JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 31 OF 1983

BEFORE: THE HON. MR. JUSTICE ROWE, J.A.
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WHITE, J.A.

BETWEEN	JOAN ABRAHAMS (By Her Mother and Next Friend GLORIA ABRAHAMS	)	PLAINTIFFS APPELLANTS
AND	GLORIA ABRAHAMS	)	
AND	THE ATTORNEY GENERAL	)	DEFENDANTS RESPONDENTS
AND	HEZEKIAH RAMDATT	)	

R. CARL RATTRAY, Q.C., AND N. SAMUELS FOR ABRAHAMS.
R. LANGRIN AND WILKINS FOR ATTORNEY GENERAL.

19th, 20th January; 4th April, 1984

CAREY, J.A.:

The point which arises on this appeal is entirely procedural and relates to a matter of pleading. This was a running down action in which the infant plaintiff and her mother suing in her own right and as next friend, brought this suit against the Attorney General and one Hezekiah Ramdatt, averring in their statement of claim (so far as is material) as follows:

> "3. The First Defendant is sued by virtue of the Crown Proceedings Act, the vehicle involved lettered and numbered NC-5257 being registered in the name of the Agricultural Engineering Department of the Ministry of Agriculture - a Department of the Crown.
>
> 4. The Second Defendant is and was at the material time a chauffeur and was driving the aforesaid motor vehicle as the servant or agent of the Crown.
>
> 5. On or about the 24th day of September, 1976, the infant plaintiff was lawfully using the main road at Linstead in the parish of Saint Catherine when the Second Defendant so negligently operated the said motor vehicle that it struck down and injured the infant Plaintiff."

The Attorney General in his defence admitted paragraphs 3 and 4 and with respect to paragraph 5, he pleaded as follows:

> "5. The Defendant says that any claims that the Plaintiff might have had, without admitting that the Plaintiff had any claim, against the Defendant is now statute-barred, and says that at the trial reliance will be placed on the provisions of the Public Authorities Protection Act."

For completion I might add that the Attorney General expressly denied the allegation of negligence and, of course, the particulars of special damages. In their reply to the paragraph in the defence raising the statute of limitation, the plaintiffs said:

> "(1) Paragraph 5 of the Defence is denied. The Plaintiffs say that in the circumstances the Public Authorities Protection Act does not apply."

When the matter came on for hearing before Parnell, J., that learned and experienced judge acceded to a point in limine, viz., that the action was not commenced within one year of the act complained of as required by the Public Authorities Protection Act. The act of negligence occurred on 24th September, 1976 and the action was not filed until 23rd June, 1980 being some three months shy of four years. In the result, the action was dismissed with no order as to costs.

The arguments in the court below and before us, although presented by different counsel, are to the same effect. Evidence, it was urged, was necessary to be adduced to show that at the material time, the driver of the vehicle was performing a public duty and that on the state of the pleadings, it was not established that the driver of the vehicle was performing a public duty at the time of the accident. It was submitted that the onus was on the Attorney General to establish this essential factor and that at this stage of the proceedings only an admission by the Attorney General that the driver had been performing a public duty at the material time would enable the court to dismiss the action summarily, and this it was further submitted, the Attorney General had failed to do on the pleadings.

Learned counsel for the appellants cited a number of cases. These were:

1. Nelson v. Cookson & Anor. [1939] 4 All E.R. 30;
2. Bradford Corporation v. Myers [1916] A.C. 242;
3. Hawkes v. Torquay Corporation [1938] 4 All E.R. 16;
4. Clarke v. St. Helens Borough Council [1916] 85 L.J. K.B. 17;
5. Griffiths & Anor. v. Smith & Anor. [1941] 1 All E.R. 66;
6. Western India Match Co. v. Lock [1946] 2 All E.R. 227.

It was the burden of his submission that these cases demonstrate that a servant or agent of an authority may be acting properly as such but the authority may not be acting in pursuance of any public duty in which event the protection of the Public Authorities Protection Act is inapplicable. For example, in Bradford Corporation v. Myers (supra), the corporation authorised by Act of Parliament to carry on the undertaking of a gas company and were bound to supply gas to the inhabitants of the district, and they were also empowered to sell the coke produced in the manufacture of the gas. The corporation contracted to sell and deliver a ton of coke to the plaintiffs, and by the negligence of their agent the coke was precipitated through the plaintiff's shop window. The plaintiff commenced an action more than six months after this event. The corporation pleaded sec. 1 of the Public Authorities Protection Act 1893 which is in terms similar to the Public Authorities Protection Act of Jamaica, as a bar to the action. Lord Buckmaster, L.C., at p. 238, expressed himself thus:

> "The act complained of arose because one of the servants of the appellants (the Corporation) 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.
>
> In my opinion an action for such negligence is not within the class of action contemplated by the statute."

Lord Atkinson in his speech seemed to be suggesting that the act in respect of which the action is brought, must arise directly from the public duty and not be an act incidental to carrying

out the public duty, for he said at p. 254:

> "One cannot find, therefore, the obligation of 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 plaintiff). 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."

One of the Scottish members of the House, Lord Shaw of Dunfermline, pithily expressed his opinion in this way at page 262:

> "It is not enough that the neglect occurs in the doing of a thing which is authorized by statute, but the thing done is not every or any thing done but must be something in the execution of a public duty or authority, and it is only neglect in the execution of any such duty or authority that is covered by the statute. This restriction appears to me to be vital. The Act seems to say:- there are many things which a public authority, clothed, say, with statutory power, may do, which the limitation will not cover; but when the act or neglect had reference to the execution of their public duty or authority - something founded truly on their statutory powers or their public position - to that, and that only, will the limitation apply."

The case of Hawkes v. Torquay Corporation (supra), is also illustrative of this construction of the English Statute. The defendant corporation acting under certain statutory powers erected and were carrying on an entertainment pavillion. While the plaintiff was purchasing a ticket at the booking office of this pavillion, a poster-frame fell and injured her. The corporation claimed the protection of the Public Authorities Protection Act 1893, but it was held in an action for negligence brought by her against the corporation that the relevant Act merely enabled the corporation to build this pavillion and did not compel them either to build it or having built it to carry it on. They were engaged in a voluntary activity and the Act did not apply.

I did not find Nelson v. Cookson & Anor. (supra), to be relevant as it was concerned with the question of whether medical

officers who, it was alleged, had negligently performed an operation upon the plaintiff were independent contractors or servants or agents of the authority, viz., The Middlesex County Council. It was held that these officers of a public authority were performing a public duty imposed upon the public authority and accordingly entitled to the umbrella provided by the Public Authorities Protection Act 1893.

It is not, I think, necessary to consider the other cases to which our attention was called in any detail. Western India Match Co. Ltd. v. Lock & Ors. (supra), shows that where a corporation or indeed "any person" claims that the limitation applies, it must be shown that the act which gives rise to the action or proceeding must relate to an act done "in pursuance "or execution of any law or of any public duty or authority ...."

Western India Match Co. Ltd. v. Lock & Ors. (supra), is of interest because Goddard, L.C.J., left it open whether in reference to actions against an officer of the Crown, the mere fact that he is acting as such, must inevitably lead to the conclusion that the Act applies. He said at p. 230:

> "At the same time, I do not desire to be taken as deciding that, whenever the defendant is an officer of the Crown, commissioned or otherwise, and is acting on behalf of the Crown, he must necessarily be entitled to the benefit of the section."

In Griffiths v. Smith (supra), Lord Maughan said this at p. 76:

> "My Lords, since the decision of this House in Bradford Corpn v. Myers [1916] 1 A.C. 242; 38 Digest 110, 784; 85 L.J.K.B. 146; 114 L.T. 83; affd., [1915] 1 K.B. 417, and the tacit or express approval of the cases to which I have referred, it has been impossible to doubt (if it was doubtful before) that it is not essential that a public authority seeking to rely on the Act of 1893 must show that the particular act or default in question was done or committed in discharge, or attempted discharge, of a positive duty imposed on the public authority. It is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority or a power conferred on the authority not being a mere incidental power, such as a power to carry on a trade. The words in the section are 'public duty or authority,' and the latter word must be taken to have its ordinary meaning of legal power or right, and does not imply a positive obligation."

Here again, it is being emphasized that the act which gives rise to the action must be done in execution of a public duty and not an incidental power. In Griffiths v. Smith (supra), the female appellant was invited to attend an exhibition of her son's work and sustained injuries through the collapse of a floor due to lack of repair. The managers of the school who were sued in respect of her injuries claimed the protection of the Public Authorities Protection Act 1893. One of the contentions was that the managers in holding the exhibition, were not acting in pursuance of any public duty or in execution of any Act of Parliament but were performing a purely voluntary act. The House of Lords held that the act was done in the course of exercising for the benefit of the public an authority on a power conferred on the public authority not being a mere incidental power and accordingly the managers were within the protection of the Public Authorities Protection Act.

In an unreported decision of Rowe, J., (as he then was) in Lloyd v. Jamaica Defence Board & Ors. (C.L. 1978L-083) dated 14th December, 1978, relying on this distinction between the direct exercise of a public duty or authority and an act which albeit permissible is only incidental, expressed his view thus:

> "In other words when a public authority is exercising or purporting to exercise any of its primary functions in the matter authorised by law, the Public Authorities Protection Act applies but that Act may not apply where the public authority is merely exercising an optional incidental function."

The plaintiff, an officer in the Jamaica Defence Force, filed a writ against the Jamaica Defence Board, the Permanent Secretary in the Ministry of Defence and the Attorney General seeking a declaration that his commission had not been lawfully terminated or retired. The defendants applied to strike out the plaintiff's claim on the ground that it disclosed no cause of action and secondly, and more relevantly, that the action was statute-barred by virtue of the Public Authorities Protection Act. The learned judge came to the conclusion that the act of dismissal carried out by the Defence Board was an exercise of its

primary function under the Defence Act and the protection applied.

It is fair to say that these cases are authority for saying that in relation to public authorities, not being the Crown, the protection provided by the Public Authorities Protection Act is only available where the act or neglect which is the basis of the action, amounts to the performance of a public duty or authority or is pursuant to some specific statutory authority. But the Public Authorities Protection Act cannot be invoked if the act or neglect is not the primary function of the authority or is incidental to the performance of some public duty or is some voluntary act on the part of the authority.

This brings me to the present case. The suit against the Crown in this case is one of negligence, the appellants' allegations being that the Crown as master is vicariously liable for the acts of its servant committed in performance of a public duty. Any other act of the servant could not, in point of law, fix the Crown with liability. If the servant were on a "frolic of "his own" or not acting in performance of his public duties, it is clear that no action could be maintained against the Attorney General for it is by virtue of the Crown Proceedings Act that actions against servants or agents of the Crown are maintainable against the Attorney General.

Seeing that the plaintiffs themselves allege that the second defendant was a servant or agent of the Crown, and that this relationship was admitted by the Attorney General, no evidence is required on this point for the reason that the act which was the genesis of the action must have been done in execution of a public duty. Had it been the intention of the appellants to bring suit against the second defendant exclusively in his personal capacity as a tortfeasor it would be difficult to conceive of the Attorney General being added as a defendant for the purposes of the Crown Proceedings Act.

The cases cited by Mr. Rattray relate to Public Corporations whose activities are necessarily circumscribed but which

may for good public relation considerations or other good reason undertake obligations which are not obligatory having regard to the provisions of the statute which created them. See Bradford Corpn. v. Myers and Hawkes v. Torquay Corpn. The Crown in Jamaica is the ultimate public authority; it acts through various Ministries and Departments. Any duty performed by officers of the various Ministries and Departments as servants or agents of the Crown is necessarily performed in pursuance either of some Act, some public duty or authority - for the public benefit.

Where in an action against the Crown, the Attorney General relies on the Public Authorities Protection Act, the nice distinctions and technicalities applicable to public corporations established for narrow and specific purposes would appear to be undesirable in view of the multifaceted duties of the Crown. Where a public officer is engaged upon the very activity for which he is employed, and paid from public funds, the only reasonable inference is that he is performing a public duty or a duty for the public benefit.

The Crown is not responsible for acts of its servants unless the servant is acting as such and an action under the Crown Proceedings Act could not be otherwise maintained against the Attorney General. In any action in which the Crown is sued in virtue of the Crown Proceedings Act, arguments such as those successfully employed in Bradford Corpn. v. Myers; Hawkes v. Torquay Corpn., really have no place. There are two situations when an action is taken against the Crown, either the servant or agent is in fact acting as an agent of the Crown in executing some public duty or in pursuance of some authority or he was acting in a private capacity. If the former is the case, then the action must be commenced within 12 months; if the latter, the Crown has no liability and the Public Authorities Protection Act necessarily plays no part. If on the pleadings there is a question of fact to be determined by evidence at trial as to whether

the tortfeasor is a servant or agent of the Crown or whether or not the tortfeasor was acting in the lawful execution of his public duty, then those issues cannot be determined without trial. Those triable issues do not arise on these pleadings.

The plaintiffs themselves allege that the second defendant, was at the material time a servant or agent of the Crown acting as such. The Attorney General and second defendant admitted that allegation. In those circumstances, I hold that there is no need to adduce evidence to show that in addition to his acting as a servant or agent of the Crown, that the servant in so acting was performing a public duty.

It is for these reasons that I concurred in the order that the appeal be dismissed with costs.

WHITE, J.A.:

I concur.

ROWE, J.A.:

I concur.