

THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

SLUHCV2014/0140

BETWEEN:

PATRICK MCKENZIE

Claimant

and

THE ATTORNEY GENERAL
LEONTIUS JOSEPH

Defendants

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mrs. Cynthia Hinkson-Ouhla and Mr. Leslie Mondesir for the Claimant
Mrs. Karen Bernard and Mrs. Rochelle John-Charles for the Defendant

2021: February 10, 18, 26;
April 8, 12; (written submissions)
October 29.

JUDGMENT

- [1] **CENAC-PHULGENCE J:** The claimant, Patrick McKenzie (“Mr. McKenzie”) claims special, general and exemplary damages against the defendants, the Attorney General (“the AG”) and Leontius Joseph (“Sgt. 432 Joseph”) for personal injuries resulting from an accident on 13th November 2012 allegedly caused by Sgt. 432 Joseph’s negligence. Mr. McKenzie also claims interest and costs.

Pleadings

- [2] On 4th March 2014, Mr. McKenzie filed a claim, which was amended with the leave of the Court on 28th July 2016. In that amended statement of claim, Mr. McKenzie alleges that on 13th November 2012 at about 4:40 p.m. he was crossing the John

Compton Highway near LUCELEC when Sgt. 432 Joseph so negligently drove, managed, and controlled his motorcycle that he caused or permitted the motorcycle to collide with him causing him injury.

[3] Mr. McKenzie alleges the following particulars of negligence against Sgt. 432 Joseph:

- (a) Driving at a speed which was too fast in all the circumstances;
- (b) Failing to keep a proper lookout or to have any sufficient regard for pedestrians crossing the road;
- (c) Failing to give any or adequate warning of his (Sgt. 432 Joseph's) approach;
- (d) Failing to heed his (Mr. McKenzie's) presence on the road;
- (e) Failing to stop, slow down, swerve, or in any other way manage or control the motorcycle to avoid colliding with him (Mr. McKenzie).

[4] Mr. McKenzie alleges that as a result of Sgt. 432 Joseph's negligence, he suffered injuries, loss, and damage.

[5] In response to Mr. McKenzie's amended statement of claim, the defendants, in their amended defence, aver that it was Mr. McKenzie who carelessly emerged from between a moving line of traffic and caused the collision between him and Sgt. 432 Joseph.

[6] The defendants aver that their investigations revealed that Sgt. 432 Joseph was on traffic duties at the time of the accident, was dressed in police uniform, and was proceeding on a police motorcycle SLG 2047 in a southerly direction along the John Compton Highway. Upon reaching within 300 yards of the LUCELEC intersection, Sgt. 432 Joseph was riding the motorcycle cautiously alongside the line of static traffic at approximately 15 miles per hour when Mr. Mc. Kenzie suddenly emerged across the roadway in a westerly direction and into the path of the motorcycle being ridden by Sgt. 432 Joseph, thereby causing the collision. The investigation also revealed that Mr. McKenzie failed to look to his right before

attempting to cross the road, failed to have regard to the presence of Sgt. 432 Joseph on the road, and crossed at a time when it was not safe to do so.

[7] The defendants aver that Sgt. 432 Joseph took all necessary measures to avoid Mr. McKenzie but Mr. McKenzie, who was attempting to cross the street between moving traffic, failed to observe the necessary precautions as a pedestrian, thereby causing the collision.

[8] The defendants further aver that Mr. McKenzie failed to make use of the pedestrian crossing on the Highway, which was in close proximity to where he attempted to cross; at all times, he failed to have regard to other users of the roadway; and was negligent in crossing the Highway as he did.

[9] The defendants do not deny or admit any of the items of special damages claimed and observe that no receipts were submitted in support of the items. They therefore put Mr. McKenzie to strict proof of those.

Evidence

[10] The evidence for the claimant was given by Mr. McKenzie and Mr. Royston Taylor ("Mr. Taylor"), Manager of North American Assemblies Ltd., Mr. McKenzie's employer. On behalf of the defendants, Sgt. 432 Joseph, Assistant Superintendent of Police [Ag.] Benson Deterville ("ASP Deterville"), PC 312 Barrie Charles ("PC Charles") gave evidence. It is to be noted that both the claimant and defendants had filed witness summaries on behalf of PC Charles but a witness statement was subsequently filed from PC Charles by the defendants. The defendants had filed a witness summary on behalf of Mr. Adolphus Herbert, Officer in Charge, Traffic Department ("Mr. Herbert"). However, despite two adjournments, the defendants were unable to secure his attendance and closed their case on 26th February 2021. Mr. Herbert's witness summary was accordingly struck from the evidence.

Issues

- [11] The issues for determination are as follows:
- (i) Whether the second defendant, Sgt. 432 Joseph is a proper party to the claim and whether he can be sued in his personal capacity?
 - (ii) Whether the claim is prescribed? If not, then
 - (iii) Whether Sgt. 432 Joseph owed a duty of care to Mr. McKenzie and breached that duty, causing the accident? If yes,
 - (iv) Whether Mr. McKenzie is entitled to damages and if so, what quantum?
- [12] The claimant filed written closing submissions on 8th April 2021 and the defendants, having filed written submissions on 29th January 2021 prior to the trial as had been ordered, filed further written submissions on 12th April 2021.

Issue (i) - Whether the second defendant, Sgt. 432 Joseph, is a proper party to the claim and whether he can be sued in his personal capacity?

- [13] In the statement of claim, Mr. McKenzie sets out the relationship between the first and second defendants and states that the Attorney General is being sued as the employer of the second defendant pursuant to section 13 of the **Crown Proceedings Act**.¹ He goes on to state that in the alternative the second defendant is being sued in his personal capacity.
- [14] The defendants in their amended defence deny that there is any basis for bringing a claim against the second defendant in his personal capacity or that it would be liable to answer to any claim made against Sgt. 432 Joseph in his personal capacity. The defendants also aver that the AG is not the employer of Sgt. 432 Joseph as alleged, but acts as the legal representative of the Crown pursuant to sections 4 and 13 of the **Crown Proceedings Act**.

¹ Cap 2.05, Revised Laws of Saint Lucia.

Discussion

- [15] The defendants in their written submissions submitted that the second defendant is an improper party to the proceedings as, at all material times, he was acting in the course of his duties and therefore ought to be struck out. In their further submissions, the defendants raised, for the first time, that the claimant did not plead service of notice of suit on Leontius Joseph nor is there any evidence of such service on him as required by article 28 of the **Code of Civil Procedure**.² They submit that this is fatal to the claim and no judgment can therefore be entered against them and the claim ought to be dismissed.
- [16] The position of a police officer was looked at in the Court of Appeal decision of **Jewel Thornhill v The Attorney General**³ where the learned Chief Justice entertained no doubt that, although a police officer may not be regarded as a servant or agent of the Crown in the strict sense, he or she is nonetheless an officer or an employee of the Crown in the sense that he/she performs a very important public duty – that of peace officer charged with enforcing the law of the land by protecting honest citizens as they go about their daily lives in peace within a community.
- [17] In the case of **Tamara Barrow v PC 240 John Flavien**,⁴ Mason J accepted the proposition, as referenced by Edwards J in **Peter Clarke v Attorney General et al**,⁵ that, generally speaking, unauthorized acts by government officers may be the subject of actions against them in their personal capacity but not in their official capacity unless otherwise provided by law.⁶ Mason J went on to also agree with Edwards J's pronouncements in **Peter Clarke** that, on a close look, section 4(3) of the **Crown Proceedings Act** was a provision that is an example of the law providing otherwise. Section 4(3) makes the Crown absolutely liable in

² Cap. 4.01A, Revised Laws of Saint Lucia.

³ SLUHC VAP2012/0035, (delivered 16th April 2015, unreported).

⁴ SLUHC V2006/0182 (delivered 22nd September 2006, unreported).

⁵ SLUHC V1999/0475, (delivered 19th April 2004, unreported) at paragraphs 49 and 50.

⁶ At paragraph 31.

every respect for the conduct of its servants, provided their wrongful acts are done in the course of performing their official duties.

[18] Mr. McKenzie, in his pleadings, also states that the second defendant was employed at the material time as a traffic officer within the Royal Saint Lucia Police Force, which is not disputed by the AG. It is evident from that statement that Mr. McKenzie accepts that Sgt. 432 Joseph was acting at the material time in the course of his duties as a traffic officer. There is nothing on his pleadings to suggest that Sgt. 432 Joseph was not acting in the course of his duties and so I cannot find any basis for Sgt. 432 Joseph to be sued in his personal capacity.

[19] However, I see no reason to strike Sgt. 432 Joseph as a party to the claim. It is clear from the claimant's pleadings and the evidence that there is no question of Sgt. 432 Joseph acting in a personal capacity. That much I have established. Even so, I agree with the view expressed by Mason J in **Tamara Barrow** at paragraph 30, that though section 13 of the **Crown Proceedings Act** mandates that actions against the Crown be instituted in the name of the Attorney General, there is really nothing to prevent the alleged wrongdoer, who is an officer of the Crown and a public officer and was so acting in that capacity on the date of the accident, from being joined as a party to the action.

[20] Whilst it is the position, as stated in **Bryan James et al v The Attorney General**,⁷ that failure to comply with article 28 of the **Code of Civil Procedure** is fatal to a claim, I note that this was only raised by the defendants in their written submissions and that they have prosecuted their defence without ever raising this issue. To my mind, they have submitted themselves to the Court's jurisdiction and it would not further the overriding objective for the Court to, now allow the defendants to take this point. I therefore, make no pronouncement as relates to this issue, which has only now been raised, and go onto discuss the second issue of prescription.

⁷ SLUHCVP2013/0023 and 0024, (delivered 10th February 2016, unreported).

Issue (ii)-Whether the claim is prescribed?

The Applicable Law and Principles

[21] Article 2124 of the **Civil Code**⁸ provides that actions against public officers in respect of acts done by them in good faith and in respect of their public duties are prescribed by six months. Good faith according to article 2066 of the **Civil Code** is presumed and he who alleges bad faith must prove it. Therefore, the actions of the defendants are presumed to have been done in good faith and the claim would be prescribed unless the claimant proves bad faith.

[22] In **Fast Kaz Auto Supplies Limited et al v The Attorney General**⁹ Blenman JA looking at article 2066 said at paragraph 62:

“... This provision makes it clear that **the onus rests on the party alleging bad faith to not only particularise the allegations of bad faith but to prove them**. Collymore J in the Trinidadian case of *Marcano v Attorney General* (21TT 1985 HC 63) observed that:

“The keystone upon which the exercise of all public functions rest, as all the authorities show is good faith. The existence of bad faith in the exercise of any administrative function is sufficient warrant for the court to say that that is an improper exercise and so is unlawful. (See *The Matter of L.J. Williams v. Percival Smith and the Attorney General* No. 176/78). The onus rests upon the applicant to show bad faith, and that in the absence of anything to the contrary, the Authority must be presumed to be acting properly.” (my emphasis)

[23] In determining whether an act amounts to bad faith, the court may examine not only the conduct at the time of the act but those actions before and after. This is supported by the dicta of the learned Chief Justice in **Jewel Thornhill** at paragraph 37:

“... I accept however, as a general and commonsense proposition that indetermining bad faith one should look at the entire course of conduct as a continuum, as bad faith is usually to be inferred from a certain state of things which may include conduct not only at the specific point in time of the action complained of but also actions taken before and after as all of these may be relevant in divining bad faith in respect of the act.”

⁸ Cap. 4.01, Revised Laws of Saint Lucia.

⁹ SLUHC VAP2018/0040 (delivered 12th June 2020, unreported).

Discussion

- [24] The claim was originally filed on 4th March 2014 which was outside of the six-month period prescribed by Article 2124 of the **Civil Code**.¹⁰ In order to extend the prescription period to three years, Mr. McKenzie has to plead and prove bad faith.
- [25] Therefore, in his amended statement of claim filed on 28th July 2016, he alleges that the investigating officer, PC 312 Charles filed an internal report in which he concluded that Sgt. 432 Joseph was responsible for the accident but that his recommendations and findings were disregarded and thereafter he was transferred to another department.
- [26] He also alleges that Sgt. 432 Joseph and other officers, during the course of their employment and in abuse of their authority, maliciously and in bad faith proceeded to change the contents of the traffic accident report and as a result exonerated Sgt. 432 Joseph from all liability for the accident. He further alleges that Sgt. 432 Joseph and the other officers knew that exonerating Sgt. 432 Joseph from liability would cause him anxiety and financial and emotional distress.
- [27] The specific particulars of malice and bad faith as pleaded by Mr. McKenzie are as follows:
- (a) Substituting the contents of the Road Traffic Report;
 - (b) Exonerating Sgt. 432 Joseph from liability and attributing blame to him;
 - (c) Delaying preparation of the Road Traffic Report despite several verbal requests from Mr. McKenzie's employer to Police Officer Aldolphus Herbert;
 - (d) Deliberately failing to prepare the Traffic Accident Report in a timely manner so as to avail the defendants of the defence of prescription;
 - (e) Transferring the investigating officer from the Traffic Department;
 - (f) Not caring that their actions would cause injury to Mr. McKenzie.

¹⁰ Cap. 4.01, Revised Laws of Saint Lucia.

- [28] This is the evidence led by Mr. McKenzie as relates to the allegations of bad faith. In his witness statement, he says that he has read the two police versions of how the accident occurred and both show that Sgt. 432 Joseph was at fault. Mr. McKenzie does not exhibit what he claims are the two versions of how the accident happened. He says it took him five months to obtain the Traffic Accident Report, which he only received on 4th April 2013 and that after he received the report, his attorney wrote to the Commissioner of Police but the letter was never acknowledged.
- [29] Mr. McKenziesays that the police 'have taken the trouble to change the contents of the report' so that he could be seen as the one who is at fault.' In cross examination, Mr. McKenzie agreed with counsel for the defendants, Mrs. Karen Bernard that if someone makes a recommendation, it can either be accepted or rejected.
- [30] Mr. Taylor is Mr. McKenzie's employer. Mr. Taylor's evidence is that after the accident, he made an oral application for the Traffic Accident Report. After several requests and no response, he personally visited the officer in charge and demanded the report as it was approaching six months since the accident. From his evidence, he made visits and left messages but got no response, and it began to get frustrating. He gives no timelines for the attempts that he speaks of.
- [31] He then sought to obtain a contact number for the officer in charge but was furnished with his name, Inspector Herbert. He says he got a contact number for him and despite urging him to assist in expediting the report, the report was still not available in March 2013. Mr. Taylor says he thought the delay was deliberate. He then says that when he finally received the report in April 2013, he realised that the measurements did not reflect or match the description of where the point of impact was stated. This discrepancy, he says, raised a concern and he contacted Inspector Herbert. He then visited Assistant Commissioner of Police Eugene

(“ACP Eugene”). He says that it was revealed that the Traffic Department had not followed standard procedure and had failed to report the accident to administration. It is unclear what this actually means as it is just a bald statement to which I attach no weight. Mr. Taylor then goes on to indicate what ACP Eugene said to him, which is clearly hearsay.

[32] Mr. Taylor was not presented as an expert in the field of accident reconstruction and therefore his attempt to produce a plan of the area with the measurements included goes beyond him expressing his views. Accident reconstruction is a specific science, which requires expertise. It is not a matter of his opinion, and Mr. Taylor possesses no expertise in the area to allow him to even proffer an opinion. In addition, the plan/drawing had not been disclosed and therefore could not be relied upon by the claimant in accordance with CPR 28.13(1). At the trial, I had ruled the plan/drawing referred to in paragraph 9 of Mr. Taylor’s witness statement inadmissible. Whether the measurements support the conclusion or are incorrect is a matter which would have to be tested at a trial.

[33] Mr. Taylor expressed that he was frustrated with the length of time the Traffic Accident Report was taking and that the delay was deliberate. However, in cross examination, he agreed that he was not in the habit of applying for traffic reports and further that he had no idea of how long a police report takes. He also agreed, like Mr. McKenzie, that a recommendation can be accepted or rejected. Mr. Taylor indicated that he was not present when the accident occurred but that he was present when the measurements were taken, yet there is no record of Mr. McKenzie raising any queries with the measurements taken.

[34] Given how invested Mr. Taylor appeared to be, one would think that he would have pressed Mr. McKenzie to raise any issues which he perceived may have been incorrect on the day the measurements were taken but there is no evidence of that.

- [35] The defendants neither admit nor deny the particulars of malice and bad faith pleaded by Mr. McKenzie and state that the particulars are vague and incoherent, and they do not know to whom the allegations made relate. They specifically wish Mr. McKenzie to prove how the contents of the particulars relate to them and specifically, the connection and relevance of the transfer of PC Charles from the Traffic Department to the traffic accident report.
- [36] Despite the above, the defendants, in response to the allegations of bad faith, aver that PC Charles, as part of the investigative process, prepared an investigation file, which contained the traffic accident form, the traffic accident report booklet, witness statements, measurements, pocketbook entries and recommendations. The recommendation of PC Charles was that Sgt. 432 Joseph was at fault. The standard procedure thereafter is that the investigation file is submitted to the supervising officers for their consideration and a decision on the appropriate action to be taken.
- [37] The defendants aver further that PC Charles submitted his investigation file to his supervising officer and in accordance with standard procedure, the supervising and senior officers conducted a review of the investigation, recommendations and findings, and after consideration of the matter, determined that there was reasonable and sufficient basis to find that Mr. McKenzie was responsible for the accident. As a result, the recommendation of PC Charles that Sgt. 432 Joseph was at fault was not accepted.
- [38] The defendants state that as soon as was reasonably possible after the conclusion of the investigations, standard internal deliberations and review process, the Traffic Accident Report dated 4th April 2013 was prepared and signed by the officer in charge of the Traffic Department. The findings of the report were that pedestrian, Patrick McKenzie, contributed to the accident and by extension sustained bodily injuries. The report also stated that police prosecution was not considered necessary in the matter.

- [39] The defendants aver that PC Charles was transferred to the marine Unit of the Royal Saint Lucia Police Force in the normal course of his duties as a police officer.
- [40] The defendants deny the allegations of abuse of authority, malice and bad faith made by Mr. McKenzie. In response they state that the findings of investigating officers are not conclusive until reviewed by senior ranking heads of the Traffic Department. They aver that a review of all accident files by senior heads of the Traffic Department is the standard operating procedure and that once the evidence and measurements are reviewed by such heads, initial findings can be overturned if unfounded or inaccurate.
- [41] The defendants further aver that a Road Traffic Report is not required for the filing of any civil action and Mr. McKenzie has failed to show how anything alleged by him precluded or obstructed him from filing a civil claim within the prescribed time. The defendants therefore aver that Mr. McKenzie has failed to rebut the presumption of good faith and the claim is prescribed.
- [42] Finally, the defendants state that notwithstanding his own acknowledgement of the defence of prescription, Mr. McKenzie has filed and served a claim which is so egregious in its breach of procedural law that it is nothing more than a failed attempt to circumvent the applicable laws. As such, the claim is vexatious, unfounded and a gross misuse of the Court's time and should be struck out as being wholly untenable with costs.
- [43] Let us examine the defendants' evidence as it relates to the allegations of bad faith. Sgt. 432 Joseph's evidence is that PC Charles spoke to Mr. McKenzie and him at the accident scene and they both gave an explanation as to how the accident occurred which was recorded in the officer's pocketbook. He says they both showed PC Charles the point of impact which he marked. He says that

returned to the accident scene at a later date to take measurements which PC Charles recorded in his pocketbook. Sgt. 432 Joseph says he and Mr. McKenzie were both asked whether they wished to have any additional measurements taken and he requested that the height of the minibus similar to that which Mr. McKenzie had crossed in front of and Mr. McKenzie's height be taken.

[44] In cross examination, counsel for the claimant questioned Sgt. 432 Joseph about his relationships with several officers and he indicated that he had worked with ASP Deterville for a few months not years, and with Inspector Herbert for a number of years and that he had good working relationships with them. PC Charles he says was his junior at the time and he had a working relationship with him. He was aware that PC Charles had been transferred from the Traffic Department but could not say how long after the accident that was. Sgt. 432 Joseph in cross examination said there was no specific time for a Traffic Accident Report to be prepared and said that once the matter has not gone beyond the six months a report can be prepared within that period. Sgt. 432 Joseph said he never saw the Traffic Accident Report and was not aware of PC Charles' recommendation but agreed having looked at its date that it was prepared five (5) months after the accident. Sgt. 432 Joseph could not speak to the time frame for lodging criminal complaints and said he may have forgotten.

[45] ASP Deterville at the material time was Acting Inspector at the Traffic Department. Mr. Herbert was the Officer in Charge then. ASP Deterville's evidence is that at the time, his responsibilities included perusing accident files from his subordinates which included the supervisors who received accident files from constables. In cross-examination, ASP Deterville said he had been a police officer for thirty-one years and had known Sgt. 432 Joseph for over ten years. He says that during the early part of 2013 he received a traffic accident file from PC Charles in relation to the accident.

- [46] ASP Deterville sets out some of the details in relation to the accident and notes that the investigating officer recommended at the time that Sgt. 432 Joseph should be charged for careless driving. He says he disagreed with the recommendation and called PC Charles, the investigating officer to his office, had a discussion with him and advised him that based on the investigations, he concluded that the pedestrian was the one who contributed to the accident.
- [47] ASP Deterville's evidence is that the file was also submitted to Mr. Herbert, the Officer in Charge, who he says agreed with his recommendation and further submitted it to ASP Eugene. He says the file was transmitted to the then Director of Public Prosecutions ("DPP") who agreed with his recommendation that Sgt. 432 Joseph was not responsible for causing the accident.
- [48] He says that the then DPP returned the file with a memo outlining the facts and reasons why Sgt. 432 Joseph was not at fault and the pedestrian had contributed fully to his demise. Based on the DPP's recommendations, ASP Deterville says Sgt. 432 Joseph was not prosecuted. In cross-examination, ASP Deterville was asked how long after he received the report from PCCharles he submitted his own report to Inspector Herbert and he said not more than two days. ASP Deterville in answer to counsel for the claimant as to whether he had produced anything in support of his evidence regarding the DPP's recommendation, said that he had not and that he did not have anything that he could have submitted. ASP Deterville said he was aware of the six-month time limit for filing a complaint, but he was not aware that civil claims must also be brought within six months in relation to public officers.
- [49] PC Charles was attached to the Traffic Department from May 2012 to January 2013. PC Charles gives evidence that on the date of the accident he responded to the accident scene and cautioned both Mr. McKenzie and Sgt. 432 Joseph and recorded brief explanations as to how the accident occurred in his pocketbook, which was done in the presence and hearing of each other.

- [50] Briefly, he says that Sgt. 432 Joseph's explanation was that he was driving the motorcycle towards Castries; he was cruising down because the traffic was at a standstill; he suddenly saw Mr. McKenzie come out from the front of a minibus which was stationary, and he came into contact with Mr. McKenzie. In relation to Mr. McKenzie, PC Charles states that his explanation was that he was in front of a stationary bus; he did not see the bike and he was crossing and then he felt the bike hit him; he did not look left or right as the traffic was at a standstill.
- [51] PC Charles says he marked off the position of the motorcycle using spray paint and the point of impact as indicated and agreed by the rider and pedestrian at the time of the accident, and indicated that they would have to return to the accident scene to take the measurements as Mr. McKenzie required medical attention. PC Charles' evidence is that he along with Mr. McKenzie and Sgt. 432 Joseph returned to the accident scene on 4th December 2012 where he took measurements which he recorded in his pocketbook. The parties both agreed with the measurements taken and Sgt. 432 Joseph requested additional measurements which were taken. He produced a copy of his pocketbook showing where he recorded the explanations of the two gentlemen and the measurements which had been taken.
- [52] PC Charles says that having concluded his investigations he was of the view that Sgt. 432 Joseph was at fault in the accident since paragraph 6 of the driving code appeared to have been violated based on the point of impact recorded. He says he prepared a Traffic Accident Booklet in the matter which contains a sketch plan of the accident scene and showing the point of impact. He says he submitted the file and his recommendations to the officer in charge at the Traffic Unit through his supervisor for perusal and onward transmission to the Administrative Sergeant. His recommendation was that Sgt. 432 Joseph be prosecuted for driving without due care and attention.

[53] In cross examination, PC Charles was questioned about the procedure, and it was suggested to him that had there been issues with his report this would have been flagged before it got to ASP Deterville and he agreed. He confirms that he had a discussion with ASP Deterville who held a different view as to who was responsible for the accident but that Corporal Jn Baptiste and Sgt. Cumberbatch to whom the report was first submitted before it got to ASP Deterville were not part of the discussion.

[54] PC Charles agreed with counsel for the claimant that he completed his report on 18th January 2013 and that this showed that he acted diligently in submitting his file to his superiors. In relation to the Traffic Accident Report, PC Charles said he was not aware of the date of the report but agreed given its date that it was prepared five months after the accident. He also said he was familiar with the six-month limitation for filing a traffic case.

Analysis

[55] In the main, the claimant's contention is that the delay in preparing the Road Traffic Report denied him the opportunity to file his civil claim within the prescriptive period and that the defendants maliciously changed the findings and recommendations of the Traffic Accident Report to exonerate Sgt. 432 Joseph. Counsel for the claimant, Mrs. Cynthia Hinkson-Ouhla and Mr. Leslie Mondesir jointly submitted that Sgt. 432 Joseph and ASP Deterville exhibited little knowledge of the limitation periods and that this is an indication of a negligent approach to their duties. I will now further dissect the first two allegations of bad faith: (i) substituting the contents of the Road Traffic Report; and (ii) exonerating Sgt. 432 Joseph from liability and attributing blame to Mr. McKenzie.

[56] Of critical note is that in the evidence of Sgt. 432 Joseph he does not speak to any involvement in the Traffic Accident Report preparation. In the statement of claim Mr. McKenzie specifically pleaded that Sgt. 432 Joseph and other officers changed the contents of the Traffic Accident Report but there is absolutely no

evidence that Sgt. 432 Joseph was involved in its preparation. The reference to other officers is a very vague and general statement and the claimant fails to identify the 'other officers' to whom he refers. Allegations of bad faith cannot be vague and speculative.

[57] Counsel for the claimant also took issue with the defendants' evidence that their actions were justified as they followed standard procedure and say that this is not borne out by the witnesses' testimony. They say that the evidence revealed that the accident was not reported to the Administration as is required by standard procedure. This was stated in the witness statement of Mr. Taylor as something which he says ASP Eugene revealed to him. However, the witness did not provide any further clarification as to what that meant. In addition, this evidence is hearsay.

[58] The claimant, in submissions, contended that the traffic accident file ought to have been submitted to the DPP but that the defendants have no evidence to show that this procedure was followed, nor did they produce any evidence that the DPP agreed with the recommendation of the Senior Officer not to charge Sgt. 432 Joseph.

[59] Counsel for the claimant submitted that the decision to defend the proceedings also constitutes circumstances which can be considered when determining bad faith.

[60] For completeness, I will examine the "versions" of the report as alleged by the claimant. I believe it may be more accurate to say the versions of how the accident occurred and the recommendations.

The Traffic Accident Report dated 4th April 2013

- [61] That report contained the same measurements as recorded in PC Charles' pocketbook. Under the rubric "How Accident Happened" this is what appears:

"Motor cycle licence plate number SLG 2047 driven by Leontius Joseph was traveling South along the John Compton Highway. It has been established that Patrick McKenzie, a pedestrian, was attempting to cross the same road from East to West, inevitably in a line of static traffic which was at the time occupying the left lane facing South to Castries. Upon emerging from beyond the line of vehicles, Patrick McKenzie got struck down by motor cycle SLG 2047 on the left side of the road facing South towards Castries. The pedestrian Patrick McKenzie is the one who contributed to the accident and by extension sustained bodily injuries."

- [62] Under the rubric "Detail of Proceeding Pending/Taken" it states: "police prosecution is not considered in this matter."

Traffic Accident Booklet

- [63] In the Traffic Accident Report booklet signed and submitted by PC Charles after his investigations, under the rubric "How Accident Happened"- the content is the same as in the Traffic Accident Report dated 4th April 2013 save that the last line is not included. Under Reporting Officers Comments and Recommendations, PC Charles states that 'investigations into the accident ... revealed that Leontius Joseph driver of SLG 2047 is at fault in the accident. I therefore recommend that the said driver be prosecuted for driving without due care and attention.'

- [64] PC Charles in cross examination confirmed that at the date of the accident he had been a police officer for seven to ten months and was assigned to the Traffic Department for about that same period so that he was clearly a junior officer. That is in contrast to the thirty-one years' police experience of ASP Deterville.

- [65] The evidence reveals that there was only one Traffic Accident Report issued to the claimant dated 4th April 2013. The claimant's reference to two versions of the Traffic Accident Report is therefore misleading. The findings and

recommendations of PC Charles as contained in his submitted traffic accident report booklet and his investigation file were not accepted and the Traffic Accident Report dated 4th April 2013 was issued with the recommendations which ASP Deterville said he thought were more appropriate after he had reviewed the file and evidence. ASP Deterville also gave evidence that he called PC Charles and discussed the matter with him and informed him that he did not agree with his findings. This evidence was supported by PC Charles. I therefore find that based on the evidence of ASP Deterville his actions were not for an improper intent or alien purpose.¹¹It would seem highly strange for someone acting in bad faith or for any improper purpose to call the junior officer to discuss the matter.

[66] It must always be remembered that a Traffic Accident Report is simply a summary of the police's findings, measurements and conclusions but that it is not conclusive of the matters stated therein and these can certainly be challenged in a court of law. It is also to be noted that the court is not at all bound by the findings in the report and would ultimately make a decision based on all the evidence presented at trial.

[67] It is important to remember that it is for the claimant to prove his allegations of bad faith. The defendants in their evidence provided the procedure which is employed in dealing with a traffic accident leading up to the report preparation. That evidence is gleaned from PC Charles and ASP Deterville and was not controverted in any way by the claimant. It is clear from the evidence that an investigating officer's recommendations are reviewed by his superiors and as agreed by both Mr. McKenzie and Mr. Taylor recommendations may be accepted or rejected. In this case, ASP Deterville indicates that he did not agree with the recommendations of PC Charles. This is confirmed by PC Charles in his evidence. Therefore, whilst it may be that the final report did not accept PC

¹¹ See Roncarelliv The Hon. Maurice Duplessis[1959] S.C.R. 121 at page 143.

Charles' recommendations or that it shifted blame for the accident to Mr. McKenzie, this by itself is insufficient, in my view, to establish and prove bad faith.

[68] I now turn to the allegations of bad faith-(i) delaying preparation of the Road Traffic Report despite several verbal requests from Mr. McKenzie's employer to Police Officer Aldolphus Herbert; and (ii) deliberately failing to prepare the Traffic Accident Report in a timely manner so as to avail the defendants of the defence of prescription.

[69] The Traffic Accident Report Booklet submitted by PC Charles shows that it was signed by him on 6th February 2013 which is in keeping with ASP Deterville's evidence where he says that he received the file from PC Charles in the early part of 2013. The measurements were taken in December 2012 and PC Charles' witness statement which forms part of the investigation file is recorded as dated 18th January 2013 which shows that the file could only have been submitted to his superior after that date. The other statements from Mr. McKenzie and Sgt. 432 Joseph had been taken in November 2012. This runs counter to PC Charles' evidence on cross examination that he completed his report on 18th January 2013. He may have completed his investigations on 18th January 2013, but he clearly signed the Traffic Accident Report Booklet on 6th February 2013. I think it may be fair to say that PC Charles would have submitted his complete investigation file after 6th February 2013.

[70] This means that after PC Charles submitted his file to his superiors it took about two months for the Traffic Accident Report to be provided to the claimant. It is therefore incorrect to simply say that the report took five months to be prepared without looking at all the circumstances. The evidence also reveals that the claimant paid for the Traffic Accident Report on 20th March 2013. Mr. Taylor in his evidence speaks to making several requests for the report but gives no specific time period, and it is unclear what prompted the payment for the report on 20th March 2013.

- [71] The evidence reveals that ASP Deterville knew the time limit for filing a criminal complaint but not in relation to civil claims. In any event, lack of knowledge of a statutory time limit for filing of a civil suit in the circumstances of this case, which related to a traffic accident which is criminal in nature, cannot without more amount to bad faith.
- [72] This is supported by the Court of Appeal decision of **Elvis Daniel v Public Service Commission**¹² where Baptiste JA stated at paragraph 47 thus:
- “... An allegation of bad faith is a serious matter and is not to be lightly made. Bad faith must be clearly alleged and proved. **Mere error or irrationality does not of itself demonstrate bad faith. Bad faith is not to be found simply because of poor decision making. Errors of fact or law and illogicality will not demonstrate bad faith in the absence of other circumstances which show capriciousness: SBBS v Minister for Immigration & Multicultural & Indigenous Affairs (2002] FCAFC 361.**” (my emphasis)
- [73] It is quite curious that the claimant has raised the fact that the defendants acted in bad faith because they prepared the report late to be able to rely on prescription as a defence. However, the evidence is clear that the report was prepared five months after the accident and that as of its date, 4th April 2013, the claimant still had one month and 8 days within which he could have given notice of his intention to file a civil claim and file his claim. That would have been prominent in their minds especially as Mr. Taylor’s evidence is that he knew that the six-month limitation was fast approaching and that is why he was following up on the report. Yet, armed with this knowledge, Mr. McKenzie’s lawyer then wrote to the Commissioner of Police on 13th April 2013 and then only filed a claim on his behalf almost one year later, on 4th March 2014. That claim was clearly filed way outside of the six-month prescription period and even then, did not contain any allegations of bad faith. It was only two years later that the claimant having obtained leave of the court, filed an amended claim with allegations of bad faith.

¹² SVGHC VAP2016/0007, (delivered 29th January 2019, unreported) at paragraph 47.

- [74] Mr. McKenzie did not suffer prejudice because of the delay in receiving his report. Had PC Charles' recommendations been accepted, there would still have been time to pursue a criminal complaint against Sgt. 432 Joseph. The defendants in their written submissions filed after trial submit that not being in possession of the Traffic Accident Report did not preclude or prevent Mr. McKenzie from filing his claim and I agree. There was also time to have filed a civil suit as the Civil Procedure Rules do not require documents being relied on to be annexed to the statement of case, but that they be identified. Even in the absence of a police report, PC Charles could have been summoned as the investigating officer to give evidence if the need arose.
- [75] I therefore find no merit in these allegations of bad faith and the claimant has failed to prove them as is required.
- [76] In relation to the allegation of bad faith that the investigating officer PC Charles was transferred from the Traffic Department, I am unable to understand how this amounts to bad faith without more. A claimant cannot just make such bald allegations of bad faith. There is no evidence that the transfer was related in any way to this accident or PC Charles' investigation of the accident. The defendants' evidence is that PC Charles was transferred to the Marine Unit as part of the normal powers of the Commissioner of Police to transfer officers between Divisions and Branches.¹³ That allegation of bad faith has also not come up to proof.
- [77] The final allegation is 'not caring that their actions would cause injury to Mr. McKenzie'. This is a bald allegation and I can find no merit in it. There is absolutely nothing on the evidence to support this allegation.
- [78] Having assessed the allegations of bad faith, I find that the claimant has failed to prove these allegations. In addition, I wish to point out that the allegations are all

¹³ See Standing Order 4 of the Standing Orders of the Royal Saint Lucia Police Force 1990.

very vague and fail to show how they relate to the party to this claim being Sgt. 432 Joseph, the motorcycle rider, who was not responsible for any component of the accident investigation and report. I entertain doubt as to whether it is sufficient to simply state allegations of bad faith without any specification as to who committed the acts of bad faith. The allegations in the main do not speak to this and where it does it simply says the other officers.

[79] Counsel for the claimant contended in written submissions that Sgt. 432 Joseph 'failed to uphold the requisite standard of care in keeping with his office'. Counsel further argued that when one considers the circumstances of the accident which include the preparing of the report, the attempt to completely exonerate him from any responsibility for the accident, his ignorance regarding the final contents of the Traffic Accident Report, his lack of knowledge regarding the legal framework in which he operated, the inevitable conclusion is that these collectively amount to gross or serious carelessness. In support of this contention, counsel relied on the case of **Finney v Barreau du Quebec**.¹⁴

[80] In **Finney**, the court recognized that statutory immunity is necessary to provide a public body with the freedom that it needs in order to perform its functions. However, on the facts of **Finney**, the Supreme Court of Canada found that the Barreau,¹⁵ could not escape liability relying on its statutory immunity for acts in good faith in performance of its duties as it would be contrary to the fundamental objective of protecting the public if this immunity were interpreted as requiring evidence of malice or intent to harm to rebut the presumption of good faith. The Court then said that gross or serious carelessness is incompatible with good faith.

[81] Whilst it may appear that **Finney** gives an expanded definition of what constitutes bad faith, this must be appreciated in light of the facts of that case. The respondent had made several complaints against a barrister who had a history of

¹⁴[2004] 2 R.C.S. 17.

¹⁵ This is the regulatory body for practice of advocates in Quebec.

disciplinary infractions and therefore, the dilatory manner in which the Barreau dealt with the matter, which was of great importance to the general public, meant that another member of the public could have been subjected to his acts of professional misconduct. Hence, the court's view that the Barreau had displayed gross carelessness in how it had handled the matter. I cannot see that this is applicable in the context of the claim before me. The evidence in this case does not show any gross or serious carelessness as submitted by counsel for the claimant. Sgt. 432 Joseph was not involved in the preparation of the Traffic Accident Report and the fact that he did not know of its contents, to my mind, suggests further that there was no interference by him in the investigation process. There is simply no evidence to sustain the submissions made by counsel for the claimant.

- [82] In addition, even if the Court were to make a finding of negligence in relation to Sgt. 432 Joseph, this does not in and of itself amount to bad faith. This was made clear in the case of **Tamara Barrow** where Mason J said at paragraph 16:

"Negligence connotes a failure to take proper care, some degree of thoughtlessness, some measure of irresponsibility which by themselves do not necessarily presuppose lack of good faith or presuppose bad faith which in turn implies an intention."

The consequences of failure to prove bad faith by the claimant

- [83] Having found that Mr. McKenzie has failed to prove any of the allegations of malice and bad faith which he pleaded, it means that his claim should have been filed within six months of the date of the accident, that is, by 12th May 2013. This failure therefore means in the words of Peterkin JA in **Norman Walcott v Moses Serieux**,¹⁶ that:

"... **both the right and the remedy are extinguished** and therefore there is no question of a party being called upon to choose whether he would plead the defence of limitation. **As long as the evidence in a case discloses that the period of limitation has expired, the judge has no discretion in the matter.**" (my emphasis)

¹⁶ Civil Appeal No, 2 of 1975, delivered 20th October 1975, unreported.

[84] Article 2129 permits no exercise of discretion by the court and effectively that ends the matter. There is therefore no need to continue to deal with issues (iii) and (iv) identified in paragraph [11] above. The unfortunate conclusion for the claimant is that his claim therefore fails and must be dismissed.

Misfeasance in Public Office?

[85] Counsel for the defendants in their submissions submit that the claimant's pleadings suggest that the claimant is also alleging the tort of misfeasance in public office. They do not expound except to say that the claimant has not satisfied the necessary ingredients to establish misfeasance in public office. Counsel for the claimants having been privy to this submission, sought to address the matter in submissions filed after the trial.

[86] In the case of **George W. BennettBryson's & Co. Ltd, trading as Bryson's Shipping v George Purcell trading as Hortico Landscaping and Nursery**¹⁷, the Court of Appeal had to decide the issue of whether the learned trialjudge erred in making findings of law and fact on breach of contract when the issue that was joined was bailment and whether a relationship of bailment existed between the parties. The court held that:

"It is a rule of pleadings that a party is bound by his pleadings unless he is allowed to amend them. It is the duty of the court to firstly examine the pleadings and then to decide the case on the basis of the pleadings. ... The court is bound by the parties' pleadings and can only adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings."¹⁸

[87] Quite curiously, in this case it is not the claimant who has sought to raise this new issue but the defendants, and have sought to do so in their written submissions. As there were no pleadings in relation to the tort of misfeasance, I decline to deal with this issue and have only made reference to it for the sake of completeness.

¹⁷ ANUHCVP2011/0023, delivered 28th February 2014, unreported.

¹⁸ See paragraphs 30-40 for the full discussion.

Conclusion

- [88] In light of the foregoing discussion, I find that the claim is prescribed having been filed outside of the six-month prescription period and the claimant having failed to prove the particulars of bad faith as alleged by him.

Order

- [89] The claim is dismissed. Prescribed costs are awarded to the defendants by the claimant pursuant to CPR 65.5 on the value of \$6,578.41 calculated in the sum of \$986.76.

**Kimberly Cenac-Phulgence
High Court Judge**

By the Court

Registrar