application as it relates to the interplay between the FAA and limitation statutes such as was the CRCA but which is equally applicable to the PAPA notwithstanding the difference in language. Both the CRCA and the PAPA refer in substance to an action in the nature of an indemnity – in essence an action personal to the person damaged or injured by the wrongful act, neglect or default of the public authority. In my view the learned master failed to appreciate the wider principle enunciated in **Gentile** and the recognition that the claim under the FAA was not a claim devolving to the estate of the Deceased but was a new right of action vested in a class of persons therein set out, for their benefit under the FAA, and to which the time limitation set under the PAPA did not apply. In my

[26] At p. 1041. See also: Union Steamship Company of New Zealand, Limited v Mary Robin [1920] AC 654 where the Privy Council referred to the decision in Gentile and approved it as an authoritative statement of the principles with respect to the time limit for actions under the FAA and similar enactments even if the point raised was not identical. In Venn v Tedesco [1926] 2 KB 227, McCardie J felt constrained to follow the decision in Gentile.

view, the learned master fell into error in focusing on the comparison of language used in the CRCA provision and that used under section 2 of the PAPA rather than focusing on the substantive nature of the claim which both addressed, which was, in essence, the claim which would have been personal to the Deceased. This led her to disregard the wider principle emanating from the **Gentile** decision and with which I agree.

[25] In my view the ratio in **Gentile** is equally applicable to the PAPA as it was to the CRCA. I am satisfied that section 2 of the PAPA is not applicable to the claim under the FAA and the action having been brought later than six months but less than twelve months after the accident and the death of the Deceased is maintainable. That this must be the correct approach can be demonstrated by an analysis of how the provisions of the FAA are intended to operate. Under the FAA, the claim must be brought within twelve months of the death of the deceased. In essence, the time is reckoned not as from the date of the wrongful act, neglect or default although it is accepted that there must be a wrongful act, neglect or default occasioned to the deceased which would have been actionable were he alive, but as from the moment of death. Whereas, were the deceased alive, his claim for damage or injury to him by a public authority must be brought within six months so as not to be caught by the limitation protection provided by the PAPA, it is clear that the entirely new right of action given by the FAA to the class of persons thereunder, made the wrong occasioned to the deceased actionable by this class of persons only upon the death of the deceased. Thus if the Deceased died as result of injury occasioned by the wrongful act, neglect or default of the public authority, not instantaneously or coinciding with the date of the default, but rather say some seven months later, then a claimant qualifying under the FAA would have lost his entitlement to bring an action under the FAA notwithstanding that the claim is brought less than twelve months after the death of the deceased, as the time between the commission of the wrongful act and the time of commencement of an action under the FAA will have exceeded the time allowed for commencing an action under the PAPA.

[26] If the FAA and the PAPA are to operate in the way as found by the learned master, it would mean the FAA may only be operable to all practical intents and purposes, if the wrongful act and the death coincided in point of time and a personal representative is immediately appointed and the claim commenced within the six month period stipulated in the PAPA. But such a construction would in my view collide with the very provision of the FAA, which provides not only for a claim to be brought by the deceased personal representative for the benefit of the class of persons set out in the FAA but which further provides in section 6 that where the personal representative fails to bring an action within six months then one of the persons for whose benefit the claim may be brought may himself bring an action. This entitlement could itself only be exercised after the expiration of six months and thus would be outside of the period limited under the PAPA. This could not be the result intended by Parliament. Rather, the intention of Parliament based on the provisions and tenor of the FAA, was that this right of action, to be exercised within twelve months after the death of the deceased, was not to be governed or circumscribed by the limitation contained in the PAPA but is rather to be governed only by its own limiting provisions attached to the right of action thereby granted.

[27] The later decision of the Ontario Court of Appeal in **Whittington v The County of Middlesex**[27] accords with the view expressed above. There Hope JA said:

> "It may not be amiss to add that if the judgment appealed from were allowed to stand, then a singular and … an unreasonable situation would exist as a result of the provisions of s. 7(1) of the Fatal Accidents Act, which reads as follows:
>
> > 'If there is no executor … no such action is, within six months after the death … brought by such executor … such action may be brought by all or any of the persons for whose benefit the action would have been if it had been brought by such executor …'
>
> Hence, if the three months' period of limitation provided by s. 480(2) of The Municipal Act were to overrride [sic] the time of limitation set by The Fatal Accidents Act, namely, one year, the result would be that all or any of the persons for whose benefit an action under The Fatal Accidents Act

[27] [1948] OR 419-428.

> may be brought, and who can only bring such action without the aid of an executor … after the expiry of six months from the date of death, would find their right of action barred before they were entitled to exercise it. Such a result could not … have been contemplated by the Legislature."

[28] The more recent decision in **Tardif (Estate of) v Wong**,[28] a decision of the Canadian Court of Appeal, also accords with the view expressed above. There the court opined that:

> "The object and purpose of the ***Fatal Accidents Act*** and the ***Survival of Actions Act*** was to create a right of action which was not possible under the common law. The ***Limitation of Actions Act*** provided the limitation period for those actions was to be two years. Nothing in any of those three Acts state such actions are subject to the one-year limitation period in s 55(a)[29] nor is there any policy reason why s 55.(a) should pre-dominate."[30]

The Court went on to conclude: 'If … some inconsistency is inevitable, an interpretation which favours the plaintiff is to be preferred as limitation statutes are to be construed strictly in favour of plaintiffs.'

[29] I am more in favour and adopt the reasoning in the Canadian cases of **Whittington** and **Tardif** as capturing the essence what Parliament intended by the enactment of the FAA. It could not have been in the contemplation of Parliament to create a specific right which could be exercised within a twelve month period only to have the same right defeated by a more general limitation provision in another statute such as the PAPA. Furthermore, I can discern no good policy reason for requiring such an approach which would have the effect of reducing or depriving a claimant of a right of recovery who has suffered loss or damage. A claimant should have the benefit of the more favourable limitation period where there are conflicting limitation periods.

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[28] [2002] ABCA 121.
[29] S. 55(a) of the Limitation Act provided for a limitation period of one year after the termination of medical services for negligence or malpractice claims against physicians.
[30] At para. 54.

[30] Before concluding, I make this general observation in respect of the application as was made herein to strike out the claim. While I note the statement of Barrow JA [Ag.] in **St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited**[31] to the effect that the issuance of a claim after the expiration of a limitation period could amount to an abuse of process as contemplated under CPR 26.3, this certainly should not be taken as suggesting that in every claim where there is an assertion that the claim is statue barred this automatically translates to being an abuse of process in respect of which the nuclear weapon of striking out should be deployed. It is well established that the resort to striking out is a draconian step, ordinarily of last resort and one which should be exercised with caution. Also, I entertain grave doubt as to whether such an application is appropriate where a defence of limitation is raised save in the clearest of cases. The question as to whether a claim is time barred can be in and of itself fact sensitive and thus not at all suitable for this approach but should be left for trial.

Conclusion

[31] For the reasons which I have given, I would hold that the claim herein under the FAA is maintainable and the limitation protection contained in the PAPA does not apply. I would allow the appeal and order that the decision of the learned master be set aside in its entirety. The respondents have not participated in this appeal save for the Corporation notifying its opposition to the appeal.[32] It has arisen however from the application made by the Corporation. Accordingly, I would order that the first respondent bears the costs of this appeal fixed in the sum of $1,500.00.

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[31] SKBHCVAP2002/0006 (delivered 31st March 2003, unreported).

[32] The Court is not sufficiently resourced to take on the task of reminding parties of filing deadlines under the Rules.

[32] Finally, I am grateful to counsel for their helpful submissions.

Dame Janice M. Pereira,DBE
Chief Justice

Davidson Kelvin Baptiste
Justice of Appeal

Louise Esther Blenman
Justice of Appeal