JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CIVIL APPEAL No. 66/73

BEFORE: The Hon. Mr. Justice Edun, J.A.(Presiding).
The Hon. Mr. Justice Hercules, J.A.
The Hon. Mr. Justice Zacca, J.A.(ag.).

B E T W E E N CLARENCE McKAY - Plaintiff/Appellant

A N D THEOPHILUS FORREST - Defendant/Respondent

Mr. A. Campbell for the appellant.

Mr. A. Davis with Mr. Sobers for the respondent.

12th June 1974
11th October 1974

EDUN, J.A.:

The appellant Clarence McKay, Inspector of Police at Moneague, St. Ann, claimed from the respondent, Theophilus Forrest, damages for negligence arising out of a collision between a car driven by the appellant and a truck belonging to the Ministry of Health driven by the respondent. The appellant said he was driving his car on February 14, 1972 about 7.15 p.m., with headlights on, near Jobs Lane when about one chain from the intersection the truck driven by the respondent travelling in the opposite direction turned to its right and across the appellant's path without any indication signals. The appellant swerved to his right to avoid the collision but nevertheless the left side of his car collided with the left side of the truck. Both vehicles stopped at the point of impact and the appellant spoke to the respondent who said he did not see the appellant coming. The appellant's car was a complete wreck and he claimed -

$1100.00 for the value of his car;
pre-accident value $1600, less
$500 for value of wreck,

$ 20.00 for wrecker to remove his vehicle

and $ 100.00 for loss of use.

$1220.00

Learned attorney for the Attorney-General, in defence filed a special defence and relied upon section 2 (1) of the Public Authorities Protection Law, Chapter 316, in that the action was filed more than one year after the date of the accident. Evidence was led on behalf of the respondent that he was employed by the Ministry of Health on the day in question to take medical supplies to the Linstead Hospital and to Lionel Town. The respondent denied driving negligently because he had his blinkers on indicating his turning into the entrance of the Jobs Lane intersection. The appellant's vehicle was reversing across the lane into his path. He had to stop for two seconds and then he heard a collision at the tail end of his truck. He came out and saw the damage to the appellant's car. He denied saying to the appellant that he did not see him coming.

The learned Resident Magistrate found for the respondent. He held -

1, at the time of the accident the respondent was driving in the course of his employment a vehicle belonging to the Ministry of Health;

2, the respondent was clearly negligent in turning across the path of the oncoming plaintiff's vehicle when it was patently unsafe to do so, but

3, the plaintiff had only himself to blame for bringing the action out of time as required by s.2(1) of the Public Authorities Protection Law, Ch. 316.

It is against that judgment, the appellant has appealed. Learned attorney for the appellant submitted that this was a case of the appellant seeking his rights against the negligence of respondent and even though the respondent was employed by the Ministry of Health, he was not protected by s. 2(1) of Public Authorities Protection Law. Furthermore, the Attorney-General was not here sued. Learned attorney for the respondent does not disagree with the findings of negligence in the respondent but claimed that the learned Resident Magistrate was correct in holding that the appellant's action was out of time. He relied on the decision and reasons for judgment in Reeves v. Deane-Freeman (1953) 1 A.E.R. 461.

I find it necessary to consider the Reeves' Case and if I hold that it is applicable to the facts of the instant case, then this appeal, in my view, ought to be dismissed and if the Reeves' case is not applicable then this appeal ought, in my view, to be allowed. In the Reeves' case, as the result of a collision between the plaintiff who was riding a motor bicycle, and a lorry belonging to the Canadian Army driven by the defendant, who was a private soldier in the Canadian Army in the course of his duty, the plaintiff issued a writ in an action for damages for personal injuries against the defendant more than one year after the date on which the cause of action accrued. Parker J., in Chambers ordered that the issues of law raised by the special defence was to be disposed of before the trial of the action. Lord Goddard C.J., held that as the defendant was driving the lorry in pursuance of a public duty, he then being a soldier in His Majesty's Army he was protected under the Public Authorities Protection Law. It was held on appeal that an act done by a soldier in His Majesty's Army in the course of duty was done in pursuance of a public duty within the meaning of the Public Authorities Protection Act 1893, and therefore the action could not be maintained as it was filed out of time.

Several cases were cited in the Reeves' case and I propose to consider those most relevant to the issues in the instant case.

In Wilson v 1st Edinburgh City R.G.A.V. (1904) 7F (Ct. of Cessions) 168, the father of a child who was killed on the public street by an ammunition waggon, the horses of which had bolted, brought an action for damages against a regiment of volunteers and the officer commanding the regiment. He averred in his claim that the accident had been caused by the fault of the commanding officer in not seeing that quiet horses were used, that competent drivers were employed, that waggons were driven according to military regulations, and that a competent commissioned officer was present to superintend the parade. The action was not raised within six months after the date of the accident, and it was held that the action against the Commanding officer as an individual was excluded by the statute and the fault averred against him was neglect of duty in his public capacity as commanding officer. It is to be noted that the action was excluded because the fault averred was a neglect of

duty in his public capacity of a commanding officer.

In Greenwell v Howell (1900) 1 Q.B. 535, the plaintiff, a land owner, was denying that a road over his land was a public highway and was threatening proceedings against any person using it. Two officials of the county Council were directed by the Council acting under the provisions of the Local Government Act 1894 to use the road for the purpose of formally testing the right; which they did. The landowner brought an action of trespass against them. It was held that as the acts were done by the defendants in pursuance or execution or intended execution under the Local Government Act 1894, the case came within the Public Authorities Protection Act 1893. It is to be noted that the acts of trespass were carried out under the provisions of an Act of Parliament; public duty was that of the officers using the road for the purpose of formally testing the right.

In Bradford Corporation v Myers (1916) A.C. 242 the defendants who were a municipal corporation, were authorised by Act of Parliament to carry out an undertaking of a gas company, and they did so. They contracted to sell and deliver a ton of coke to the plaintiff and by negligence of their agent, the coke was shot through the plaintiff's shop window. It was held that the act complained of, was not an act done in the direct execution of a statute, or in the discharge of a public duty or the exercise of a public authority and that the Act of 1893 afforded no defence to the action.

After discussing those cases and others Somervell L.J. in the Reeves' Case (supra) had this to say:-

> "The plaintiff's next point was that a soldier driving a lorry on a highway as in this case should be regarded as not engaged in the execution of his duties, but that the accident in the present case should be regarded as caused by a breach of a private right. I find great difficulty about that. In the ordinary case, the plaintiff is complaining of a breach of his private rights, but once one comes to a conclusion, to which I have come, that the neglect occurred in the carrying out of a duty, I do not think that that submission avails the plaintiff. Once one finds that the claim is based on some act or neglect in carrying out duties, it seems to me having regard to the cases which I have cited, that the Act applies. On that point, therefore, I agree with the learned Lord Chief Justice, and for the same reasons, he gave." (underlining mine).

May I repeat for emphasis, that the Lord Chief Justice Goddard held in the Reeves' Case that as the defendant was driving the lorry in pursuance of a public duty, he being a soldier of Her Majesty's Army, he was protected ... The important words of section 2(1) of the Public Authorities Protection Law Ch 316 (and same as the Public Authorities Protection Act 1893) are:-

> "Where any action ... is commenced against any person for any act done in pursuance .... of any Law or of any public duty or authority, or in respect of any alleged neglect or default in execution of any such Law, duty or authority ...
>
> (a) the action ... shall not lie ... unless it is commenced within one year next after the act ... complained of ..."

The Law is headed Public Authorities Protection Law. The text emphasises that the act complained of, must be done in pursuance of any public duty or authority. In my view, the Reeves' Case was decided on the basis that the soldier was driving the lorry on a public duty, he being a soldier of Her Majesty's Army. In the instant case, the respondent though employed to drive the truck belonging to the Ministry of Health, he was neither a soldier, nor a sailor as in the Danube II case (1921) p. 183. I fail to see under what national command or public duty the respondent in this case was driving that truck. In my view, he was employed by the Ministry of Health to drive the truck in his private capacity as an ordinary citizen. To extend the provisions of the Public Authorities Protection Law to protect him and to deny another citizen of his private right to bring an action within six years of the accrual of his right of action is to give an alarming extension of the words "public duty or authority." I am confirmed in my view by the recent decision in the Privy Council in Government of Malaysia v Lee Hock Ning (1974) A.C. 76 that the Public Authorities Protection Ordinance (same as our Public Authorities Protection Law, Ch 316) gave protection against claims in contract as in tort arising out of a neglect or default in execution of a written law, duty or authority, but a suit arising out of a private claim under a contract was distinguishable from one arising out of failure to perform a public

duty. In that case, Bradford Corporation v Myers [1916] A.C. 242 (H.L(E) was applied. In the instant case, out of the private contract of employment by which the respondent drove the vehicle belonging to the Ministry of Health he committed the tort which resulted in damage to the appellant's vehicle. The respondent was under an implied duty to drive the vehicle with care - it has not been shown that he was under any national command or public duty. And in breach of that implied duty to drive with care, he as a private citizen committed a tort against another private citizen who had a right to use the road.

In conclusion I hold that the facts of the instant case, fall to be considered under the principle of Bradford Corporation v Myers rather than that of the Reeves' case. For the reasons given, I would allow the appeal because the learned Resident Magistrate misdirected himself on the law. I would enter judgment for the plaintiff/appellant in the sum of $1220 with costs of the trial to be taxed or agreed upon and costs of the appeal of $50 to him.

HERCULES, J.A.:

There was a collision between a car driven by the Plaintiff/Appellant and a Ministry of Health truck driven by Defendant/Respondent in the parish of St. Catherine on 14th February, 1972. The Plaintiff/Appellant filed an action claiming damages for negligence on 7th May, 1973, i.e., more than one year later.

On 5th June, 1973, Defendant/Respondent filed a notice of intention to plead the special defence of not guilty by statute. At the trial on 2nd August, 1973, His Honour Mr. T.N. Theobolds, Resident Magistrate, St. Catherine, found that the Defendant/Respondent had been negligent, but that the Plaintiff/Appellant had brought the action out of time, since the Defendant/Respondent was entitled to rely on the provisions of the Public Authorities Protection Law, Chapter 316 (hereinafter referred to as the Law). Accordingly he entered judgment for the Defendant/Respondent.

The sole ground of appeal is that the learned Resident Magistrate erred in holding that the provisions of the Law applied to this Ministry of Health driver. It is to be noted that the usual practice of joining the Attorney-General as a Defendant was not observed, although officers of the Attorney-General's Department represented the Defendant/Respondent at the trial and at the hearing of the appeal.

Section 2 (1) of the Law reads as follows:-

> "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 Law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Law, 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 one year next after the act, neglect or default complained of, or, in case of a continuance of injury or damage, within one year next after the ceasing thereof.

This section of the Law is substantially the same as Section (1) of the English Public Authorities Protection Act, 1893, as re-enacted by Section 21 (1) of The Limitation Act, 1939. The point which arises in this appeal is whether the learned Resident Magistrate was right in holding that Section 2 (1) of the Law applies.

The same point fell for consideration in the English Court of Appeal in Reeves v. Deane-Freeman /1953/ 1 All E.R. 461. That was an appeal from a decision of Lord Goddard C.J. The facts briefly were that as a result of a collision on November 14, 1946, between the Plaintiff, who was riding a motor bicycle, and a lorry belonging to the Canadian army and driven by the Defendant, who was a private soldier in the Canadian army, in the course of his duty, the Plaintiff, on December 2, 1949 issued a writ in an action for damages for personal injuries against the Defendant. The Defendant pleaded not guilty by statute and Lord Goddard held that an act done by a soldier in Her Majesty's army in the course of duty was done in pursuance of a public duty within s. 21 (1) of the Limitation Act, 1939. The Court of Appeal affirmed Lord Goddard's decision in favour of the soldier Defendant.

Somervell L.J. in delivering the leading judgment referred to several cases where Defendants succeeded with the same defence as individuals on the ground that the fault averred was neglect of duty in a public capacity. He made it clear at page 465 c. that no distinction can be drawn amongst individuals for purposes of the defence. As Romer L.J. declared in a supporting judgment:-

"I should have thought that provided that a representative of a public authority is told to perform an act of public duty, then, if the other elements are present which are requisite to attract the operation of the Act, it will be attracted whatever be the position of the representative in question. Indeed, if one is to draw the kind of distinction which counsel for the Plaintiff invited us to draw, it seems to me it would be a task of an impossible kind to classify officials who do qualify for protection as distinct from those who do not."

In the case under review the Defendant was neither Minister of Health, Permanent Secretary in the Ministry nor anything of the sort. He was a truck driver. The Plaintiff/Appellant said in cross-examination

that he "believed that Ministry of Health was marked on the truck. Defendant told me he was working at Ministry of Health and I believe him." Moreover, the evidence of the Defendant/Respondent was that he was a driver with the Ministry of Health since 1967 and on 14th February, 1972, he was sent to Linstead and Lionel Town with drugs. The Defence also called evidence from Leroy Pinnock, the Supervisor of the Medical Stores, Ministry of Health. This officer supported the evidence of Defendant/Respondent's employment and that Defendant/Respondent was detailed to take medical supplies to the Linstead Hospital on the day in question. There was therefore abundant evidence on which the learned Resident Magistrate could find that the Defendant/Respondent was driving in the course of his employment. Forsooth there was not even the slightest suggestion that he was on a frolic of his own.

Mr. Ainsworth Campbell contended that the non-joinder of the Attorney-General precluded the Defendant/Respondent from being caught by the Law notwithstanding the evidence. He cited no authority in support of that proposition and I have not myself been able to find any, but the Law clearly provides for an action against "any person." Indeed, if it were held that the Defendant/Respondent is not protected, it seems to me that that would defeat the very purpose of the legislation, for the Ministry of Health is a public authority and can only act through its servants or agents. So I am prepared to agree with the learned Resident Magistrate that the neglect or default was occasioned by a servant of a public authority in pursuance of a public duty and the Law applies.

I would dismiss the appeal.

ZACCA, J.A.(ag.):

The Public Authorities Protection Law Cap. 316, section 2 (1) reads as follows:-

> "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 law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such law, 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 one year next after the act, neglect or default complained of, or, in case of a continuance of injury or damage, within one year next after the ceasing thereof."

The point for decision is whether the Defendant/Respondent who at the time of the collision, was employed by the Ministry of Health as the driver of a truck owned by the Ministry of Health delivering drugs to the Linstead and Lionel Town Hospitals, is entitled to the protection of the section as being a public authority engaged in a Public Duty.

In Reeves v Deane-Freeman (1953) 1 A.E.R. 461 the Court of Appeal held that an act done by a soldier in Her Majesty's Army in the course of his duty was done in pursuance of a public duty within s.21(1) of the Limitation Act 1939. The wording of s.2(1) of The Public Authorities Protection Law Cap. 316 is substantially the same as s.21(1) of the Limitation Act 1939.

It was the public duty of the Ministry of Health to supply drugs to the Linstead and Lionel Town Hospitals which are Public Hospitals. The Defendant/Respondent was acting as the servant or agent of a Public Authority, to wit, the Ministry of Health, at the time of the collision and was therefore performing an act in the course of his duty in pursuance of a public duty. I hold that the Defendant/Respondent would be entitled to the protection of s. 2 (1) of

the Public Authorities Protection Law Cap. 316.

I would dismiss this appeal.

EDUN, J.A.:

The appeal is dismissed. Costs to the defendant/respondent $40.