

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO. SLUHCV2011/1292

CATHERINE SHARON PETER-MERCNER
Representative of the Estate of Ansha
Adora Sherlaee Marquis

Claimant

and

THE HONOURABLE ATTORNEY GENERAL

Defendant

Appearances:

Mr. Vern Gill for the Claimant/Respondent
Mr. Dwight Lay for the Defendant/Applicant

2013: January 29;
2015 : February 26.

DECISION

- [1] **BELLE, J.:** On the 23rd December 2011 the Claimant filed a claim against the Defendant The Honourable Attorney General for the sum of fifteen thousand dollars (\$15,000.00) for funeral expenses and a medical report.
- [2] In paragraph 2 of her Statement of Claim the Claimant stated that the Defendant is the representative of the Crown and is sued in respect of its servants or agents being employees of the Crown at Victoria Hospital and the Claimant will rely on the principle of vicarious liability.
- [3] The Claimant went on to plead facts in support of the claim. In her defence the honourable attorney general stated that in relation to paragraph 2 of the Statement of Claim, the defendant admits that it is the representative of the Crown and the Crown is sued in respect of its vicarious liability for its

employees at the Victoria Hospital. The defendant then went on to make the legal assertion that the vicarious liability of the Crown does not arise at common law and that such employees are servants and or agents of the defendant as alleged in the said paragraph 2 of the statement of claim. But the defendant concluded that both the defendant and the employees of the Victoria Hospital are servants of the Crown.

- [4] On March 14th, 2012 the Defendant filed an application asking that the Claimant/Respondent's Statement of Claim filed on the 23rd day of December, 2011 be struck out as disclosing no reasonable ground for bringing such claim against the Defendant/ Applicant and for costs and further or other relief.
- [5] The application was supported by an affidavit sworn by Sheryline Joseph who purports to set out evidence that she was not served notice of the suit neither were other medical practitioners who treated the deceased but that only the Hospital Administrator was served.
- [6] The Claimant replied to this application with her own affidavit on 12th November, 2012 explaining that she had served the Hospital Administrator and that she was aware that a copy of the patient's file was sent to the attorney general. Indeed in its own application the AG displayed very detailed knowledge of background facts to the case involving the deceased who is being represented by the Claimant in this suit.
- [7] In his submissions counsel for the Defendant states at paragraph 6 that the main issue for consideration is whether the claimant can succeed on the claim in circumstances where she failed (a) to comply with the provisions of Article 28 of the Code (of Civil Procedure) in respect of the employees whose acts allegedly gave rise to the claim; and (b) to include in her statement of claim a plea of liability arising pursuant to section 4 (1) of the Crown Proceedings Act.
- [8] The Defendant's counsel argues that (a) the claimant was under a mandatory obligation to give notice of suit to the employees whose acts, allegedly gave rise to the claim, (b) the consequences of giving no notice to such persons is fatal to the claimant's action against the defendant/applicant and (c) the claimant was under a mandatory obligation to include in her statement of claim a plea of liability arising pursuant to section 4(1) of the Crown Proceedings Act.

- [9] I think this latter point at (c) can be disposed of by simply asserting that the only way the Crown can be sued is pursuant to Crown Proceedings Act. This is a matter of which the court can take judicial notice and it does not have to be pleaded. In addition the Defendant acknowledged that this was a suit against the Attorney General in her capacity of representative of the Crown. In my view having made this admission I see no basis for the defendant to argue that this legal basis for suing the Crown must be pleaded. I will say more on this later.
- [10] The Defendant appears to rely heavily on the assertion that the Crown cannot be sued in common law. But this is a red herring since the Act itself states that the Crown can be sued in delict or quasi delict which are terms taken from the Saint Lucia Civil Code and not the Common Law.
- [11] The legal origin of the civil wrong pleaded in the Claim therefore is the Civil Code. The Crown Proceedings Act only modifies the manner in which the general law of delict is applied in suits against the Crown. The nature of the creature called the Crown as an employer makes it almost inevitable that the persons committing acts in delict or quasi delict who work for the state, as is alleged, would be servants or agents of the Crown and that the Crown's liability would be as the employer of those servants or agents.
- [12] Section 4 of the Crown proceedings Act does not set out to protect the Crown without more, it also declares that the Crown would be liable just as any other legal person may be liable for the consequences of any delict or quasi-delict committed by its servants or agents: See Section 4 of the Crown Proceedings Act Cap2.05 of the Laws of Saint Lucia.
- [13] But the Defendant argues that the Attorney General has no liability unless the person who committed the civil wrongs would be liable for the act in delict. While this cannot be denied the question is whether in order for the court to rule on liability these individuals must be served Notice of the action personally one month before the suit is filed. I think not.
- [14] Let us suppose that one of these individuals, a servant or agent of the Crown goes on leave overseas after having committed the wrong. Then the law it is presumed must be understood to mean that the person must be served wherever they may be within six months of the act having

been committed but at least one month before proceeding with the action. This means in light of the applicable law of prescription that every such person must be served personally within 5 months of the act having been committed. If the Claimant only discovers that the possible defendant is overseas after 4 months of investigation, it is very unlikely that they could be served within five months of the act having been committed and before the period of 6 months the applicable prescription has expired. The consequences of a likely failure to meet those deadlines would be nothing short of unjust.

[15] The representatives of the Crown are quite aware that when the shoe is on the other foot the Crown faces no such restrictions. Perhaps the Crown does not have to bring such actions very often but the fact is that the law clearly discriminates in the Crown's favour. Discrimination is frowned upon by the law and the constitution. Approval for such discrimination has to therefore itself be granted in very clear and circumscribed conditions.

[16] I therefore conclude that the better interpretation of the law is that individuals who may have committed the delicts be identified in the pleadings by name or description and that the persons with the administrative responsibility in the public service be given an opportunity by way of the required notice to respond to the charges being levelled against their institution and the Crown by interviewing them and inviting them to provide statements on the matter for trial.

[17] I have stated elsewhere recently that the idea that the public servants who committed the delict must be made part of the suit is not to be applied across the board as a general rule in all cases. For example in the case where a police officer is accused of wrongful arrest or malicious prosecution it should be required that such notice be given because of the ingredients of those civil wrongs (torts) or delicts which require personal knowledge and intention as elements to be present at the time of the act which is complained of. But the case at Bar is different. Medical negligence does not require a mental state such as intention or knowledge of the specific consequences of the wrongful acts.

[18] It should also be noted that the old idea that the Crown would have difficulty defending itself because it would not be able to adduce evidence from records of an institution which would be

hearsay at Common Law can now be debunked by sections 55 and 56 of the Evidence Act Cap .15 of the Laws of Saint Lucia which allow for an officer such as the Hospital Administrator in this case to use documents compiled in the course of her business and over which she has control and easy access to respond to allegations of negligence by medical staff. The relevant member of staff can also be called to verify the records if necessary.

- [19] Indeed in this case the hospital administrator and the Crown based on their own disclosure are well aware of the individuals involved in the matter and actually instructed one of these individuals to file an affidavit saying that she was not served rather than have them filing an affidavit in her defence to the alleged delict.
- [20] I go further to say that Article 28 provides the Crown with an opportunity to investigate and research an alleged wrong committed by the Crown and to mount a defence if necessary in cases where the employee may be liable but the Crown may not because the employee was not acting within the scope of his or her duties at the time of the act in delict or in cases where the Crown may have a defence. See subsection 4 (3) of the Crown Proceedings Act Cap 2.05 of the Laws of Saint Lucia.
- [21] Indeed a Claimant would not be able to establish an act in delict where the employee was acting outside of the scope of his/her employment. Obviously whether the employee was acting within or outside of the scope of employment would then become a bone of contention.
- [22] Indeed there may also be a case where the employee is acting within the scope of his or her employment but may be protected personally such as a bailiff of the court but yet the state may be liable for their acts. The employee may therefore have a statutory defence. See Section 4 (5) of the Crown Proceedings Act. It is also true that in some cases the Crown's liability may be limited in the same way that the public officer's liability is limited.
- [23] But nothing prevents the Crown from simply stating this in its own defence where applicable. Indeed therefore it is not true to say that the Crown can only be liable if the Defendant/ employee is liable. The Defendant/employee may be indemnified by the law but the Crown may still be liable.

Stating it differently, there are cases in which the employee's wrongful act would not result in him/her being called upon to repair or pay damages to the Claimant. This is the context in which the Crown Proceedings Act works conjointly with other provisions.

- [24] The manner in which the Crown proceedings Act operates in conjunction with the Code of Civil Procedure is raised by the Crown in relation to the application of Article 28 of the Code. That Article states as follows:

"No Public Officer or other person fulfilling any public duty or function, can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any judgment be rendered against him, unless notice of such suit has been given him at least one month before the issuing of the writ of summons.

Such notice must be in writing, it must specify the ground of the action, must be served upon him personally, or at his domicile, and must state the name and residence of the plaintiff."

- [25] Again it is important to note that Article 28 relates to public officers. Not all agents of the Crown are "public officers" but the acts of agents may nevertheless give rise to proceedings against the Crown in respect of Section 4 (1) (a) of the Crown Proceedings Act. To establish the defence in that manner being argued by the Crown would have to show that the doctors and nurses in all cases referred to and relevant to this case are public officers, as a prerequisite of the requirement of service of notice of suit.

- [26] Secondly the Crown would have to show that the Claimant intends to sue the persons who allegedly committed the delict for damages. If there is no intention to sue this person for damages then based on a literal interpretation Article 28 does not apply. Obviously if the person who committed the delict is not sued then that person cannot have a judgment rendered against them for damages and there would be no point raising Article 28.

- [27] Counsel for the Crown is asking the court to automatically assume these two conditions mentioned above in light of the provision in section 4 (1) of the Crown Proceedings Act. That proviso states as follows:

Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in delict or quasi-delict to which, if it were a private person of full age and capacity, it would subject.....

(a) In respect of delicts of quasi-delicts committed by its servants or agents

- (b)
- (c)

However, proceedings shall not lie against the Crown by virtue of paragraph (a) in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in delict or quasi-delict against that servant or agent or his or her estate.

[28] I find it difficult to understand how the language “would apart from the provisions of this Act have given rise” could be equated to “liability is proved”. These phrases have different literal meanings and can only by the stretch of the greatest elasticity be deemed to mean the same thing in law.

[29] But counsel says that the Court of Appeal has said that Article 28 limits the liability of the Crown in a case of **Sonson v Attorney General**, Civil Appeal No. 5 of 2007. I have not seen a written decision in this case. The issue involved in this matter are by no means simple and straightforward and therefore it would be imperative that if this court is being asked to follow a decision of the Court of Appeal that the issues referred to above would have been traversed by that court. I glean based on the defendant's submissions that the Court of Appeal in **Sonson** spent some time examining Section 4 (4) of the Crown Proceedings Act.

Section 4 (4) of the Crown Proceedings Act states:

“Any enactment which negatives or limits the amount of the liability of any Government department or officer of the Crown in respect of any delict or quasi-delict committed by that department or officer shall, in the case of proceedings against the Crown under this section in respect of a delict or quasi-delict committed by that department or officer, apply in relation to the Crown as it would have applied in relation to that department or officer if the proceedings against the Crown had been proceedings against the Department or officer.”

In my view this section refers to the incidence of certain limitations on suits against certain departments of Government and their officers. In this regard it does not only or specifically refer to Article 28 of the Code of Civil Procedure. Indeed Article 28 makes no reference to Departments of the government but only to public officers or other persons fulfilling any public duty or function. I understand it to mean that if a department of government is immune from suit to some extent then the government is immune from suit to the same extent arising from the acts of the said department of Government.

- [30] Counsel for the Crown has not told us the facts of **Sonson v The Attorney general**. In relation to this case counsel has not stated whether the persons who were alleged to have committed the delict were public servants/ officers or agents of the Crown or whether the language of the court of appeal in this decision showed that there was an intention to lay down as a general rule that all persons who may have committed a delict for which the Crown may be found liable must be given one month's notice of a law suit pursuant to Article 28 of the Code of Civil procedure, if the Crown is to be held liable. There is no suggestion that the court of appeal considered the issue whether it was required that liability be proved against these persons rather than that a cause of action would arise against such persons. Article 28 does not state that a cause of action would not arise based on the facts if the public officer is not served. It does not state that it expunges liability of the Crown it only prevents the specific officers from being sued for damages. It does not mention and in my view does not protect the relevant department of government.
- [31] I am therefore unable to follow the unreported decision of the Court of Appeal in this case, a decision in my view which obviously was not intended to establish the broad sweeping consequence of a bar to suits against the attorney general or a department of government.
- [32] The Crown should also take into account the possibility that the Crown is depriving the Claimant of her right to access to the law and the courts pursuant to Article 28 by interpreting it in the manner in which it seeks to. As I have earlier pointed out, the law could not have been intended to disqualify a claimant from bringing a claim against a government which has a legal personality which can be sued and sue in law simply because the government's employee could not be located in time to meet the statutory deadline for bringing a claim. It would appear to me that this is quite unfair.
- [33] The Crown should be cognizant of the fact that in Saint Lucia fairness is not only a Public Law concept developed by the Common Law. Indeed in most if not all of the constitutions of the Eastern Caribbean the concept of fairness is enshrined in the constitution in terms stated in Section 8 (8) of the Constitution of Saint Lucia which states:

"Any court or other authority prescribed by law for the determination or existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time."

- [34] The restrictions on filing a suit against the Crown are already discriminatory. Article 2124 of the Civil Code provides that actions against Public Officers, (not the Crown nor agents of the Crown) in respect of acts done by them in good faith and in respect of their public duties are prescribed by six months.
- [35] Clearly if the intention is to bring an action against a public officer it is prescribed by six months unless the act done by them is not done in good faith. The proviso that the act be done in good faith is recognition that fairness would require that in such a circumstance the restriction of six months should not apply in relation to the public officer.
- [36] This provision also gives the Crown time to distance itself from the public officer's action and leave the matter of filing a law suit personally against the officer up to the Claimant. It is difficult to imagine that in a framework where this kind of stricture already exists the law would also provide that in all of the circumstances an action must be brought against every public officer who committed the relevant delict.
- [37] The Crown representing the state has a degree of permanence that no individual public officer has. A government department also has such permanence. It is easy to locate the officer responsible for the business of a department of government within six months. The same cannot always be said about the specific officer committing the legal wrong. Fairness pursuant to the constitution in my view would not require that in each and every case a public officer be sued and served personal notice of such an intention. To interpret the statute in this way would be to impose too harsh a burden on persons who wish to bring actions against the Crown based on legal wrongs committed by public officers which legal wrongs "give rise" to an action against the Crown. In my view such an interpretation would result in an unfair and unconstitutional trial.
- [38] The language of the section 4 (1) of the Crown Proceedings Act itself displays the intention to differentiate between a case in which it is necessary to prove a case against the Crown as against

the public officers or agents of the Crown themselves as it would have been in the absence of the Crown Proceedings Act or any other statutory protection.

[39] In my view on these grounds alone I could dismiss the Applicant defendant's application but I go on to traverse the arguments put forward by counsel.

[40] Counsel Mr. Gill argued that the Applicant defendant's submission that the Claimant should have pleaded that the Crown is being sued pursuant to section 4 (1) of the Crown Proceedings Act is not supported by any authority. Indeed the Applicant cited no authority and I am not aware of any such authority. It should also be noted that the need for an authority is rendered redundant by the concept of judicial notice.

[41] The court must take judicial notice of any statutory provision. In Phipson on Evidence Twelfth Edition paragraph 49, page 23 the learned author states as follows:

"Judicial notice will be taken of the existence and contents of all public statutes; and all Acts of Parliament of whatever nature passed since 1850 unless the contrary is expressly provided; as well as of every branch of unwritten law obtaining in England or Ireland."

[42] Section 5 of the Interpretation Act Cap 1.06 of the laws of Saint Lucia also states:

"Every Act and every Ordinance shall be a public Act and shall be judicially noticed as such unless the contrary is expressly provided by the Act or Ordinance."

[43] The only other matter left to be determined is whether the court should strike out the Affidavit of the Claimant which was filed on March 11th, 2013 after the directions for submissions to be filed were given. Barring any breaches of the rules of evidence or the making of affidavits governing the Claimant's affidavit I am of the view that the affidavit was filed with a view to assisting the court in its quest to do justice. The issues at stake in the application were not all legal issues. As I have pointed out earlier the issues pertinent to the application involve the interpretation of discriminatory legislation which has constitutional implications. Certain facts can assist in that regard.

[44] The Claimant states at paragraphs 5 and 6 of the Affidavit:

"I came in and the months following were extremely difficult and trying to get the information to make decisions and to get to the point of proceeding with this matter within the time prescribed by law proved to be extremely challenging."

In these circumstances and in the absence of specific information the claim was filed on my behalf against the Attorney General after the required Notice had been given to the Victoria Hospital Administrator and the Attorney General."

[45] The facts relating to the impact of the defendants' interpretation of Article 28 are therefore relevant and hence to the extent that the affidavit assists the court in its determination of those issues the affidavit is relevant and important. The court did not impose any bar on the filing of further affidavit evidence. The factual nature of these allegations made in the affidavit can be sorted out in other proceedings. But I will not order that the Claimant's affidavit be struck out in its entirety. However even without the affidavit the Court would have felt that the decision given below is the proper one in the circumstances.

[46] Based on the aforesaid analysis of the facts and conclusions on the law I dismiss the Defendant's application to strike out the Claimant's claim on the basis that it does not give rise to a cause of action against the Attorney General and order that the Crown pays the Claimant's costs of the application in the circumstances in the sum of \$1500.00

The matter should hereafter be and is referred to the Master for Case Management.


Francis H V Belle
High Court Judge