

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2018/0024

BETWEEN:

VANITA HENRY

Appellant

and

**[1] THE SUPERINTENDENT OF PUBLIC WORKS
(NOW STYLED THE DIRECTOR OF PUBLIC WORKS, ALSO AS THE
SURVEYOR OF ROADS)
[2] THE ATTORNEY GENERAL OF ST. KITTS AND NEVIS**

Respondents

Before:

The Hon. Mde. Margaret Price Findlay
The Hon. Mr. Trevor M. Ward
The Hon. Mr. Eddy D. Ventose

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Ms. Chauntelle Hobson for the Appellant.
Mr. Christopher Forde for the Respondents.

2024: June 19;
July 26.

Civil appeal – Statutory duty on Crown – Duty to maintain roads and highways – Section 7 of the Roads Act - Breach of statutory duty - Section 4(2) of the Crown Proceedings Act - Crown’s liability in tort for breach of statutory duty - 1st respondent’s breach of statutory duty to maintain road and verge in state of good repair – Common law nonfeasance rule - Exemption at common law from liability for failure to maintain or repair roads or highways - Whether common law nonfeasance rule applicable in Saint Christopher and Nevis – Section 2 of the Common Law (Declaration of Application) Act - Whether common law nonfeasance rule repealed by section 4(2) of the Crown Proceedings Act - Private remedy for breach of statutory duty - Damages for personal Injury - Whether appellant had a private remedy for

damages for personal injury against the respondents owing to breach of statutory duty - Constitutionality of common law nonfeasance rule - Appellate court's jurisdiction to deal with breaches of the Constitution raised as new points on an appeal

In December 2013, the appellant was walking along the pedestrian crossing located on the Island Main Road in the vicinity of Brimstone Hill National Park, Sandy Point, Saint Christopher. The appellant then fell into a ditch immediately after stepping off the road. The ditch was directly adjacent to the designated pedestrian crossing. The appellant stated that when the incident took place, it was raining and the area was poorly lit which meant that the existence of the ditch was not easily discernable to her. The appellant sustained severe injuries because of the fall into the ditch.

The appellant filed a claim in the lower court against the respondents seeking, among other things, special damages and general damages as a result of the injuries she sustained from falling into the ditch. The appellant claimed that her injuries were the direct result of the Superintendent of Public Works (now called Director of Public Works) (the "Director") and his failure to properly carry out his statutory duties under section 7 of the Roads Act. She alleged that the Director failed or neglected to keep the roadway and the verge in a proper state of repair. In the alternative, the appellant claimed that there existed a duty on the Crown/Government of Saint Christopher and Nevis as the owner and the ultimate manager of the road and verge to exercise reasonable care in the management and maintenance of the road and verge for the safety of pedestrians. She asserted that the Crown/Government through its servants and/or agents was negligent in the exercise of that duty.

In a written judgment dated 22nd August 2018 the learned trial judge held that: (a) the appellant had established that there was a duty imposed on the Director to keep the roadway and verge in a proper state of repair; (b) the Director breached that duty; (c) the breach did not give rise to a private cause of action for injuries sustained by the appellant; (d) the respondents were not liable in negligence by virtue of the common law rule exempting public authorities from liability for nonfeasance; and (e) section 7 of the Roads Act was the original 1912 text and it had not been amended to give a remedy for neglect of the duty it imposes. The judge found that there was nothing in the language of section 7 that indicated expressly or by necessary implication an intention to impose any liability on the Government to pay any damages to persons who had been injured if the Director failed to maintain and repair roads which encompassed verges and consequently, the appellant was not entitled to special or general damages.

Being dissatisfied with the judge's ruling, the appellant appealed. The appellant filed 19 grounds of appeal. The first six grounds related to a challenge to the constitutionality of the common law nonfeasance rule. The next seven grounds concerned the alleged negligence of the Director and the final six grounds concerned whether the common law nonfeasance rule applied in Saint Christopher and Nevis. As to the grounds of appeal concerning the negligence of the Director, the appellant conceded these grounds at the hearing of the appeal. The Court went on to consider the constitutionality points raised by the appellant and also noted that the following issues arose in relation to the common law nonfeasance rule: (i) whether this Court should follow the approach of the Supreme Court of Canada in not applying the nonfeasance rule; (ii) whether section 4(2) of the Crown Proceedings Act

provides a private remedy in tort to the appellant for breach of statutory duty by the Crown, its servants or agents; (iii) whether a breach of section 7 of the Roads Act provides a remedy in tort for breach of statutory duty committed by the servants or agents of the Crown; and (iv) whether the common law nonfeasance rule is inapplicable because: (a) the Director is not an “inhabitant” for the purposes of the nonfeasance rule; (b) no legislation in Saint Christopher and Nevis made the nonfeasance rule applicable to the Director; and (c) the ditch in which the appellant fell was not part of the road itself.

Held: dismissing the appeal, affirming the decision of the learned trial judge and making no order as to costs, that:

1. As a general rule, an appellate Court does not have original jurisdiction to deal with breaches of the Constitution. It has jurisdiction in two situations, viz: on appeal from a final decision of the High Court where such issues were raised for determination, and where such questions arise in extant appellate proceedings. On the facts, whilst the appellant did not argue that the question of constitutional law arises directly for consideration by this Court in these proceedings, the appellant essentially challenged the common law nonfeasance rule on constitutional grounds. This constitutional challenge was raised for the first time on the appeal and did not fall within the situations in which an appellate Court would have jurisdiction to deal with contraventions of the provisions of the Constitution. Consequently, this Court had no jurisdiction to entertain the grounds of appeal based on the alleged constitutional infringements.

Levi Maximea v The Chief of Police et al DOMHCVAP2020/0009 (delivered 7th December 2023, unreported) followed.

2. At common law, the duty to maintain and repair a highway was not based in negligence but in nuisance, and was an absolute duty. Prior to 1959, in the United Kingdom, this common law duty was placed on the inhabitants at large of an area. This duty, however, did not impose on the inhabitants the additional burden of compensating anyone who suffered injury as a result of a failure to maintain or repair the highway. Thus, the inhabitants benefitted from an exemption from liability for nonfeasance. However, by virtue of section 38(1) of the United Kingdom Highways Act 1959 (“the 1959 Act”), this duty on the inhabitants was abolished. Under the 1959 Act, the duty transferred to the highway authorities and under section 298, the authorities benefitted from the exemption from liability for nonfeasance. By 1961, however, this exemption was repealed so that in the United Kingdom, the nonfeasance rule was effectively abolished. To mitigate this, section 58(1) of the United Kingdom Highways Act 1980 provided a special statutory defence so that a highway authority would not be liable if it proved that it took such care as in all the circumstances was reasonably required.

Goodes v East Sussex County Council [2000] 1 WLR 1356 considered; **Cowley v Newmarket Local Board** [1892] A.C. 345 considered.

3. In Saint Christopher and Nevis, the Common Law (Declaration of Application) Act ("the Common Law Act") was passed on 5th March 1887 and section 2 provided that the common law of England at that date, as far as it stood unaltered by any written laws of Saint Christopher and Nevis, was in force in the jurisdiction. This meant that the exclusion of liability for nonfeasance in the United Kingdom at common law came into force in Saint Christopher and Nevis at the time the Common Law Act was passed in 1887. Contrasting with the position in the United Kingdom, no law has since been enacted in Saint Christopher and Nevis to abolish the common law nonfeasance rule. The liability of the Crown to actions in tort for breach of a statutory duty under section 4(2) of the Crown Proceedings Act is only engaged where the Crown is bound by a statutory duty which is also binding on persons other than the Crown and its officers. Under section 7 of the Roads Act, the surveyor has the general care and supervision of roads in Saint Christopher and Nevis. Section 4(2) of the Crown Proceedings Act would not be applicable to a breach of section 7 of the Roads Act since that section places the statutory duty on the surveyor and no other person. Consequently, applying the common law nonfeasance rule in Saint Christopher and Nevis means that, the surveyor would not be liable for damages resulting from a failure to carry out the duty under section 7 to maintain roads of the State in good repair. The learned trial judge therefore did not err in finding that no private remedy in tort was available to the appellant for the breach of the section 7 duty by the Crown and its servants/agents.

Section 2 of the **Common Law (Declaration of Application) Act** Cap 3.05 of the Revised Laws of Saint Christopher and Nevis, 2002 applied; Section 4(2) of the **Crown Proceedings Act** Cap 5.06 of the Revised Laws of Saint Christopher and Nevis, 2002 distinguished; Section 7 of the **Roads Act** Cap 15.05 of the Revised Laws of Saint Christopher and Nevis, 2009 considered.

4. The Supreme Court of Canada in **City of Vancouver v McPhalen** rejected the common law nonfeasance rule as it had developed in England at the time of the decision in 1911. In *McPhalen*, the court held that where a municipal corporation was guilty of negligent default by nonfeasance of the statutory duty imposed upon it to keep its highways in good repair, persons suffering injuries in consequence of such omission may maintain civil actions against the corporation although no such right of action had been expressly provided for by statute. The court found that the common law nonfeasance rule was inapplicable to British Columbia since the rule under which inhabitants of areas through which highways passed were responsible for their repair and maintenance was never introduced into British Columbia and an 1858 proclamation ordained that the civil laws in England, as the same existed at 19th November 1858 and so far as the same were not, from local circumstances, inapplicable to British Columbia would remain in force until such time as they were altered. In Saint Christopher and Nevis, however, it is no answer to state, as the appellant does, that there was never a duty on the inhabitants to repair the roads and since this duty never existed, it could not be transferred to the surveyor. If the appellant's approach was to prevail, it would have the effect of subjecting all common law rules to a minute examination of their origin to determine whether similar circumstances then existed in Saint Christopher and Nevis before any

common law rule was to have any application. This was not the approach adopted by section 2 of the Common Law Act which is different to that adopted in British Columbia by the 1858 proclamation. This Court therefore would not follow the approach taken in Canada.

City of Vancouver v McPhalen (1911) 45 SCR 194 distinguished.

JUDGMENT

- [1] **VENTOSE JA:** This is an appeal filed on 4th October 2018 against the decision of the learned trial judge dated 22nd August 2018 in which the learned trial judge, among others, dismissed the appellant's claim for damages in respect of injuries and loss she allegedly suffered because of the respondents' breach of statutory duty and negligence.

Background

- [2] On or about 29th December 2013, the appellant was walking along the pedestrian crossing located on the Island Main Road in the vicinity of Brimstone Hill National Park, Sandy Point, Saint Christopher. The appellant then fell into a ditch immediately after stepping off the road. The ditch was located directly adjacent to the designated pedestrian crossing on the road and was less than two feet from the end of the pedestrian crossing. The appellant sustained severe injuries to her left leg because of the fall into the ditch. The appellant stated that when the incident took place, it was raining, and the area was poorly lit which meant that the existence of the ditch was not easily discernable to the appellant.
- [3] The appellant filed a claim form and statement of claim on 27th June 2014 in which she claimed against the respondents, among other things, special damages in a specified sum, and general damages for pain and suffering and loss of amenity because of the injuries she sustained from falling into the ditch immediately after traversing a pedestrian crossing in the area near the Brimstone Hill National Park. The appellant claimed that her injuries were the direct result of the Superintendent of Public Works' (now called Director of Public Works) (the "Director") failure to carry

out and/or properly carry out his statutory duties under section 7 of the **Roads Act**.¹ The appellant alleged that the Director failed and/or refused and/or neglected to keep the roadway and the verge in a proper state of repair in either not being aware of the ditch when he ought to have been aware of it, or by permitting a ditch on the verge of roadway to remain there. The appellant also alleged that the Director was negligent in properly maintaining the roadway, by failing to place any warning signs on the roadway itself to warn of the ditch at the end of the pedestrian crossing, or to take such steps to prevent the use of the pedestrian crossing, or to take such steps to prevent the use of the pedestrian crossing since the pedestrian crossing was the place particularly designated for pedestrians to use.

[4] In the alternative, the appellant claimed that there existed a duty on the Crown/Government of Saint Christopher and Nevis as the owner and the ultimate manager of the road and verge in question to exercise reasonable care in the management and maintenance of the road and verge for the safety of pedestrians who would use the pedestrian crossing on the road. The appellant continued that the Crown/Government through its servants and/or agents was negligent in failing to exercise reasonable care and attention in relation to the management and/or maintenance of the road and verge.

[5] In the defence, the Director, who is also the Surveyor of Roads of the Ministry of Public Works, admitted that he had a statutory study under section 7 of the **Roads Act** to repair and/or maintain the entire Island Main Road inclusive of the attendant verges of the roadway and that there was a ditch adjacent to the designated pedestrian crossing located on the Island Main Road in the vicinity of the Brimstone Hill National Park. The Director stated that he instituted a reasonable system of inspection and maintenance in all the circumstances and that he could not reasonably have been expected to fence off or warn the appellant of the ditch because he did not know of its existence. The Director claimed that he had arranged for competent persons to carry out or supervise the maintenance of the Island Main

¹ Cap 15.05 of the Revised Laws of Saint Christopher and Nevis, 2009.

Road including the part of the road where the appellant allegedly fell by a system of regular inspections which were carried out. The Director also claimed that in all the circumstances the conduct of the first respondent was beyond reproach and that he took reasonable steps in all the circumstances to properly keep the roadway in a safe condition.

- [6] The Director stated that the appellant wholly caused and/or contributed to her injuries by failing to take reasonable care and that if the loss or damage was caused by the respondents, which was not admitted, the appellant was precluded from recovering against the respondents by a rule of the common law that a highway authority is exempted from liability in a civil action by a private individual for damages sustained by that individual as a consequence of mere non-repair.

The decision in the court below

- [7] The matter came up for trial before the learned trial judge on 9th and 10th November 2017 and in a written judgment dated 22nd August 2018 the learned trial judge held, in relation to breach of statutory duty, that: (1) there was no dispute that there was a statutory duty on the Director to ensure that all public roads, roadways and attendant verges on Saint Christopher and Nevis are maintained and kept in a state of repair (at paragraph 15); (2) the existence of the ditch in the side walk proved that the Director was in breach of his statutory duty in failing to ensure that the road was being kept in a proper state of repair or in such a condition that no danger was caused to any road user (at paragraph 22); (3) the statutory duty to repair encompasses maintenance of the verge near the pedestrian crossing and ensuring that any holes near the pedestrian crossings are properly filled and covered (at paragraph 22); (4) that the nonfeasance rule was applied to Saint Christopher and Nevis by the **Common Law (Declaration of Application) Act**, (the "**Common Law Act**")² (at paragraph 28); and (5) no local legislation had since abrogated the common law nonfeasance rule and that it continued to form part of the law of Saint Christopher and Nevis (at paragraph 9).

² Cap 3.05 of the Revised Laws of Saint Christopher and Nevis, 2002.

- [8] The learned trial judge also held that: (1) the **Roads Act** did no more than codify the common law position and had left unaltered the old common law rule that those responsible for the maintenance and repair of public highways could not be made liable in civil action for damages caused by the condition of the highway if the condition were merely attributable to failure to repair (at paragraph 29); (2) there was merit in the view that to make the Director liable, the statute had to include clear provisions abrogating the common law position and also creating a statutory right to a private law remedy (at paragraph 29); (3) the appellant could not recover against the respondents unless she proved on the balance of probabilities that she fell into the ditch because of the Director's negligence in carrying out repairs, as opposed to a failure to carry out repairs, or some other act of misfeasance or negligence (at paragraph 30); and (4) the Director would not be liable if he is guilty of mere nonfeasance, that is, where he failed in his statutory duty to carry out repairs (at paragraph 30).
- [9] In relation to the claim for negligence, the learned trial judge held that: (1) there was not sufficient evidence that the cause of the accident was attributable to the negligence of the respondents, or breach of statutory duty (at paragraph 43); and (2) the respondents were not liable in negligence and therefore the appellant was not entitled to damages as claimed or at all (at paragraph 45).
- [10] The learned trial judge, after considering the evidence, the submissions and legal principles, gave her overall conclusions at paragraph 49 as follows, that: (a) the appellant had established that there is a duty imposed on the Director to keep the roadway and verge in question in a proper state of repair; (b) the Director breached that duty; (c) the breach did not give rise to a private cause of action for injuries sustained by the appellant; (d) the respondents were not liable in negligence by virtue of the common law rule exempting public authorities from liability for nonfeasance; (e) section 7 of the **Roads Act** was the original 1912 text and it had not been amended to give a remedy for neglect of the duty it imposes. There was nothing in the language of section 7 that indicated expressly or by necessary implication an

intention to impose any liability on the Government to pay any damages to persons who have been injured if the Director failed to maintain and repair roads which encompassed verges; and (f) the appellant was not entitled to special or general damages.

The appeal

- [11] The appellant appealed against the decision of the learned trial judge with 19 grounds of appeal. The first six grounds of appeal relate to a challenge to the constitutionality of the common law nonfeasance rule. The next seven grounds of appeal relate to the alleged negligence of the Director. The last six concerned whether the common law nonfeasance rule applies in Saint Christopher and Nevis. Before considering the last grounds of appeal, a few comments on the first thirteen are necessary.
- [12] The appellant cites the decision of this Court in **R v Pigott**³ and **Tyson v R**⁴ and that of the Caribbean Court of Justice in **Solomon Marin Jr v The Queen**⁵ for the principle that the Court of Appeal is authorised to hear constitutional points raised for the first time on an appeal. This is not the correct interpretation of these decisions. The correct principle was recently restated by this Court in **Levi Maximea v The Chief of Police et al**⁶ as follows:

“[44] As a general rule, the Court of Appeal does not have original jurisdiction to deal with breaches of the Constitution. It has jurisdiction in two situations, viz: on appeal from a final decision of the High Court where such issues were raised for determination, and where such questions arise in extant appellate proceedings. In this case there is no final decision on the constitutional issue in the High Court and Mr. Maximea must bring his case under the second situation. However, his challenge to the constitutionality of the delay in the delivery of the judgment in the Old Claims by filing an additional ground of appeal in this appeal does not qualify as an issue that arose in extant appellate proceedings. The challenge could have been raised in an appeal against a decision on the Old Claims, or in the High Court as was done in claim 84 of 2015.”

³ (2015) 88 WIR 299.

⁴ (2017) 92 WIR 328.

⁵ [2021] CCJ 6 (AJ) BZ.

⁶ DOMHCVAP2020/0009 (delivered 7th December 2023, unreported).

[13] The appellant does not complain that the question of constitutional law arises directly for consideration by this Court in these proceedings. Rather, the appellant challenges the common law nonfeasance rule on constitutional grounds. This constitutional challenge does not fall within the situations in which the Court of Appeal would have jurisdiction to deal with contraventions of the provisions of the Constitution. Consequently, this Court has no jurisdiction to entertain the grounds of appeal based on the alleged constitutional infringements.

[14] At the hearing of the appeal, counsel for the appellant conceded on the grounds relating to the alleged negligence of the Director. The learned trial judge had found that the appellant had not established her claim in negligence against the Director. In **HXA v Surrey County Council and another party**,⁷ the United Kingdom Supreme Court stated as follows:

“88 ... To establish liability for such a failure to benefit (which can be viewed as imposing liability for an omission), which is the exception rather than the rule in the common law, one of the recognised exceptional principles must be established. These principles were neatly encapsulated by Stelios Tofaris and Sandy Steel, “Negligence Liability for Omissions and the Police” (2016) 75 CLJ 128 in a summary which was cited and approved in Robinson [v Chief Constable of West Yorkshire Police [2018] AC 736] and then in N v Poole [Borough Council [2020] AC 780]:

“In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless (i) A has assumed a responsibility to protect B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A’s status creates an obligation to protect B from that danger.”

[15] The concession by the appellant relating to negligence was properly made because given the facts found by the learned trial judge, the Court agrees that the appellant could not establish that any of the categories (i) to (iv) applied to establish liability by the Director for negligence.

⁷ [2023] UKSC 52.

- [16] In respect of the final six grounds of appeal, the following issues arise in the appeal: (1) whether this Court should follow the approach of the Supreme Court of Canada in not applying the nonfeasance rule; (2) whether section 4(2) of the **Crown Proceedings Act**⁸ provides a private remedy in tort to the appellant for breach of statutory duty by the Crown, its servants or agents; (3) whether a breach of section 7 of the **Roads Act** provides a remedy in tort for breach of statutory duty committed by the servants or agents of the Crown; and (4) whether the common law nonfeasance rule is inapplicable because: (a) the Director is not an “inhabitant” for the purposes of the nonfeasance rule; (b) no legislation in Saint Christopher and Nevis made the nonfeasance rule applicable to the Director; and (c) the ditch in which the appellant fell was not part of the road itself.

The statutory provisions

- [17] Section 7 of the **Roads Act** states that:

“Surveyor to have control and management of roads.

7. The Surveyor shall have the general care and supervision of the roads of the State and, subject to the directions of the Minister shall be entrusted with, and be responsible for the laying out, making, repairing, widening, altering, deviating, maintaining, superintending and managing the same, and shall see that all contracts are duly and satisfactorily performed.”

- [18] Section 2 defines Surveyor as, “the Superintendent of Public Works and Surveyor of Roads for the State” and defines road as including, “a public road, a street mentioned in the Schedule to the Act, a statutory road, a private road, roadway, bridle path, and a bridge.” Further, section 5 states that:

“Property in public road.

5. (1) Any public road and any land on which a public road is constructed shall be the property of the Government of the Federation.

(2) Where a private or statutory road is repaired at public expense, with the consent of the owner, then such a road shall thereafter be taken and used as a public road for all purposes, except in any case where special arrangements are made to the contrary.

(3) A person, statutory body or statutory corporation may construct a private road to which the public has access provided that the

⁸ Cap 5.06 of the Revised Laws of Saint Christopher and Nevis, 2002.

construction of such a road must be approved and be subject to inspection by the Department of Public Works.”

[19] Section 3 provides for the funding of public roads as follows:

“Cost of maintenance of public roads.

3. The roads of the State mentioned in the Schedule to this Act and the bridges over which they pass, together with the retaining and breast walls thereof, shall, save as is hereinafter provided, be constructed and maintained at the public expense out of such moneys as may be provided by the National Assembly for that purpose:

Provided that the Minister may, out of the said moneys, apply such sums as he or she shall think fit, not exceeding in the aggregate four hundred and eighty dollars in each year, towards the maintenance and repair of any of the roads of the State not mentioned in the Schedule.”

The common law nonfeasance rule

[20] It is necessary to commence with the scope of the common law rule relating to nonfeasance. This rule was recently explained in **Goodes v East Sussex County Council**⁹ where the House of Lords, citing the decision of Diplock L.J. in **Griffiths v Liverpool Corporation**,¹⁰ explained the nature of the common law duty to repair the highway as follows:

“The duty at common law to maintain, which includes a duty to repair a highway, was not based in negligence but in nuisance. It was an absolute duty to maintain, not merely a duty to take reasonable care to maintain, and the statutory duty which replaced it was also absolute.”

[21] The duty to maintain the Highway is now codified by section 41 of the United Kingdom **Highways Act 1980**¹¹ (the “**1980 Act**”) as a duty to “maintain the highway.”

[22] Before 1959, the duty to maintain the highway at common law was that of the inhabitants at large of an area. However, in time, parishes were authorised to levy rates and appoint a “surveyor of highways” on whom the duty to maintain highway was entrusted. The surveyor was the agent of the inhabitants and the duty remained upon them; and was not liable on indictment or damages for any breach of that duty.

⁹ [2000] 1 WLR 1356.

¹⁰ [1967] 1 QB 374 at 389.

¹¹ Cap 66 of the Revised Laws of the United Kingdom, 2024.

Section 38(1) of the United Kingdom **Highways Act 1959**¹² (the “**1959 Act**”) abolished the duty on the inhabitants at large to maintain the highway. It provided that “no duty with respect to the maintenance of a highway shall lie on the inhabitants at large of any area.” Section 38(2) also provided that a highway which, immediately before the commencement of the **1959 Act**, was maintainable by the inhabitants at large or maintainable by a highway authority, should be, for the purposes of the **1959 Act**, a highway “maintainable at public expense.”

- [23] The House of Lords in **Goodes** further explained that, although the common law imposed upon the inhabitants at large a duty to maintain highways irrespective of their resources, it did not impose upon them the additional financial burden of paying compensation to anyone who suffered damage because of a failure to repair. At common law, an individual had no cause of action arising from any damage resulting from a failure to repair the highway. When the responsibility for maintaining the highway was transferred from the inhabitants to highway authorities, the courts held that that exclusion from liability was also transferred: **Cowley v Newmarket Local Board**.¹³ This exclusion from liability for highway authorities was codified by section 298 of the **1959 Act**. Section 298 made clear that the duty of the highway authority to maintain the highway is subject to an existing exemption at common law from liability for non-repair which is available to the highway authority “as the successor to the inhabitants at large.” Section 298 was short-lived as it was repealed only two years later in 1961 by the **Highways (Miscellaneous Provisions) Act 1961**.¹⁴

- [24] The effect of these changes in the United Kingdom was to allow a private cause of action for breach of statutory duty to maintain the highway against a highway authority. The repeal of section 298 had effectively abolished the nonfeasance rule in the United Kingdom. To mitigate this, the **1959 Act** gave highway authorities a special statutory defence, which is now in section 58(1) of the **1980 Act**: the highway

¹² 7 & 8 Eliz. 2, Ch 25 of the Laws of the United Kingdom 1959.

¹³ [1892] A.C. 345.

¹⁴ 9 & 10 Eliz. 2, Ch. 63 of the Laws of the United Kingdom.

authority is not to be liable if it proves that it took “such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic.”

- [25] The position at common in England and Wales was that the exemption that existed for the inhabitants from liability for any damage caused by a failure to comply with the statutory duty to maintain the highway was transferred to the highway authority in 1959 when the **1959 Act** transferred the obligation to maintain the highway from the inhabitants to the highway authority.

The common law in Saint Christopher and Nevis

- [26] Section 2 of the **Common Law Act** provides as follows:

“Application of Common Law of England.

2. The Common Law of England, as far as it stands unaltered by any written Laws of Saint Christopher and Nevis, or some of them, confirmed by Your Majesty, or some of your Royal Predecessors in Council, or by some Act or Acts of Parliament of the Kingdom of England, extending to Saint Christopher and Nevis, is in force in Saint Christopher and Nevis, and is the certain Rule whereby the Rights and Properties of your Majesty’s good Subjects inhabiting Saint Christopher and Nevis, are and ought to be determined; and that all Customs or pretended Customs, or Usages, contradictory thereunto, are illegal, null, and void.”

- [27] When the **Common Law Act** was passed on 5th March 1887, the exclusion of the highway authority from liability for nonfeasance in the United Kingdom was expressed in the following way in the decision of **Cowley** at pages 354-355:

“The question, therefore, is reduced to this, whether the defendants in whom the powers and liabilities of surveyors of highways are vested by statute have thereby imposed upon them a liability to be sued for a cause of action which could not have been maintained against the surveyor of highways. This is a subject which has engaged the attention of the Courts on many occasions. The governing principle was stated in the Exchequer Chamber as long ago as 1863 in the case of *Young v. Davis* [9 LT 145] (1), that the surveyor of highways was not liable to be sued for damage resulting from the highway being out of repair because no action could have been brought against the parish, and that the Act of Parliament requiring the surveyor to keep the roads in repair was not passed for the purpose of creating a new liability, but simply in order to provide machinery whereby the duty of the parish to repair might be conveniently fulfilled.

This principle is equally applicable where the duties and liabilities of the surveyor have been transferred to other bodies, unless a distinct intention on the part of the Legislature can be inferred from the particular statute under consideration to create a new liability. This was laid down in 1870 in the case of *Gibson v. Mayor of Preston* [Law Rep. 5 Q. B. 218] (2), where the previous authorities were considered; and, unless this House is prepared to overrule that case, it governs the present. After careful attention to the arguments which have been addressed to your Lordships, I adhere to the judgment given in the case of *Gibson v. Mayor of Preston* [Law Rep. 5 Q. B. 218] (2), and I therefore think that the judgment appealed from should be affirmed."

[28] Therefore, any person or body on whom the power to maintain the highway was transferred was not liable to be sued for any damage resulting from the failure to maintain or repair the Highway. Section 7 of the **Roads Act** states that the Surveyor shall have the general care and supervision of the roads of the State and, subject to the directions of the Minister shall be entrusted with, and be responsible for the laying out, making, repairing, widening, altering, deviating, maintaining, superintending and managing the same, and shall see that all contracts are duly and satisfactorily performed. Applying the common law nonfeasance rule means that the Superintendent of Public Works and Surveyor of Roads for the State of Saint Christopher and Nevis is not liable to be sued for any damage resulting from the public road being out of repair or not maintained in breach of section 7 of the **Roads Act**.

[29] The question, then, is whether there is a written law in Saint Christopher and Nevis that has the effect of altering the nonfeasance rule. It is to this issue I shall now turn.

The Crown Proceedings Act

[30] Section 4(2) **Crown Proceedings Act** states as follows:

"(2) Where the Crown is bound by a statutory duty which is binding also upon persons other than the Crown and its officers, then, subject to the provisions of this Act, the Crown shall, in respect of a failure to comply with that duty, be subject to all those liabilities in tort (if any) to which it would be so subject if it were a private person of full age and capacity."

- [31] Section 2(1) of the **Crown Proceedings Act** defines “statutory duty” to mean “any duty imposed by or under any enactment or other law extending to (or having effect in) the State.”
- [32] At first blush, section 4(2) seems applicable, but a closer reading suggests that it is not. The liability of the Crown under that section is only engaged where the Crown is bound by a statutory duty which is binding also upon persons other than the Crown and its officers (emphasis added). In other words, for that section to be engaged the statutory duty of the Crown must also be shared or be co-extensive with persons other than the Crown and its officers. Section 4(2) of the **Crown Proceedings Act** is not applicable to any breach of section 7 of the **Roads Act** because that section places the statutory duty to, among other things, repair the public road on the Surveyor and no other person (emphasis added).

The common law position in Canada

- [33] The appellant submits that the decision of the Supreme Court of Canada in **City of Vancouver v McPhalen**¹⁵ is to be preferred. In **McPhalen**, the Supreme Court of Canada held that where a municipal corporation is guilty of negligent default by nonfeasance of the statutory duty imposed upon it to keep its highways in good repair, and adequate means have been provided by statute for the purpose of enabling it to perform its obligations in that respect, persons suffering injuries in consequence of such omission, may maintain civil actions against the corporation to recover compensation in damages, although no such right of action has been expressly provided for by statute, unless something in the statute itself or in the circumstances in which it was enacted justifies the inference that no such right of action was to be conferred.
- [34] The decision in **McPhalen** rejected the common law nonfeasance rule as it had developed in England at the time of the decision in 1911. At that date, the common law position was as quoted above at paragraph 27 from the decision of the House of

¹⁵ (1911) 45 SCR 194.

Lords in **Cowley**. The Supreme Court of Canada in **McPhalen** rejected the common law of nonfeasance as being applicable to British Columbia because: (1) the common law rule under which the inhabitants of parishes through which highways passed were responsible for their repair was never introduced into British Columbia; and (2) the proclamation of Governor Douglas dated 19th November 1858 issued under the authority of an order-in-council of 2nd February 1858 in which it was ordained that “the civil laws of England as the same existed” on the 19th November 1858 “and so far as the same are not from local circumstances inapplicable to the Colony of British Columbia are and will remain in full force in the colony till such time as they shall be altered,” according to law meant that “the common law rule has never been acted upon and was, in 1858, and still is, “from local circumstances inapplicable”. In other words, the local circumstance in British Columbia means that the nonfeasance rule was inapplicable.

- [35] Since the common law nonfeasance rule was held inapplicable to British Columbia, it meant that in determining whether the municipal corporation was liable for breach of statutory duty the court had to construe the relevant statute without reference to that common law rule. Consequently, it was then open to the Supreme Court of Canada to express its position (at pages 212-213) as follows:

“The ground upon which I think the liability of the corporation may be put consistently with every relevant decision and with almost if not quite all the dicta I have seen, is this: where a municipal corporation acting under powers conferred by the statute creating it, constructs a work for use of the public, and invites the public to use it, the corporation having the ownership of and full authority to control the work, and to regulate the use of it by the public; and the statute creating the corporation in express terms imposes upon it the legal duty and at the same time gives it full authority to take all the necessary measures to prevent that work becoming a danger to the public making use of it in the exercise of their right, and owing to the unreasonable neglect of the corporation to perform this duty the work does become a public nuisance, then, in order to resist successfully a claim for reparation by one of the public who has suffered a personal injury in consequence of the existence of the nuisance, (while properly using the work in the exercise of the public right,) the corporation must shew something in the statute indicating an intention on the part of the legislature that the remedy by action shall not be available in such circumstances.”

[36] Once it is accepted that the common law nonfeasance rule became part of the common law of Saint Christopher and Nevis by virtue of section 2 of the **Common Law Act**, it is not open to question the rationale for the rule and then submit to the courts that the circumstances existing for its creation did not apply to Saint Christopher and Nevis and, consequently, it should not have been received as part of the common law received in 1887. The common law position that was received in 1887, as mentioned above, was as stated earlier in **Cowley**. It is no answer to that fact, to state, as the appellant does, that there was never a duty on the inhabitants of Saint Christopher and Nevis to repair the roads and that since this duty never existed, it could not be transferred to the Director. If the approach of the appellant was to prevail, it would have the effect of subjecting all common law rules to a minute examination of their origin to determine whether similar circumstances then existed in Saint Christopher and Nevis before any common law rule was to have any application. This was not the approach adopted in section 2 of the **Common Law Act** which is different to that adopted in British Columbia. In British Columbia, the 1858 proclamation expressly stated that the English common law would apply to British Columbia “so far as the same are not from local circumstances inapplicable.”

The verge as part of the road

[37] During the trial, there was no dispute that the verge formed part of the responsibility of the Director under section 7 of the **Roads Act**. This much was admitted by the respondents in paragraph 4 of the defence. Ms. La Rein Gumbs, an engineer with responsibility for the Roads Division in the Department of Public Works gave evidence at trial that part of her duties involved the maintenance and repair of the roads, verges, drains and bridges. The learned trial judge averted to this at paragraph 15 of the judgment. In oral closing submissions at the end of the trial, the respondent contended that the duty of the Director under section 7 does not extend to the verge. The learned trial judge observed at paragraph 14 of the judgment that this submission was inconsistent with paragraph 4 of the defence where the respondents accepted that the statutory duty to maintain the road extended to the verge. Based on the reasoning of the learned trial judge, she must have accepted as a fact that the ditch

where the appellant fell was part of the verge and therefore covered by the statutory duty under section 7 of the **Roads Act**.

The common law nonfeasance rule: the way forward

- [38] In the United Kingdom, the nonfeasance rule was codified by statute in 1959 but was subsequently repealed in 1961. It is not for this Court, an intermediate court, to change or abolish a common law rule of such vintage. This is a matter for the National Assembly of Saint Christopher and Nevis or the Judicial Committee of the Privy Council.

Disposition

- [39] Accordingly, I would dismiss the appeal and affirm the decision of the learned trial judge and make no order as to costs.
- [40] I am grateful for the assistance provided by learned counsel for the appellant.

I concur.
Margaret Price Findlay
Justice of Appeal

I concur.
Trevor M. Ward
Justice of Appeal

By the Court

Chief Registrar