Michaelmas Term
[2017] UKPC 42
Privy Council Appeal No 0101 of 2015

JUDGMENT

Alves (Appellant) *v* Attorney General of the Virgin Islands (Respondent) (British Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

before

Lord Neuberger
Lord Kerr
Lord Carnwath
Lord Hughes
Lord Hodge

JUDGMENT GIVEN ON

18 December 2017

Heard on 2 May 2017

Appellants
Howard Stevens QC
John Carrington QC
Katherine Deal
(Instructed by Freshfields Bruckhaus Deringer LLP)

Respondent
James Guthrie QC

(Instructed by Charles Russell Speechlys LLP)

LORD HUGHES:

1. The claimant was a nurse working in the Peebles public hospital in Tortola. In April 2003 she was attending an elderly and immobile patient when the wheel of his bed collapsed. In an effort to save him from harm, she injured her back quite severely.

2. As her employer, the Government met her medical expenses for some three years or more, but then ceased to do so. In December 2007 she brought an action claiming damages for the personal injuries which she had sustained. Her case was put in negligence, on the basis that her employer owed her the ordinary employer's duty of care at common law to provide and maintain a safe system of work together with adequate plant and equipment, and had broken that duty by failing to supply a bed in good repair.

3. The government by its pleaded defence admitted the whole of the statement of claim except for the claim for interest. But it pleaded that the action was statute-barred by the six month period provided for by section 2 of the Public Authorities Protection Act (Cap.62) ("PAPA"). Unless that Act applied, the claimant's action was brought in time. The only issue in the case was and remains whether the six month period applied. The trial judge held that it did not, but the Court of Appeal disagreed.

The statute

4. Section 2 of PAPA 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 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 supplied)

5. It is immediately apparent that there are grammatical slips, doubtless inadvertent, in the statute as printed. The here emphasised word "**of**" in the fourth line plainly ought to read either "**for**", or "**in respect of**". Secondly, the here emphasised word "**act**" in the fifth line is plainly a reference to the statute, not to a deed or event; it should accordingly be "**Act**". "In respect of" and "Act" both appeared in the English Public Authorities Protection Act 1893 (56 & 57 vict, c 61) ("PAPA 1893"), now long repealed, which was clearly the model for this statute and which was otherwise in identical terms. Thus read, as clearly it has to be, the statute says that the six month limitation period applies to:

> "any action (etc) commenced against any person for any act done in pursuance, execution, or intended execution of any Act or Ordinance or of any public duty or authority or for/in respect of any alleged neglect or default in the execution of any such Act, duty or authority."

6. This is merely to give effect to the undoubted intention of the legislature. The principal question in the case is whether the statute applies the six month limitation period in relation to any and every action performed by a person authorised to do it by statute, or only to some subset of such actions. On this point, the cases decided on this and directly comparable statutes in various jurisdictions are very difficult to reconcile.

The hospital

7. The relevant statutory provision, relied on by the employer government for the application of PAPA, was the Public Hospital Ordinance (Cap.195). Section 3 of that Ordinance says as follows:

> "3. The several buildings erected in Road Town in the Island of Tortola now generally known as the 'Peebles Hospital' together with all ways, paths, walls, drains, buildings, erections, rights, easements, and appurtenances thereto respectively belonging shall be appropriated by the Government as heretofore to the reception and care of sick persons, and shall hereafter be conducted and managed at the public expense as a hospital for the purposes aforesaid in accordance with the provisions of this Ordinance and of all regulations made under the authority of section 15."

8. The Ordinance goes on to provide for the Governor to appoint a Board to manage the hospital. These provisions gave rise to a secondary argument on behalf of the claimant that PAPA did not apply to her accident because the government, as her employer, was not acting under the Ordinance at the material time. Those provisions of the Ordinance are, so far as material, as follows:

> "4. The Governor shall appoint a Board for the proper management of the hospital consisting of not more than six and not less than four persons, of whom any three shall form a quorum …
>
> 7. The Board shall, subject to the provisions of this Ordinance and all regulations made thereunder, have the entire control of the hospital and it shall be their duty to see to the proper clothing, care and maintenance of sick persons in the hospital. The Board shall have control of all subordinate officers, employees and servants at the hospital and shall ensure that discipline and good order are maintained, and that all regulations are duly observed:
>
> > Provided that the matron, nurses, dispensers and dressers shall be, in respect of their professional duties, under the sole direction and guidance of the Superintendent of the hospital.
>
> 8. The Chief Medical Officer for the time being of the Territory shall be the Medical Superintendent of the hospital, and shall be responsible for the medical and surgical care and treatment of all persons admitted to the hospital.
>
> …
>
> 10. The Superintendent shall have authority to admit to the hospital any person suffering from any disease, sickness or injury which in the opinion of the Superintendent cannot be properly treated elsewhere, upon such terms as to payment and other matters as the Governor in Council shall determine.
>
> 11. The Superintendent shall submit a report to the Governor on the admission of persons to the hospital and the medical and surgical cases dealt with therein.

12. The Governor may appoint a matron for the management and service of the hospital who shall receive such emoluments as may be determined by the Governor.

13. The Board may appoint such other officers and such attendants and servants as the Board may think fit for the management and service of the hospital, who shall receive such emoluments as may be determined by the Governor. Such officers, attendants and servants shall be servants of the Board and shall perform such duties as the Board shall from time to time direct. The Board, subject to approval by the Governor, may dismiss such officers, attendants and servants.

…

15. Subject to the provisions of this Ordinance, the Governor in Council may make regulations with regard to all or any of the following matters, that is to say -

(a) the powers and duties of the officers and servants of the hospital,

(b) the functions of visitors,

(c) admissions to, and discharges from the hospital,

(d) the lodging, clothing, care and maintenance of the inmates of the hospital,

(e) the fees and charges to be paid by persons able to pay for their treatment in the hospital,

(f) the general good order and government of the hospital and every part thereof, and may attach a penalty which shall not exceed twenty-four dollars to any breach of any such regulation."

9. The claimant contended that the government could not have been acting under the Ordinance at the time of Mrs Alves' accident, because the management of the

hospital was committed not to the government but to the Board. That argument was accepted by the judge. The Court of Appeal, without dealing with it expressly, must have rejected it in order to allow the defendant government's appeal.

10. This supplementary argument is unsound. Whatever may be their correct ambit, the terms of PAPA apply equally to an action done in pursuance (etc) of a statute, such as the Ordinance, and to any other action done in pursuance (etc) of any public duty or authority. Even if section 3 of the Ordinance does little more than vest the real property of the hospital in the government, it certainly authorises the government to carry on a public hospital there. There is no evidence about the present working relationship between the Board and the government. It seems likely that the true position is that the Board manages the hospital on behalf of the government, being appointed by the Governor, who has the very extensive powers of control via regulations which are given by section 15. That the Board is given powers of management under sections 7 and 13 is in no sense inconsistent with this. But even if the Board is properly to be regarded as an entirely independent body, it is an admitted fact that Mrs Alves was employed to work at the hospital by the government. The government is plainly a public body, and it can only have been exercising a public power or duty (in the broadest sense of public function) in employing nurses to work in a public hospital. The claimant's action against the government was grounded in the assertion that it was responsible for the system of work in the hospital, and for the equipment provided there, which responsibility was admitted. Consistently with that assertion and admission, it is impossible to contend that the government was not acting either under the Ordinance or in pursuance of a public power, duty or function when it did so.

The ambit of PAPA

11. It follows that the critical question in the case is the one adverted to in para 6 above: to which claims, ie to which actions performed under statutory or public enabling, does PAPA apply?

12. It is plain that it is possible to read PAPA literally as applying to everything done by any person in either actual or purported discharge of either a duty or authority (ie power) conferred by statute, or for that matter under public authority existing independently of legislation. Thus construed literally, PAPA would apply (a) to private persons or bodies given statutory authority and (b) to virtually every action of a public body. All would attract the very short six month limitation period. The cases show, however, that Acts in these terms have limitations to their ambit; those cases are less clear about what those limitations are.

To whom does PAPA apply?

13. The difficulty identified above in construing the proper ambit of PAPA has been apparent from the earliest days of statutes in such terms. From the very outset of the life of PAPA 1893 in England it was limited to the acts of public authorities, as distinct from private persons or corporations acting under statutory enabling. That the English Act had to be read in that way was the opinion of Jeune P in *The Ydun* [1899] P 236, although on appeal it was clear that the body in that case was indeed a public one. Then, in *The Attorney General v Company of Proprietors of Margate Pier and Harbour* [1900] 1 Ch 749 the defendant was a private company with shareholders which had been incorporated by statute and, under that statute, had the function of building and maintaining the town's harbour. Its functions were, as Kekewich J expressly held, clearly to maintain a public utility for the benefit of the public generally. But the company was held not entitled to the protection of the six month limitation period under the 1893 Act. It was, he held, just like a commercial railway company established or empowered by statute. The Act was limited to public bodies, discharging public duties, whether statutory or otherwise, and did not extend to commercial persons or companies even if providing public utilities. By the time of *Bradford Corpn v Myers* [1916] AC 242 (see below), this very important limitation on the apparently expansive words of PAPA 1893 was treated by the House of Lords as established law beyond debate: see Lord Buckmaster LC at 247.

14. Some support for this limitation was found in both those cases in the long title of PAPA 1893, which read:

> "An Act to generalize and amend certain statutory provisions for the protections of persons acting in the execution of statutory and other public duties."

Those words, however, scarcely resolved the question in favour of the limitation applied, since although they speak of public duties, they also speak of "persons" generally. The Virgin Islands' PAPA does not contain this long title. But even if the words of the English long title are significant, the limitation described was plainly settled law by the time the Virgin Islands' statute was first enacted in 1916, and its enactment must be taken to have been made in the knowledge of the law as declared in the cases on its English model. It follows that from earliest times, an entirely literal construction of statutes in this form has been rejected.

What kind of actions? Early authorities

15. In *Palmer v Grand Junction Railway Co* (1839) 4 M & W 749; 50 ER 1624 an action was brought against a railway company, operating under statutory authority, for

negligent injury to horses which it had accepted for carriage. The special Act of Parliament under which the company operated specifically provided for tolls to be charged by it for the carriage of animals, thus clearly authorising their transportation. It also provided that no action should be brought for anything done or omitted to be done in pursuance of the statute or in execution of the powers and authorities or any of the orders made, given, or directed in reference to or under the Act, unless 14 days' previous notice in writing should be given. The Court of Exchequer, in a judgment delivered by Parke B, held that this notice provision did not apply to the suit before it because although the company had statutory power to carry horses, the statute created no obligation on it to do so. It held that the statute did not compel the company to become common carriers, and that if it chose to do so, it fell under the ordinary legal duties of such people. That decision necessarily involved holding that it was not enough to engage the statutory restrictions on actions against the company that what it had done had been done under the **authority** of the statute. That decision was clearly reached despite the wording of the statute, which spoke of authority to act, rather than duty to do so, just as the literal language of PAPA and other similar legislation treats acts in pursuance of statutory authority in the same manner as acts in pursuance of statutory duties. A similar decision was reached by Lord Denman CJ in *Carpue v London & Brighton Railway* (1844) 5 QB 747; 114 ER 1431 at the trial of an action by a passenger alleging negligence, where the statute was in similar terms. Although in later years the *Margate Pier and Harbour Co* limitation excluding private persons might have justified the outcome in *Palmer* and *Carpue* on that different ground, that was not the reasoning in either case. On the contrary, the reasoning depended on narrowing the breadth of the deeds or activities to which the statutory restrictions applied. The terms of those statutes were directly analogous to the later-enacted provisions of PAPA 1893 and to the Virgin Islands' PAPA here in question.

16. Conversely, in *Parker v London County Council* [1904] 2 KB 501, Channell J held that the PAPA 1893 did apply its shortened limitation period to a passenger's action brought against a local authority operating a tramway under statutory authority and based on injury attributable to a collision caused by the alleged negligence of the company's employees. The defendants in that case were clearly a public authority and not a commercial company and so the critical question was the ambit of activities covered by PAPA 1893. The judge did not follow *Palmer* or *Carpue*, albeit with some reluctance. He held that it was enough to engage PAPA 1893 that the public body was carrying out a public duty to provide the tramway, and relied on *The Ydun* [1899] P 236. In the latter case the action was brought for negligently managing the navigation of the River Ribble, in other words for negligently performing precisely the public duty created by the statute. However, in neither *Parker* nor *The Ydun* was any possible difference between statutory duty and statutory authority addressed. *Parker* thus left a conflict between passenger cases at first instance.

17. Subsequently in *Lyles v Southend-on-Sea Corpn* [1905] 2 KB 1, another passenger's action against a local authority complaining of negligence causing him injury on its tramway, the Court of Appeal held that PAPA 1893 applied. Romer LJ said

no more (at 20) than that the action was brought against a public authority and based directly on an alleged neglect or default in the execution of a public duty or authority. As such, he held, it came "within the very words" of section 1 of PAPA 1893. That, like *Parker*, would appear to be an application of the literal reading of the section. Vaughan Williams LJ, however, giving the leading judgment, with which both Romer and Stirling LJJ agreed, addressed the decisions in *Palmer* and *Carpue*. He held (at 15-16) that there was no material difference of wording between the specific statutory provisions in those cases and PAPA 1893. He decided however (at 17) that all such provisions applied only where the public authority in question was under a **duty** and not where it merely exercised a **power.** That distinguished *Palmer* and *Carpue*, which were cases of powers, from *Lyles* where the local authority was under a duty to provide such tramway cars as the public interest reasonably required. As in *Palmer* and *Carpue*, that involved implicitly limiting the literal words of the statute, for they do not distinguish between actions in discharge of statutory duties and actions in exercise of statutory authority, or power. Ten years later, in *Myers*, the distinction which he relied upon was exploded (see below).

18. At about the same time, in *Sharpington v Fulham Guardians* [1904] 2 Ch 449, some Poor Law Guardians, undoubtedly a public body, were sued on a building contract which they had made, and claimed the benefit of PAPA's abbreviated limitation period. Farwell J, after clearly very full argument, held that although the Guardians had obvious public functions (providing accommodation for poor children), what they had done was to enter into a private contract in order to fulfil them by providing a house. That private contract did not attract the protection of PAPA 1893. It was not, he said, at p 456:

> "a complaint by a number of children or by a member of the public in respect of the public duty. It is a complaint by a private individual in respect of a private injury done to him. The only way in which the public duty comes in at all is … that if it were not for the public duty any such contract would be ultra vires."

Later, in *Myers*, Lord Buckmaster LC declined to hold *Sharpington* applicable to the action there before the court, because the latter was in substance an action in tort, not in contract. But neither he nor any of the House doubted the outcome of this case and Viscount Haldane (at 252) and Lord Atkinson (at 260) emphatically approved it. This was thus a further example of a PAPA statute being limited, rather than read literally, and it was a different limitation from the one invoked by Vaughan Williams LJ in *Lyles*.

Myers and Griffiths

19. Two later cases which reached the House of Lords illustrate, but do not resolve, the difficulties surrounding the ambit of PAPA.

20. In *Bradford Corpn v Myers* [1916] 1 AC 242 the defendant local authority was enabled by statute to carry on a gas undertaking. It was under a statutory duty to supply gas to its inhabitants, and it had an express statutory power to sell the coke by-product of the gas production process. In making a delivery of coke to a purchaser, it was alleged negligently to have discharged the load through the customer's window. The House held unanimously that the abbreviated PAPA 1893 limitation period did not apply. The reasoning of their Lordships was not identical. One reason given in some of the speeches was the distinction which had been made in *Lyles*, *Palmer* and *Carpue*, between statutory power and statutory duty, but at 262 Lord Shaw of Dunfermline convincingly exposed the illogic in this, namely that PAPA applies as much to statutory authority as to statutory duty:

> "The pinch of this case, Mr McCall has cogently urged, lies in the word 'authority'. Granted that the respondents had not a statutory duty to sell coke, still they had 'authority' to do so, and what is here complained of is neglect in doing a thing which is authorised by statute."

Moreover, at 254, Lord Atkinson expressed the opinion that there might well have been an implied duty to sell coke as part of a duty to manage the undertaking in the way most beneficial to the interests of the inhabitants; if that were so, any distinction between power and duty would not have helped resolve the case.

21. The principal ground of decision was, however, different. It was the starting point of all of their Lordships that PAPA 1893 did not apply to every action performed by a public authority under a statutory duty or power, but only to those which partake of a public character going beyond any ordinary common law relationship. The speeches were not unanimous in the manner of identifying the difference. Lord Buckmaster LC referred at 249 to:

> "…a great distinction between an incidental power to trade and a direct duty to trade;"

thus perhaps either adopting the *Lyles* distinction between duty and power or drawing a distinction between incidental and core activities. But he also had said, at 247:

> "… the words of the section themselves limit the class of action, and show that it was not intended to cover every act which a local authority had power to perform.

> 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**."

At 251, Viscount Haldane said this:

> "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 that 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."

Lord Atkinson's formulation was at 253:

> "To give a cause of action the duty must be due from the defendant to the plaintiff. And in my view this case turns upon the nature of the duty owed by the appellants to the respondent for the breach of which the latter sues. **Was it a private duty created by the specific contract entered into between the parties for the sale and delivery with reasonable care of this load of coke, or was it a public duty within the meaning of section 1 of the Public Authorities Protection Act of 1893**?"

And Lord Shaw said this at 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 anything 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."

Lord Shaw's opening words had helped to explain the underlying purpose of PAPA statutes (at 260):

> "This statute is one of much importance to local authorities throughout the country. By the limitation which it imposes it prevents belated and in many cases unfounded actions. In this way it, pro tanto, allows a safer periodical budget, prevents one generation of ratepayers from being saddled with the obligations of another, and secures steadiness in municipal and local accounting."

At 263-264, he went on to suggest where this analysis led. He said this:

> "If there be a duty arising from statute or the exercise of a public function, there is a correlative right similarly arising. A municipal tramway car depends for its existence and conduct on, say, a private and many public Acts, and the corporation in running it is performing a public duty. When a citizen boards such a car, in one sense he makes, by paying his fare, a contract; but the boarding of the car, the payment of the fare, and the charging of the corporation with the responsibility for safe carriage are all matter of right on the part of the passenger, **a public right of carriage which he shares with all his fellow citizens, correlative to the public duty which the corporation owes to all.** Similarly, when a municipality, by virtue of private and public statutes, carries on a gas undertaking, the public duty of manufacture and supply finds its correlative in the right of the consumer, a public right which he has in common with all his fellow householders, to supply and to service. In both of these cases, accordingly, the Public Authorities Protection Act applies.
>
> But where the right of the individual cannot be correlated with a statutory or public duty to the individual, the foundation of the relations of parties does not lie in anything but a private bargain which it was open for either the municipality or the individual citizen, consumer, or customer to enter into or to decline. And an

> action on either side founded on the performance or non-performance of that contract is one to which the Protection Act does not apply, because the appeal, which is made to a Court of law, does not rest on statutory or public duty, but merely on a private and individual bargain."
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> (Emphasis supplied throughout)

22. The thread which is common to these speeches in *Myers* is the difference between public duties (and rights arising from them) and private duties (and consequent rights arising). PAPA 1893 was held to apply to the former but not to the latter. This vital distinction between a public duty and a private duty is not the same as Vaughan Williams LJ's proposed test in *Lyles*, which focussed not on the nature of the duty sued upon but rather on a suggested difference between acts performed as a matter of statutory duty and those performed under a mere statutory power. Clearly, whether the defendant acted under a statutory duty or under statutory power, the claim against it will ordinarily assert a breach of some form of legal duty. *Myers* drew attention to the distinction between legal duties owed to the public generally and those owed to particular individuals.

23. In 1916, the difference in law between these two was in the early stages of consideration, just as public law was in its infancy. Whilst identifying the need to differentiate between the two, Lord Shaw would have treated a passenger on a municipal tramway as owed no more than the public duty to run the utility. Today there is no difficulty in identifying the difference. A public duty is owed to the whole world, or in some cases to a section of it, and all the members of the relevant section of the public can enforce its performance, in modern times by way of judicial review. A private duty is owed to an individual, and arises from the specific relationship between the parties. The duty to take reasonable care of employees is a good example of such a private duty. So, one would say today, is the duty to an individual passenger on the tram to take care not to injure him. It is a different duty from the duty owed to local inhabitants generally to furnish the tramway, and the fact that the private duty arises in the course of the performance of the wider public duty does not alter that essential difference. In Lord Shaw's language, the private right of a passenger or employee to have reasonable care taken for his safety is not correlative to the public right of the inhabitants generally. The private duty owed to employees, or to passengers, is closely akin to the private contractual obligation entered into by the Guardians in *Sharpington*. Just as in that case, the only relevance to it of the statutory authorisation or duty is that what is being done is intra vires.

24. In *Griffiths v Smith* [1941] AC 170 the defendants were school managers, operating a State school under statutory authority given by the Education Acts. The school staged an exhibition of the pupils' work and invited, amongst others, the parents.

The floor collapsed, killing two visitors and injuring others, including the claimant, a parent. The judge held the defendants to have been negligent. But without calling on the defendants, the House of Lords held that PAPA 1893 applied its abbreviated limitation period and barred the action. The statute imposed a direct statutory duty on the managers to maintain the structure of the school. Viscount Simon LC (at 178), Viscount Maugham (at 183) and Lord Wright (at 194) treated as the explanation for *Myers* that the selling of the coke in that case had been a voluntary act incidental to the statutory duty. By that test the plaintiff in *Griffiths* failed, for it was treated as enough, indeed to all intents and purposes as conclusive, that in holding the exhibition the managers were acting in the course of their public function to manage the school. This decision is much closer to a literal reading of PAPA 1893, but was still expressly founded on the decision in *Myers* that the Act cannot apply to every action performed by a public body. Insofar as *Myers* was treated as turning on the incidental nature of the selling of coke, *Griffiths* did not address the fuller (and different) reasons given in the earlier case for the decision, nor the difference between public duties and private duties. Lord Porter (at 208-209) referred to Lord Shaw's discussion in *Myers* of correlative rights. He concluded that the fact that the school managers held the exhibition in the course of their public function of running the school was enough to make the case one of a public rather than a private duty. But today it would be clear that the duty sued on was a private one owed to visitors, albeit arising in the course of performance of a wider public duty to the local population generally to provide and manage a school.

25. It was a characteristic of both *Myers* and *Griffiths* that their Lordships expressed the great difficulty experienced in providing a reliable test for when the duty was public and when it was private. Lord Buckmaster LC in *Myers* at 250 remarked that he was conscious that his opinion did not establish as clear a line as he would have liked to see. Viscount Haldane in the same case at 251 described the process as telling a heap when it is seen, despite the difficulty of defining it. And in *Griffiths* Lord Porter at 211 thought that it was doubtful that it would ever be possible to lay down some general principle by which all cases can be tested. That difficulty was perhaps consequent on the undeveloped nature of public law challenges, and thus of analysis of public law duties, at that time.

Subsequent cases

26. Subsequent cases have reflected (a) the established proposition that PAPA cannot be construed literally, (b) the recognition of a difference between public duties and private duties, but also (c) the difficulty on the authorities of allocating particular cases to one category or the other, and the absence of a settled test for doing so. In consequence, they are often inconsistent in their outcomes.

27. A series of clinical negligence cases in England before the repeal of PAPA 1893 in 1954 followed the *Griffiths* lead in characterising the duty of hospital providers to

patients as a public duty and thus attracting the abbreviated limitation period: see for example *Nelson v Cookson* [1940] 1 KB 100, *Higgins v North West Metropolitan Hospital Board and Bach* [1954] 1 WLR 411 and *Razzel v Snowball* [1954] 1 WLR 1382. In the first of those cases, the striking result was that the allegedly negligent doctors, sued personally, were held entitled to the benefit of PAPA 1893 because they were held to be carrying out the statutory duty of the hospital authority, even in circumstances in which, at that time, they would not have been regarded as the servants of the authority and even though the authority could not have been made vicariously liable for their actions. It seems unlikely that today the hospital provider's duty of care towards patients in its charge would be regarded as simply the public general duty to furnish a hospital.

28. A similarly literal approach to legislation in the same terms as PAPA was adopted in *Firestone Tire and Rubber Co (SS) Ltd v Singapore Harbour Board* [1952] AC 452. The defendant Board negligently lost part of a cargo of tyres destined for the plaintiffs. The abbreviated limitation period was held to apply to the plaintiff's breach of bailment claim on the basis that the Board had been acting in the course of its public duty under the legislation which established it. The Board endorsed the views expressed in both *Myers* and *Griffiths* as to the difficulty of defining the difference between public and private duties, but treated the principal test as whether the act performed was incidental, or subsidiary, to the statutory function, rather than integral to it. By that test, the handling of the cargo of tyres was held not to be subsidiary. The decision in *Myers* was, however, as has been seen, not as straightforward as a test of subsidiarity. Once again, if the different question were now to be asked whether the duty sued upon was one owed generally to the public or one owed particularly to the plaintiff, the outcome would have been likely to be otherwise.

29. *Vincent v Tauranga Electric-Power Board* [1937] AC 196 did not concern PAPA or legislation in identical terms. The plaintiff employee sued for personal injuries suffered when working on a transformer belonging to the defendant Board. The statute applied an abbreviated limitation period, and a notice requirement, in relation to <u>any</u> action against the Board in the execution or intended execution or in pursuance of the statute "for any alleged irregularity, or trespass, or nuisance, or negligence, or for any act or omission whatever". Those words were understandably described as "of the utmost amplitude", and the action was statute-barred accordingly. Although the plaintiff had sought to rely on *Myers* and other decisions under PAPA 1893, the Board held them inapplicable given the (different) terms of the legislation.

30. *Duffus v National Water Commission* [2007] UKPC 35 was an employee's claim for wrongful dismissal. It failed, principally because, as both the Court of Appeal and the Board held, the only relevant contractual provision was a requirement for reasonable notice of termination, and such notice had been given. There was, accordingly, no breach of contract, and that was the end of the suit. The defendant water commission had, however, also pleaded the Jamaican Public Authorities Protection Act, which was

in the same terms as the present statute. The plaintiff had argued that the actions of the defendants in dismissing him "cannot be said to have been done in execution of the purpose of" the Commission. That argument was, unsurprisingly, summarily rejected. No further analysis of the PAPA point was necessary or ventured.

31. In the present case, the Court of Appeal regarded *Vincent* and *Duffus* as authorities for the proposition that even though a master-servant relationship may exist between the public authority and the claimant employee, PAPA nevertheless applies to any claim by the employee. As can be seen, neither case supports so broad a proposition. *Vincent* was decided expressly on the basis that the statute there in question differed from PAPA. *Duffus* contained no analysis of a PAPA claim at all.

32. Contrastingly decided were two cases in the Eastern Caribbean Court of Appeal, to which the Court of Appeal also referred. In *Bell v Commissioner of Police* (Civil Appeal No 4 of 2001) (unreported) 26 January 2004 a British Virgin Islands police constable sued the Commissioner in respect of deafness sustained during firearm training. At first instance his claim was held statute barred by PAPA, but on appeal that decision was reversed. Redhead JA, giving the judgment of the Court, held firstly that the Commissioner was under no duty obliging him to carry out firearms training, and secondly that the duties of the Commissioner as they related to the plaintiff "did not encompass a public authority" (see Court of Appeal in the present case, para 10). In *Attorney General of the Commonwealth of Dominica v Robin* (Case No HCVAP 2011/034) (unreported) 27 June 2012 a nurse employed by the government claimed damages for negligence having sustained an electric shock from a defective light switch, hanging loose and unprotected. The Court of Appeal held that PAPA did not bar her claim because it arose out of a private obligation of the government as employer rather than in execution of any public obligation.

33. In the present case, the Court of Appeal treated *Bell* and *Robin* as having been decided *per incuriam*, given its conclusions as to *Vincent* and *Duffus.* For the reasons already given, that reasoning is unsound. *Bell* and *Robin* are, as the Court of Appeal rightly recognised, not materially distinguishable from the present case.

34. What has certainly been maintained over the years is the initial starting point that PAPA statutes must be restrictively construed. In the last of the clinical negligence cases mentioned in para 27 above, *Razzel v Snowball*, Denning LJ began his judgment with an expression of relief that the problems arising from PAPA 1893 would no longer trouble the courts, it having been repealed and replaced by a single limitation regime for all personal injuries actions. In the celebrated *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* litigation, where the issue was the liability of the government to compensate for the destruction of the plaintiff's installation, ordered in the exercise of Crown prerogative to prevent it falling into the hands of the advancing Japanese army in 1942, one limb of the government's defence was reliance on PAPA. Lord Kilbrandon,

at first instance, rejected that defence at 1963 SC 410, 435 on the grounds that the claim for compensation was not based on any complaint that the army's actions had been unlawful. But he did so in these terms:

> "This must be the swan song of that never very highly regarded statute, and the Lord Advocate, in what, I think he would permit me to describe as a somewhat half-hearted submission on it, conceded that it is not a statute that can be applied unless the grounds for doing so are very clear."

In the Inner House and subsequently in the House of Lords reliance on PAPA was similarly rejected. Far from any qualification to Lord Kilbrandon's words being suggested, Lord Clyde, Lord President added in the Inner House, at 1963 SC 410, 448, that

> "The Act has always been narrowly construed by the Courts, since 'otherwise, what was intended as a reasonable protection for a public authority would become an engine of oppression' ..."

And much more recently in *Durity v Attorney General of Trinidad and Tobago* [2003] 1 AC 405 the Board rejected a claim that a PAPA statute applied to a claim by a suspended magistrate under the Constitution alleging lack of due process. In the course of doing so, Lord Nicholls of Birkenhead, giving the judgment of the Board, summarised the history of PAPA 1893 as follows, at para 20:

> "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 (56 & 57 Vict c 61), 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 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 Corpn v Myers* … *Griffiths v Smith* … and *Firestone Tire and Rubber Co (SS) Ltd v Singapore Harbour Board* … 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* …"

Conclusions

35. Although the many conflicting decisions on Public Protection Acts cannot all be reconciled, the Board is satisfied that the principle which properly underlies the statutes can be extracted from *Bradford Corpn v Myers*, and particularly from the speech of Lord Shaw, having been accurately foreshadowed by Farwell J in *Sharpington*. It lies in the oft-repeated proposition that the essential test lies in the difference between a public duty owed to the public generally and a private duty incurred in the course of acting under statutory enabling. The Acts were clearly passed, as Lord Shaw said in *Myers*, to protect public authorities from late challenges to the exercise of their statutory functions. That was considered desirable, no doubt, to protect annual budgets from having to be adjusted in subsequent years, and no doubt similar considerations applied to the desirability of policy decisions not being exposed to delayed assaults. The same policy is, very broadly, these days reflected in commonplace provisions requiring that applications for judicial review, challenging the performance or non-performance of public powers or duties, must be brought speedily. In England and Wales such a claim must be made promptly and in any event within three months: see the England and Wales Civil Procedure Rules 54.5(1). In the Eastern Caribbean jurisdictions, rule 56.5 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 is less specific but has the same aim. It provides that, quite apart from any legislative time limit, relief may be refused if the judge considers that there has been unreasonable delay in making the application. Moreover, it provides that in assessing whether there has been such unreasonable delay the judge must consider whether a grant of relief would be detrimental to good administration.

36. By contrast, where there is a general common law or statutory duty of the kind which is the same for a public authority as it would be for a non-public person or company, there is no reason for a much-abbreviated limitation period, indeed every reason why the period should be no different for a public body defendant as for anyone else. The duties of an employer to his employees, or of a transport undertaker to his passengers, or of any contractor to his contractual counterparty, are classic examples of particular duties. They may of course arise in the course of performing public functions, but they are not public duties owed generally to the world or to a section of the public.

37. Despite the potentially wide words of PAPA, it must, as has consistently been held, be construed restrictively. It only applies to public authorities, and not to all persons acting under statutory authority. It does not apply to all actions performed by public authorities, but only to those where the obligation sued upon is owed generally

to the public or to a section of it. Where the obligation sued upon arises simply out of a relationship with the claimant which would be the same for any non-public person or body, and where there is no question of a public law challenge, the Act has no application. The duty of care which the government is admitted to have owed to Mrs Alves *qua* employer was accordingly a private obligation exactly the same as is owed by any employer, and not a public obligation for the purposes of PAPA. The six month limitation period did not apply.

38. For these reasons the Board will humbly advise Her Majesty that Mrs Alves' appeal should be allowed. The decision of the trial judge should be restored and the case should be remitted to the High Court for trial.