LIMITATION PERIODS FOR THE PROTECTION OF PUBLIC AUTHORITIES

PART I — THE PROTECTION

It is now ten years since the Limitation Act 1950 came into force.[1] Like its English precursor, the Limitation Act 1939 (U.K.), with which it is largely identical, it swept away a mass of intricate technicalities that had grown up around and by way of gloss upon the centuries of English legislation known to generations of special pleaders (or those of them who were not gentlemen) as the Statutes of Limitation. The feature of the reforming Act which will be the subject of this article is s. 23 relating to actions against the Crown and public and local authorities. In a statute which has largely been successful in simplifying the law, in removing uncertainties, and in achieving a certain element of fairness, s. 23 stands out as an example of all that the enactment was intended to abolish. Difficult to interpret; uncertain in its operation; and frequently a machine of injustice. If those charges can be established, the conclusion is clear — the section ought to be repealed, and the sooner the better.

I. Its Antecedents

Anyone who reads s. 23 in its context in the statute-book will see the Law Draftsman's marginal reference to the Limitation Act 1939 (U.K.), s. 21. The provisions of subsection (1) of both sections are almost identical in their opening words, which indicate the kind of action to which the section applies. Those words are:

> No action shall be brought against any person (including the Crown) for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty, or authority, unless . . .

But the words were not new in the English statute. They were

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1. It came into force on 1 January 1952: s. 1 of the Limitation Act 1950.

taken from s. 1 of the Public Authorities Protection Act 1893 (U.K.),[1] a statute which, unlike the Limitation Act 1939,[2] applied to Scotland. Even the Public Authorities Protection Act 1893 was not the first enactment of its kind. There had previously been many statutes which contained provisions protecting certain persons, usually public authorities, against legal proceedings of a certain kind by prescribing a briefer period of limitation than that available under the general law; by allowing a plea of a tender of amends to an action for damages; by giving the successful defendant specially favourable terms as to costs, sometimes double or treble the amount of party-and-party costs; and by applying the adage 'forewarned is forearmed' so that the defendant was entitled to notice of any action.' An attempt had been made to introduce some uniformity in the nature of the protection to which public authorities were entitled under those statutes by the Limitation of Actions and Costs Act 1842 (U.K.),[3] sometimes known as 'Pollock's Act'. The period of notice was fixed at one calendar month (s. 4), and the time within which an action might be brought was to be two years, except in the case of continuing damages, when it was to be one year after the damage should have ceased:(s. 5). That Act did not carry the process of uniformity far enough. When the Public Authorities Protection Act 1893 was enacted, it repealed in whole or in part 108 earlier statutes,[4] reaching back to the Poor Relief Act 1601,[5] and replaced the protection which they had conferred in a bewildering variety of methods by a general protection of comprehensive application. As the long title of the statute proclaimed, it was 'an Act to generalize and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties.' When the provisions of s. 1 of the Public Authorities Protection Act 1893 were re-enacted as s. 21 of the Limitation Act 1939, they were taken out of their particular context and made simply one provision among many in a statute relating to limitation of actions in general.

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1. 56 & 57 Vict. c.61, s.1 ('Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom . . . ').
2. 2 & 3 Geo. 6 c.21, s. 34(3).
3. 5 & 6 Vict. c.97.
4. Viscount Maugham's computation in Griffiths v. Smith [1941] A.C. 170, 182, agrees.
5. 43 Eliz. 1 c.2.

There is room for argument that although the context has changed, the scope remains the same. The sections in the Limitation Act 1939 are arranged in three parts: within each part the sections are arranged in divisions according to their subject-matter. Thus, ss. 4 - 17 in Part I are introduced by the divisional heading of 'Actions to recover land, advowsons and rent'. So too, s. 21 is prefaced by the heading 'Actions against public authorities'. The operative parts of the section are also clear evidence of a legislative intention neither to expand nor to restrict the scope of the provision by placing it within a different statutory environment. Subsection (2) provides:

> The foregoing provisions of this section shall not apply to any action to which the Public Authorities Protection Act, 1893, does not apply . . .

It would seem to follow that the same construction is to be placed upon s. 21 as was placed by the Courts upon its predecessor.

When the New Zealand legislature enacted s. 23 of the Limitation Act 1950, it expanded the introductory words which had been used in the English counterpart, so that they read 'Actions against the Crown and Public and Local Authorities, &c.' It is of interest to observe that the marginal notes to section 23, which, as s.5(g) of the Acts Interpretation Act 1924 makes clear, are not part of the Act, are identical with the marginal notes to s. 1 of the Public Authorities Protection Act 1893. Although the heading of s. 23 is for the purpose of reference a part of the Act, it does not affect the interpretation of the section.[1] But there can be little doubt that in construing the opening words of s. 23 of the Limitation Act 1950 our Courts would derive guidance from decisions of the Courts in the United Kingdom on s. 1 of the Public Authorities Protection Act 1893 and on s. 21 of the Limitation Act 1939.

Until the enactment of s. 23 of the Limitation Act 1950 there never has been in New Zealand any general legislation conferring protection upon persons acting in the execution of statutory and other public duties. The position was very much as it had been in the United Kingdom before 1893. The main difference appears to have been that the Legislature here was somewhat slower in providing protection for public authorities than the Parliament at Westminster. Thus, it was

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1. Acts Interpretation Act 1924, s.5(f).

not until the enactment of s. 402 of the Municipal Corporations Act 1900 that local bodies covered by that Act were given protection in legal proceedings. The terms of the protection seemed to have been based largely upon the precedent of s. 264 of the Public Health Act 1875 (U.K.),[1] which itself was largely a repetition of s. 139 of the Public Health Act 1848 (U.K.).[2] Similarly, it was only when the Counties Amendment Act 1927 was enacted that counties were given the same protection. The Limitation Act 1950 repealed nearly all the special limitation provisions included in earlier legislation and replaced them with the general provisions to be found in s. 23.

After taking so many years to conform to the British pattern of legislative protection for public authorities, the New Zealand legislature has again fallen behind. Within two and a half years of the coming into force of s. 23 of the Limitation Act 1950 in New Zealand the Parliament at Westminster repealed the provisions of the Public Authorities Protection Act 1893 and of s. 21 of the Limitation Act 1939 upon which it was based. By s. 1 of the Law Reform (Limitation of Actions, &c.) Act 1954,[3] it was provided that

> The following enactments (being enactments providing special periods of limitation for, or other privileges for the defendants in, legal proceedings against public authorities or persons acting in pursuance or execution or intended execution of Acts), that is to say —
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> (a) the Public Authorities Protection Act, 1893;
> (b) section twenty-one of the Limitation Act, 1939 . . .
>
> are hereby repealed.

II. Its Application

The uninstructed reader of the 39 reported decisions[4] of the New Zealand Courts on s. 23 of the Limitation Act 1950 might be justified in concluding that all activities

1. 38 & 39 Vict. c.55.
2. 11 & 12 Vict. c.63.
3. 2 & 3 Eliz. 2 c.36.
4. As at December 31, 1961.

of the Crown and local authorities are protected by the section. It might with some reason be inferred that simply to predicate that the defendant was a public authority was enough.[1] In only one reported case has the application of the section been raised or discussed. In Maori Trustee v. Walker [1961] N.Z.L.R. 120 counsel for the Attorney-General, who had been joined as a third party, argued that the Crown was entitled to rely on s. 23 in a case where the action was founded on contract. This submission was at first received with some surprise,[2] but the point has been concluded by the highest authority: Bradford Corporation v. Myers [1916] 1 A.C. 242, 263-4 and Firestone Tire and Rubber Co. (S.S.) Ltd. v. Singapore Harbour Board [1952]A.C. 452, 464-5, 468 (J.C.). In all the other cases decided upon s. 23, the vast majority of which were cases in tort, there was no discussion at all about the proper scope of the section's application. This silence is all the more surprising in view of the wealth of authority both in England and in Scotland on the scope of s. 1 of the Public Authorities Protection Act 1893. Furthermore, the question has been the subject of judicial consideration on several occasions in the House of Lords, two decisions of which are invariably cited as enunciating the basic principles: Bradford Corporation v. Myers [1916] 1 A.C. 242, and Griffiths v. Ellis [1941] A.C. 170. The latter appears never to have been cited in any New Zealand case on s. 23: the former only once,[3] and then in a fleeting reference to a view adopted by the Judicial Committee of the Privy Council in a later case.[4] The possibilities of exploiting the principles laid down in many British decisions seem never to have occurred to counsel for the plaintiff in any of the reported cases. Lacking the aid, or perhaps the stimulus, of argument our Courts have, through blissful ignorance, been relieved of the difficulty of defining in any particular case whether or not the act or omission complained of fell within the purview of s. 23.

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1. Watch Tower Bible and Tract Society v. Huntly Borough [1959] N.Z.L.R. 821, 823, per Shorland J.: 'There is a critical question which arises as a preliminary question in this action out of the fact that the claim advanced is one made against a local body.'
2. At p. 126.
3. Maori Trustee v. Walker [1961] N.Z.L.R. 120, 126.
4. Firestone Tire and Rubber Co. (S.S.) Ltd. v. Singapore Harbour Board [1952] A.C. 452, 465 (J.C.).

That the problem is a difficult one even the highest Courts acknowledge. In one of the earliest cases decided in England on the Public Authorities Protection Act 1893, Fielding v. Morley Corporation [1899] 1 Ch. 1, 4 (C.A.),[1] Lindley M.R. said

> some day there will probably be a great discussion as to what acts or defaults do or do not come within it.

The Lord Chancellor (Lord Buckmaster) in Bradford Corporation v. Myers [1916] 1 A.C. 242, 250, referred to

> the difficulty . . . to draw a line between the class of cases that are within and those that are without the statute.

He was conscious that his own opinion in that case did not establish as clear and distinct a line as he should have liked to see. Even Viscount Haldane found it necessary to begin his opinion with an apologia. With rare judicial candour he said, with reference to the statute under consideration,

> It is often obvious from the words he has employed that the draftsman has had instructions which have been too vague and insufficient to admit of the expression of a comprehensive principle with exactness, or at all.

Upon such a policy of despair Lord Haldane proceeded to apply, as the easiest and safest method of interpretation, the essentially negative principle of exclusion. In other words, rather than construe the words used for the purpose of determining their application, he thought it more appropriate to consider what circumstances did not fall within the scope of the language. Lord Shaw of Dunfermline regarded[2] that method as more likely to lead to confusion than to construction. It was at best a method, and not a principle — and none the less tempting. Those differences of approach may, on further analysis, reveal no basic disagreement, being linguistic rather than substantial. It is clear that Lord Shaw of Dunfermline did not regard the question as an easy one. He did not attempt to state any principle for the construction of

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1. Properly Fielden v. Morley Corporation: see [1900] A.C. 133 and Viscount Maugham in Griffiths v. Smith [1941] A.C. 170, 184.
2. At p. 261.

the words used in the section. The difficulties which had troubled the House of Lords were common to Scrutton L.J. in Edwards v. Metropolitan Water Board [1922] 1 K.B. 291, 304 (C.A.), where he said

> I cannot find a clear or distinct line or any exact principle.

The refrain was taken up again by the House of Lords in Griffiths v. Smith [1941] A.C. 170, by Viscount Simon L.C. (at 176), by Viscount Maugham (at 184, 188), and by Lord Porter who expressed the doubt (at 211)

> whether it ~~were~~ will be possible to lay down some general principle by which all cases can be tested.

In such an atmosphere of judicial uncertainty no-one would blame the Judicial Committee of the Privy Council for its reluctance in Firestone Tire and Rubber Co. (S.S.) Ltd. v. Singapore Harbour Board [1952] A.C. 452, 464, to attempt the impossible.

Nor would the New Zealand Courts attract criticism if they had failed to enunciate some general guiding principle. What is an object of wonder is that the New Zealand Courts seem never to have thought that the point was worth considering or discussing in relation to the application of s. 23. Except for the decision of Hutchison J. in Maori Trustee v. Walker [1961] N.Z.L.R. 120, no doubts appear to have assailed the Courts. It is difficult to find a satisfactory explanation for this judicial silence. Before the enactment of s. 23 of the Limitation Act 1950 there had been some discussion of the scope of similar protection provisions in legislation relating to specific public authorities. Reliance was then placed on English decisions construing and applying the provisions of s. 1 of the Public Authorities Protection Act 1893, notwithstanding the difference in language between that section and the New Zealand provisions under consideration. But when the language becomes identical, reliance upon English decisions, with one exception, ceases. Nor has there been any reference to the earlier New Zealand decisions[1] in cases decided on s. 23.

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1. It is interesting to note that Bradford Corporation v. Myers [1916]1 A.C. 242 appears to have been cited only four times in the pre-1952 cases. Twice it was cited in support of propositions for which it is no authority:

The most important New Zealand case before the Limitation Act 1950 is Vincent v. Tauranga Electric-Power Board [1932] N.Z.L.R. 1426, which eventually went on appeal to the Judicial Committee of the Privy Council. The statutory provision under consideration in that case was s. 127 of the Electric-power Boards Act 1925,[1] which reads as follows:

> No action shall be commenced against the Board or any member thereof, or any person acting under the authority, or in the execution or intended execution, or in pursuance of this Act, for any alleged irregularity, or trespass, or nuisance, or negligence, or for any act or omission whatever, until . . .

In an action based upon breach of statutory duty and upon breach of an implied term in the contract of employment a servant of the Board sued it for damages for personal injury which he had sustained in the course of his employment. Since the action had been commenced 22 months after the date of the injury, the Board relied upon s. 127 of the Electric-power Boards Act 1925. It was ordered that there should be argued before trial the question whether that section was applicable to the plaintiff's cause of action and an effective bar to the proceedings which he had instituted. To that question Smith J. in the Supreme Court gave a delphic answer.

In Fitzgerald v. Macdonald [1918] N.Z.L.R. 769 (C.A.) it was cited by Chapman J. (at 795) in support of the statement that an act done under a mistaken inference of law is as much protected by a provision similar to s. 1 of the Public Authorities Protection Act 1893 as an act done under a mistake of fact. Whatever Bradford Corporation v. Myers decides, it certainly does not decide that. In In re a Lease, Wanganui Corporation to Knight [1943] N.Z.L.R. 13 Johnston J. cited Bradford Corporation v. Myers (at 18) in support of the proposition that 'the performance, or breach, of a contract which a public authority has the power, but not the duty to make is not within the protection'. That, as has been shown in later cases, especially Griffiths v. Smith [1941] A.C. 170 (which was not cited) was not the test laid down in Bradford Corporation v. Myers.

1. Now cited as the Electric Power Boards Act 1925.

Insofar as the plaintiff's cause of action was based upon breach of a statutory duty to him, s. 127 was a complete bar to his action:[1] but if the plaintiff was able at the trial to establish, as pleaded in his statement of claim, that there was an implied term in his contract of service that the Board would provide for his security the necessary safeguards against accident, and would generally comply with all relevant Regulations, then s. 127 would not be available to the Board.[2] The reason for the difference was this: in committing a breach of such an implied term the Board would be acting in the execution or intended execution or in pursuance of an implied contract, and not in the execution or intended execution or in pursuance of the Electric-power Boards Act 1925. Such a differentiation turns largely upon pleading. If A sues the Board for breach of a statutory duty, then s. 127 applied: if B sued the Board for breach of a contract whereby the Board promised to perform the same statutory duty to B, then s. 127 did not apply. Furthermore, the decision fails to place due emphasis upon the words 'negligence, or for any act or omission whatever' which appear in s. 127.

Neither party was satisfied by the decision, and an appeal and cross-appeal were brought to the Court of Appeal: [1933] N.Z.L.R. 902. There the five Judges who composed the Court were unanimous in rejecting the dichotomy on which the judgment of the Supreme Court was founded: Myers C.J. and Blair J. at 918-923; Herdman J. at 928; MacGregor J. at 930, who described the contention that the plaintiff had two separate causes of action as 'mere juggling with words';and Kennedy J. at 936. In their full discussion of the British authorities the Judges obviously assumed a material similarity between s. 127 of the Electric-power Boards Act 1925 and s. 1 of the Public Authorities Protection Act 1893. Twice in the course of the argument Myers C.J. pointed to the differences in wording (at 904, 909) but he was prepared in his judgment (at 913) to assume for the purposes of his judgment, but without so deciding, that the protection was the same in New Zealand as in England.[3] Herdman J. quoted part of s. 1 of

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1. At pp. 1433-4.
2. At pp. 1432-3.
3. No Scottish case was cited, but as two Irish decisions were referred to by him, Myers C.J. must have overlooked that the Public Authorities Protection Act 1893 applied to Scotland and Ireland.

the Public Authorities Protection Act 1893 and said (at 924) that it differed 'little in principle' from s. 127 of the Electric-power Boards Act 1925. Kennedy J. was careful to point out (at 931) that the wording of the two sections was not identical, but suggested, as Myers C.J. had done, that the area of protection constituted by s. 127 could not be less than that afforded by the Public Authorities Protection Act 1893.

With that assessment of the relative scope of the two provisions there may be little disagreement. There may however be profound disagreement with a process of reasoning which assumes, as the judgments in the Court of Appeal seem to have done, that the rationes decidendi of the cases decided on the British provisions were applicable to the interpretation of the dissimilar provisions of s. 127 of the Electric-power Boards Act 1925. When the case was taken to the Judicial Committee of the Privy Council a wholesome warning was given about the propriety of such a process. Delivering the judgment of the Board, Lord Alness said ([1936] N.Z.L.R. 1016, 1019):

> Mr. Stable (counsel for the appellant), in the course of a forceful and ingenious argument, invoked the assistance which he conceived that he obtained from certain decisions pronounced in England under an analogous statute — viz., the Public Authorities' [sic] Protection Act, 1893. In their Lordships' judgment, these decisions, to say the least of it, fall to be handled with care, inasmuch as the wording of the two statutes differs in material particulars. Their Lordships think that they must steadily bear in mind the terms of s. 127 of the New Zealand statute.

Those statutory words were characterized by the utmost amplitude, and in the view of the Judicial Committee left the appellant no loophole for escape. As to the suggestion that it was possible to avoid the consequences of s. 127 by laying the cause of action in contract, Lord Alness indulged in some mild judicial sarcasm. If the contention was sound, he observed (at 1020),

> then the supineness of learned counsel in failing sooner to discover and apply this sovereign remedy against time limitation is, to say the least of it, remarkable.

The lesson to be learned from this case is that each

statutory provision should be interpreted in the light of its own language and not on any a priori assumptions relating to the identity of principle between the New Zealand and the British legislation protecting public authorities. The New Zealand statutes differ quite radically among themselves, as Myers C.J. recognized in Goodman v. Napier Harbour Board [1939] N.Z.L.R. 97, 105-6, when comparing s.127 of the Electric-power Boards Act 1925 with s.248 of the Harbours Act 1923 (repealed).

But the need for caution which the New Zealand Courts should have shown before the Limitation Act 1950 came into force in applying decisions in the United Kingdom based upon s.1 of the Public Authorities Protection Act 1893 disappeared when the operative wording of the two relevant provisions did in fact become identical. When they should not have applied British decisions, they did: when they should have, they did not.

III. Some rules for guidance in the application of s.23

No attempt will here be made to deduce any principle for the interpretation of s.23 of the Limitation Act 1950. The decisions do however show that some points of guidance in applying that section have been authoritatively determined.

(a) Not all the acts of a public authority are covered by the section.

This feature of the legislation was, in some respects, at the very basis of the decision of the House of Lords in Bradford Corporation v. Myers [1916] 1 A.C. 242, because it was recognized by the learned Lords who heard that case that an acceptance of the appellants' argument would have the effect of casting the blanket of statutory protection over all the activities of public authorities. It is, of course, the inarticulate premise upon which all the decisions of the Courts in the United Kingdom upon the analogous provisions there have been based.[1]

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1. Appelbe v. West Cork Board of Health [1929] I.R. 107, 117 per Kennedy C.J. ('The English authorities, having arrived at the clear view that the policy of the Act is not to give indiscriminate indemnity to public authorities by the lapse of a statutory period ...').

(b) Not all the intra vires acts of a public authority are covered by the section.

The protection afforded by the statute does not depend upon the test whether a particular activity was within the powers of the defendant.[1] Just as ultra vires acts may be protected, if, for example, a public authority embarked upon an ultra vires activity in execution, as it honestly and reasonably believed, of an Act of Parliament, so intra vires acts are not automatically protected. As Lord Buckmaster L.C. said in Bradford Corporation v. Myers [1916] 1 A.C. 242, 247:

> ... it is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority.[2]

(c) Protection is given only if the duty discharged or the authority exercised is a public one.

This assumes that there may be duties and authorities which are not public. In that case, the protection does not apply. It is not easy to formulate the test of public duties and authorities. Lord Buckmaster L.C. spoke (at 247) in Bradford Corporation v. Myers [1916] 1 A.C. 242 of public duty and public authority as meaning

> a duty owed to all the public alike or an authority exercised impartially with regard to all the public.

Apart from expressing his pointed concurrence in this portion of the Lord Chancellor's judgment, Lord Shaw of Dunfermline expanded his treatment of this topic (at 263-4) in a judgment which would warm the heart of any Hohfeldian jurist.

> If there be a duty arising from statute or the exercise of a public function, there is a correlative right similarly arising. A municipal tramway car depends for its existence and conduct on, say, a private and many

1. Ibid.
2. See also Clarke v. St.Helens Borough Council (1915) 85 L.J.K.B. 17(C.A.) at 21 per Swinfen Eady L.J.; and Harnett v. Fisher [1927] A.C. 573, 590 per Lord Atkinson.

> public Acts, and the corporation in running it is performing a public duty. When a citizen boards such a car, in one sense he makes, by paying his fare, a contract; but the boarding of the car, the payment of the fare, and the charging of the corporation with the responsibility for safe carriage are all matter of right on the part of the passenger, a public right of carriage which he shares with all his fellow citizens, correlative to the public duty which the corporation owes to all....
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> But where the right of the individual cannot be correlated with a statutory or public duty to the individual, the foundation of the relations of parties does not lie in anything but a private bargain which it was open for either the municipality or the individual citizen, consumer, or customer to enter into or decline. And an action on either side founded on the performance or non-performance of that contract is one to which the [Public Authorities] Protection Act does not apply, because the appeal, which is made to a Court of law, does not rest on statutory or public duty, but merely on a private and individual bargain.
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> The same principle applies whether the act complained of arose through breach of contract or through tort. I take no stock of such distinction, for the Act does not;

This statement was expressly approved by Lord Porter in Griffiths v. Smith [1941] A.C. 170, 208-9, as stating the true position. The same line of reasoning appears to be implicit in all the authorities following upon Bradford Corporation v. Myers, and in many which preceded it.

(d) Protection is given even where the public authority is under no obligation to perform the act out of which the action arises.

At first sight the judgments of the House of Lords in Bradford Corporation v. Myers [1916] 1 A.C. 242, might seem to conflict with this statement. There are passages in the judgments drawing a distinction between acts which the Corporation there was under an obligation to perform and acts which the Corporation was permitted, but under no obligation, to perform. In that case the Corporation was bound to supply gas to the inhabitants of its district, and consequently, they were bound to dispose of the residual products of the manufacture of gas. There was no duty to dispose of those products by sale. In carrying out a contract of sale with the respondent, the Corporation caused damage to the

respondent's premises. The contrast between acts arising out of the Corporation's duty to supply gas and its privilege to sell coke can easily be misunderstood. If the judgments in the case are carefully read in the light of the facts, it appears that the contrast was used to show that in that case the action was not based on any act which fell within the purview of s.1 of the Public Authorities Protection Act 1893. No public duty or public authority was involved. Any other view of the judgment would lead to difficulties. Any distinction between obligatory, as opposed to permissive, powers in applying the statutory provision would indicate a failure to give due weight to the word 'authority' in the section. And that word was certainly not overlooked in Bradford Corporation v. Myers [1916] 1 A.C. 242 even in the judgment of Lord Atkinson[1] which seems to go farthest towards resting the protection of the statute upon the existence of some obligatory power.

Any doubts about the true rule to apply were set aside by the judgment of the House of Lords in Griffiths v. Smith [1941] A.C.170, where the principal contention of the appellant was that the respondents, the managers of a non-provided elementary school, were under no public duty to provide a school at all, or if they so chose, they were under no duty to hold a display of school work and to invite parents to attend it. 'That', said Viscount Simon L.C. (at 179), 'is not the true test'. The real question was this:

> [Should] the managers, in authorising the issue of invitations to the display on the school premises after school hours, ... be regarded as exercising their function of managing the school?

All the other members of the House took the same view. Indeed, Viscount Maugham went so far (at 185) to read Bradford Corporation v. Myers itself as holding that

> it is not essential that a public authority seeking to rely on the Act of 1893 must show that the particular act or default in question was done or committed in discharge or attempted discharge of a positive duty imposed on the public authority... The words in the section are 'public duty or authority', and the latter word must be taken to have its ordinary meaning of legal power or right, and does not imply a positive obligation.

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1. At pp.252-260.

The point is now settled, and was so regarded by the Judicial Committee of the Privy Council in Firestone Tire and Rubber Co. (S.S.) Ltd v. Singapore Harbour Board [1952] A.C. 452, 465.

(e) Protection will be denied where the act was in substance done in performing some subsidiary power

It is at this stage of the inquiry into the application of the statutory provisions that real difficulties emerge. In Griffiths v. Smith [1941] A.C. 170, 208, Lord Porter seemed to regard the question as 'dependent upon the true deduction to be drawn from the facts rather than one of pure legal principle'. The problem has not been made any easier by the choice of nomenclature adopted in the leading cases. In Bradford Corporation v. Myers [1961] 1 A.C. 242, the epithet most frequently used was 'direct'. Lord Buckmaster L.C. spoke (at 247) of 'an act in the direct execution of a statute' and drew a distinction (at 249) between 'an incidental power to trade and a direct duty to trade'. The same test was applied by Viscount Haldane (at 251), who said:

> ... I do not think that [the words used] can be properly extended so as to embrace an act which is not done in direct pursuance of the provisions of the statute or in the direct execution of the duty or authority.

But 'direct' is a deceptively simple word.[1] What it means is often difficult to ascertain, as Lord Wright pointed out in Griffiths v. Smith [1941] A.C. 170, 194. In the latter case Viscount Maugham found it necessary to put a gloss on the word. Speaking of the duty of the manager of the school to carry it on to the best advantage, he said (at 187):

> If, as I think we must assume, the managers thought that the open meeting was in the interests and for the benefit of this voluntary school, the act of inviting people to attend was a thing done in direct discharge of a public duty,

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1. Edwards v. Metropolitan Water Board [1922] 1 K.B. 291, 300 (C.A.) per Bankes L.J., and 304 per Scrutton L.J. ('The word "direct" is not in the statute. I do not think it would help matters much if it were... I do not myself derive much help from such expressions as "direct", "predominant" or "efficient" cause.'); but in Appelbe v. West Cork Board of Health [1929] I.R. 107, 123-4 Fitzgibbon J. did not agree.

> namely, that of carrying on the school to the best advantage. I am using the adjective 'direct' simply as indicating that the duty was cast upon the managers by the mere fact that they were bound to carry on the school as efficiently as possible. This, I think, is using the word in the same sense as that which was attributed to it in the Bradford Corporation case and if so understood I am quite content to follow the lead of Lord Buckmaster in his use of the word.

Lord Wright agreed (at 194) in thinking that in issuing the invitation the managers were directly engaged in the management of the school. Although Viscount Simon L.C. adopted (at 177) the terminology of Viscount Maugham in Bradford Corporation v. Myers, he appears to have favoured a rather broader test. In the Court of Appeal, whose decision was under appeal, Greene M.R. had spoken[1] of the activities of the Bradford Corporation in the earlier case as not being 'something incidental to, or part of, the process of carrying on the gas undertaking and supplying gas compulsorily to the inhabitants. It was something that lay outside that altogether'. This test, namely whether the activity was incidental to or extraneous to, the carrying on of the statutory duty or authority, seems to have been the test adopted by Simon L.C. He concludes his judgment (at 180) by saying

> There is, in my opinion, no ground whatever for saying that the invitations issued to this display were issued for some extraneous purpose unconnected with the management of the school.

Lord Porter was more sceptical. Neither of the epithets 'direct' and 'incidental' added clarity to the meaning of the word 'execution' in the Act. He considered (at 210) that the invitation was issued in performance of a public duty; and if the adjective 'direct' was thought to add greater exactitude, then its issue was in direct performance of such a duty.

But the process of exegesis was not finished. In Griffiths v. Smith [1941] A.C. 170 Viscount Maugham had described (at 185) the essential ingredients of protection under the statute in these words:

> It is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority or a power conferred on the public authority not

1. Griffiths v. Managers of St.Clement's School, Liverpool [1939] 2 All E.R. 76, 83F

> being a mere incidental power, such as a power to carry on trade.

Apart altogether from the intrinsic difficulty of distinguishing between the incidental performance of a duty, which on Visoount Simon's test would be protected, and the performance of a mere incidental power, which on Viscount Maugham's test would not be protected, the choice of example of a mere incidental power was not altogether happy. It was seized upon by counsel for the plaintiff in Firestone Tire and Rubber Co. (S.S.) Ltd v. Singapore Harbour Board [1952] A.C. 452, (J.C.), who stressed that in carrying on the business of warehousemen the Singapore Harbour Board was acting under a power to carry on trade, which, so it was argued, was a mere incidental power to the funamental public duty or authority of administering a harbour. That argument caused a further re-examination of the proper test to be applied. Lord Tucker, delivering the judgment of the Judicial Committee of the Privy Council, preferred (at 465) to speak of a mere subsidiary power than that of a mere incidental power, since the word 'incidental' had been used in some of the judgments as equivalent to 'necessarily incidental to'. The test then becomes this: Was the act done in the course of exercising for the benefit of the public an authority or power conferred upon a public authority, not being a mere subsidiary power. Such an inquiry involves a consideration of the statutory powers and duties of the defendant. After a close examination of the material legislative provisions affecting the Singapore Harbour Board Lord Tucker concluded that the Board was enabled itself to operate its own warehouses as wharfingers and warehousemen and to levy rates for the wharfage or storage of goods therein, and said (at 468):

> Having chosen [that] alternative they did not thereby cease to function as a habour board and undertake some purely subsidiary activity of a non-public nature. They were supplying facilities essential to the shipping community in one of the ways authorized by the ordinance by which they were created a harbour board charged with the management and control of the port, and were thus fulfilling one of the main purposes for which they had been given statutory powers.

Whether the test as it finally emerged after the decision of the Judicial Committee of the Privy Council is any easier to apply may perhaps remain a matter for speculation.

(f) The mere fact that a public authority may have entered into a contract for the discharge of its duty or authority does not make that duty or authority a private one

It is now well settled that if a public authority enters into a contract and undertakes thereunder duties and obligations, the performance of the contract may nevertheless remain the execution of the public duty or authority by the public authority. The existence or absence of a contract is no longer, if it ever was, a decisive test: see Firestone Tire and Rubber Co. (.S.S.) Ltd v. Singapore Harbour Board [1952] A.C. 452, 465 (J.C.). It is obvious however that some of the incidents of a contract which a public authority may have undertaken will frequently fall outside the category of public duties or authorities. Payment of moneys due under the contract might furnish the most common example. The non-payment of such moneys is difficult to describe as an act done in pursuance or execution or intended execution of an Act of Parliament, or of any public duty or authority or in respect of any neglect or default in the execution of any such Act, duty, or authority: see Romer L.J. in Milford Docks Co. v. Milford Haven U.D.C. (1901) 65 J.P. 483, 484. In Maori Trustee v. Walker [1961] N.Z.L.R. 120, 127-8 Hutchison J. took the same view on the facts of the case before him. It should not readily be assumed that an action for non-payment of moneys can never be protected by the statut Both McManus v. Bowes [1938] 1 K.B. 98, 126 (C.A.) and Mountain v. Bermondsey Borough Council [1942] 1 K.B. 204 show that it can. If the non-payment arises 'in . . . execution or intended execution of any Act of Parliament, or of any public duty or authority', then any action thereon will be covered by the section: if, however, non-payment is subsequent to or following upon the execution or intended execution of such Act, duty, or authority, the action would seem not to be covered.

(g) The statute protects only public authorities or persons acting on their behalf

The long and short titles of the Public Authorities Protection Act 1893 are the basis for the decisions in the United Kingdom that both that statute and its English successor, s.21 of the Limitation Act 1939, were limited in providing protection only for public authorities. As Lord Buckmaster L.C. pointed out in Bradford Corporation v. Myers [1916] 1 A.C. 242, 247

> If the section stood alone, and were construed without reference to the introductory words of the statute, it

> would be wide enough to grant protection to any person who was acting in pursuance of a private Act of Parliament, but on more than one occasion the Courts have pointed out that this cannot be its true interpretation, and that 'any person' must be limited so as to apply only to public authorities.

In the United Kingdom the construction of the Act on that point was regarded by Viscount Simon L.C. in Griffiths v. Smith [1941] A.C. 170, 177, as finally settled.[1]

The concept of a public authority is easier to recognize than it is to define. It is not a term of such general importance as to have justified a definition in the Acts Interpretation Act 1924.[2] Since it is not used in the Limitations Act 1950, it is not defined there. Nor is the term defined in any of the British legislation: indeed the Public Authorities Protection Act 1893 itself does not use the expression in the long title or in the body of the statute. It is solely a creature of the short title. As close a description of a public authority as can be given appears in an Australian revenue case turning on the question whether a taxpayer was a public authority: Renmark Hotel Inc. v. Commissioner of Taxation (1949) 79 C.L.R. 10; [1949] A.L.R. 363 (H.C.), 947(F.C., on appeal). At first instance Rich J. suggested (at 18) that the characteristics of a public authority seemed to be that

> it should carry on some undertaking of a public nature for the benefit of the community or of some section or geographical division of the community, and that it should have some governmental authority to do so.

On appeal Latham C.J. in the Full Court adopted (at 23) Lord Porter's description in Griffiths v. Smith [1941] A.C. 170, 205-6 that

> there are many other bodies [than municipal corporations] which perform statutory duties and exercise public functions

as indicating the nature of the attributes which a person or body

1. See also Lord Porter (at 205): 'It is a "Public Authorities Protection Act" and not a "persons protection act" and therefore the body to be protected must be a public authority'.
2. As is the expression 'local authority': s.4 of the Acts Interpretation Act 1924.

must have in order to be a public authority within the meaning of the revenue legislation before the Court.

There is no New Zealand authority on the point. Before the Limitation Act 1950 the special legislation relating to each type of public authority made it clear what persons were protected.[1] There was no need to use or to define any generic term. With the enactment of s.23 of the Limitation Act 1950 the question arises whether the reasoning of the British decisions would be applicable in the construction of the New Zealand provisions. Reliance upon the long and short titles of the Public Authorities Protection Act 1893 would be useless. In view of the caveat in s.5(f) of the Acts Interpretation Act 1924 no assistance can be derived from the divisional heading which introduces s.23. On the contrary, the sounder interpretation, based as it is upon the need to give s.23 such fair large and liberal construction as would best ensure the attainment of the object of the section according to its true intent, meaning, and spirit, would be to eschew any restriction upon the scope of the term 'any person' as it appears in the Act.

And yet a wide construction of the words 'any person' would yield results which to say the least would be unexpected. The action in tort for breach of a statutory duty may legitimately be described, in the words of s.23(1) of the Limitation Act 1950, as 'an action . . . brought against any person . . . in respect of any neglect or default in the execution of any' Act of Parliament or any public duty. Smith v. Wilkins & Davies Construction Co.Ltd [1958] N.Z.L.R. 958 provides a useful example. In that case a writ was issued by the plaintiff against his employer some eighteen days before the period of limitation of two years prescribed by s.4(7) of the Limitation Act 1950 expired. In his statement of claim he put forward what is popularly called a common law claim in negligence Subsequently, he wished to amend his statement of claim by alleging a breach of statutory duty in the following terms:

> The said accident and the said injuries were caused by the failure of the defendant to fulfil its statutory duty in that it permitted the plaintiff to be lifted by a crane otherwise than in a suitable receptacle during the course of his employment by the defendant thereby committing a

1. Sometimes the legislation overlooked persons closely associated with the public authority who might have been expected to receiv protection: see Hall v. Kingston and St.Andrew Corporation [1941 A.C.284 (J.C.), where on the true construction of s.89 of the Public Health Law 1925 of Jamaica members of the Corporation were protected, but not the Corporation itself.

breach of the duty imposed upon it by s.22(6) of the Scaffolding Regulations 1935.

If the breach of the Regulations alleged is read as a breach of the relevant statute, then the pleading seems to be relying upon the very kind of neglect or default contemplated by s.23 of the Limitation Act 1950. But no one has suggested that such a neglect or default is covered by the protective provisions of the section. In England the answer has been given in clear terms: in New Zealand, the question seems never to have been posed. If it were raised, the Courts would probably interpret s.23 so as to exclude private persons from the statutory protection. Either they would adopt from the corpus of case law on the British legislation the same general restriction upon the scope of s.23 which was justified in the United Kingdom by the long and short titles of the Public Authorities Protection Act 1893. Or they would construe the neglect or default referred to in s.23 as meaning a neglect or default in the execution of a statute which imposes upon the defendant a public duty rather than a duty owed to persons in a specific category. Similarly the duty would be interpreted as a duty laid upon the defendant in some public capacity. If that were not the interpretation, then many defendants in actions arising out of negligence on the highway would be entitled to the protection conferred by s.23(1) of the Limitation Act 1950 because they could with some justification plead that the negligence alleged consisted wholly or in part of some neglect or default in the execution of the Transport Act 1949. For the same reasons many employers the conduct of whose businesses is regulated by Acts of Parliament might rely upon their neglect or default under those Acts as entitling them to the protection of s.23(1) of the Limitation Act 1950. It can hardly be supposed that Parliament intended to erect so ample a statutory umbrella.

IV. The giving of notice

The first requirement which must be satisfied by any intending plaintiff before he may bring an action which is covered by s.23 is to give the notice prescribed in the section. The notice is of vital importance to the scheme of the legislation. It is provided that the kind of action contemplated by s.23 shall not be brought,

> unless -
> (a) Notice in writing giving reasonable information of the circumstances upon which the proposed action will be based and the name and address of the prospective plaintiff and his solicitor or agent

> (if any) in the matter is given by the prospective plaintiff to the prospective defendant as soon as practicable after the accrual of the cause of action; ...

The cases decided since the enactment of this provision have shown that the Courts have been exacting in the compliance which they have demanded with the requirement of giving notice.

(a) The rationale of the requirement

Why has the Legislature required intending plaintiffs to give notice to public authorities? Under the nineteenth century legislation the giving of notice was linked, not with the occurrence of the cause of action, but with the commencement of the action: see s.4 of the Limitations of Actions and Costs Act 1842, where, if notice was required, it was to be given 'one calendar month at least before any action shall be commenced'. In all the special New Zealand legislation before the enactment of the Limitation Act 1950 the same pattern may be observed. Thus, in the Municipal Corporation Act 1933 (repealed), s.361, which re-anacted provisions in identical language beginning with s.402 of the Municipal Corporations Act 1900 (repealed), it was provided that notice had to be given to the intend defendant 'one month at least before the commencement of the action or proceeding'. As the action itself had to be commenced within six months in most cases, the effect of the two requirements was that notice had to be given within five months at least from the date of the accrual of the cause of action. But in the United Kingdom s.2(c) of the Public Authorities Protection Act 1893 repealed

> so much of any public general Act as enacts that in any proceeding to which this Act applies -
> . . .
> (c) notice of action is to be given; . . .

Clearly, the rationale for the requirement of giving notice which is to be found in s.23 cannot be deduced from any analogy with the British legislation.

In Brewer v. Auckland Hospital Board [1957] N.Z.L.R. 951 (C.A. the legislative policy requiring notice was discussed by Shorland J. in delivering the judgment of the Court. The learned Judge said (at 959)

> Those responsible for the administration of a public authori cannot be expected to have personal knowledge of the circumstances attending accidents and mishaps arising out

> of its activities. The effects of the passage of time in respect of changes of personnel comprising staff and upon human recollection are such that unless a public authority has early opportunity of investigating allegations of negligence intended to be made against it and of briefing or recording evidence relevant thereto, it is likely to be prejudiced in dealing with the matter at a later date.
>
> The value of notice in writing is, first, that it speaks for itself as to what in truth it is notice of; and, secondly, that from its very nature it is likely to find its way promptly to the particular officer of the public authority responsible for the handling of such matters.
>
> Oral notification given to one officer may fall by the wayside on its journey from the original recipient to the officer whose responsibility it really is to deal with such matters, and may suffer from unintentional alterations made to detail or even to substance.

Much of this piece of judicial rationalization is open to question. In the first place, the requirement of notice is a condition precedent to the bringing of all actions covered by the statute. Actions arising out of 'accidents and mishaps', although numerous, form only one category of the acts, neglect, or default to which s.23 applies.[1] The statute is as much concerned with a public authority's default in supplying gas: see Morton v. Eltham Borough [1961] N.Z.L.R. 1, as it is with the negligence of one of its employees in the gas works who, in the course of his employment, injures a fellow workman. It may be readily conceded that changing personnel and fading recollections make it advisable to brief or record relevant evidence relating to all the circumstances on which a claim may be made. Fluidity of staff and the frailty of human recollection are no monopoly of public authorities. If this were the justification for the requirement, elementary fairness would provide adequate cause for giving those who employ large numbers of workers the benefit of such a provision. Thirdly, the explanation seems to overlook, perhaps because the Court would decline to take judicial notice of it, the almost universal practice of employers of labour, reinforced as it usually is by obligations under policies covering employers' liability, to take detailed statements of all accidents and mishaps to their workers. A casual reading of the cases in which an intending plaintiff wished to be relieved from his failure to give the notice prescribed by s.23(1) would reveal

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1. See Auckland Harbour Board v. Cooke [1960] N.Z.L.R. 94, 98 (C.A.)

that in many of the cases the public authority concerned had itself taken the fullest statement of the circumstances that was then available. Indeed, in some of the cases[1] the intending plaintiff was, or had been, in receipt of workers' compensation. in respect of the accident. And it may be inferred that such compensation does not fall like manna from heaven unless the employer (or, more realistically, his indemnifier) is satisfied that there was an accident and that it did arise out of and in the course of theemployment. Finally, the basic reason for disagreement with the judicial explanation given by Shorland J. is that it is based upon an outmoded view of the master-servant relationship. No one now believes that employers of labour, even public authorities, shoulder total liability for claims arising out of accidents and mishaps. The time is past when insurance was to be enjoyed but not talked about. Public authorities do insure against their liability arising out of accidents and mishaps: they would be foolish not to. The most acceptable explanation for the legislative requirement of notice is policy. It is not necessarily any the worse for that. Such protection is in part the price paid for the execution of public duty or authority. Whether the price paid is justified now that the real beneficiary is not the public authority but its insurer is debatable. In the United Kingdom it has not been thought necessary to require the giving of notice since the enactment of the Public Authorities Protection Act 1893. No great principle would be breached if the same viewwere to prevail in New Zealand.

(b) Need the notice indicate that litigation is intended?

So long as notices required by legislation protecting public authorities were to be given one month at least before the commencement of the action or proceeding, clearly they were concerned with intended litigation. The statutory provisions frequently referred expressly to notice 'specifying the cause of action or proceeding': see, for a typical example, s.361 of the Municipal Corporations Act

1. Moeller v. New Plymouth Harbour Board [1955] N.Z.L.R.151,152; Thomas v. Nelson Harbour Board [1955] N.Z.L.R.154,155 (semble); Weeks v. Attorney-General [1956] N.Z.L.R.287,287-9; McCullough v. Attorney-General [1956] N.Z.L.R. 886,888 (semble); Silvius v. Feilding Borough [1957] N.Z.L.R. 713,715; Brewer v. Auckland Hospital Board [1957] N.Z.L.R. 951,956 (C.A.); Sullivan v. Waitaki Electric Power Board [1958] N.Z.L.R. 1092,1093; Cooke v. Auckland Harbour Board [1959] N.Z.L.R. 901,903; Smith v. Attorney-General [1960] N.Z.L.R. 324,325; Petrie v. Ashburton Electric Power and Gas Board [1961] N.Z.L.R. 239

1933 (repealed). That notice seems to have fulfilled two principal purposes. In the first place, it was treated as the delivery of particulars in anticipation of the action, because on the trial or hearing of the action the plaintiff was not to

> be permitted to go into evidence of any cause or ground thereof not stated in the notice given by him[1]

Secondly, it afforded the defendant an opportunity of making a tender of sufficient amends within one month after the giving of the notice: such a tender prevented the plaintiff from succeeding in his action.[2]

The whole machinery of tendering amends was abolished when s.23 of the Limitation Act 1950 took the place of the special enactments protecting individual public authorities. Nor does the section itself contain any provision restricting the plaintiff to the matter set forth in his notice.[3] Section 23(1) (a) speaks of 'action' and 'plaintiff' in relation to the content of the notice, but those words do not conclude the matter. It is useful to compare the language of s.361 of the Municipal Corporations Act 1933 (repealed), as a typical example of the special legislation, with that of s.23(1) (a) of the Limitation Act 1950. The earlier statute referred to 'the cause of the action or proceeding', 'the intending plaintiff', 'the intended defendant', 'one month at least before the commencement of the action or proceeding'. The later statute speaks of 'the circumstances upon which the proposed action will be based', 'prospective plaintiff and of his solicitor or agent (if any)', 'prospective defendant', 'as soon as practicable after the accrual of the cause of action'. The contrast lends no colour to the suggestion that the notice required by s.23(1) (a) must indicate that litigation is intended.

The trend of authority, however, is against that view. In Brewer v. Auckland Hospital Board [1957] N.Z.L.R. 951, 959 Shorland J., delivering the judgment of the Court of Appeal, went far towards

1. See s.361(5) of the Municipal Corporations Act 1933 (repealed).
2. See s.361(6) of the Municipal Corporations Act 1933 (repealed); and Wellington City Corporation v. Laming [1933] N.Z.L.R. 1435,1454(C.A.)
3. Although where the claimant obtains leave under s.23(2) of the Limitation Act 1950 to commence his action out of time he will be restricted to the pleadings, a draft of which should be filed with the application for leave: see Cooke v. Auckland Harbour Board [1959] N.Z.L.R. 901,909 and Cooke v. Auckland Harbour Board (No.2) [1960] N.Z.L.R. 1006.

the view that the notice should indicate the cause of action which would be pleaded. A comparison of s.52 of the Workers' Compensation Act 1956 with s.23(1) (a) of the Limitation Act 1950 showed, he said:

> that the purpose of s.23(1)(a) is that the public authority shall have prompt notice in writing not merely of the mishap or accident, or merely of the manner in which it occurred, but also of the fact that it is asserted by the claimant that certain attendant circumstances therein specified constitute negligence towards or breach of duty owed to the claimant by the public authority.

It is not clear why the Court preferred to contrast s.23(1) (a) with s.52 of the Workers' Compensation Act 1956 rather than with the earlier legislation which it superseded. If the comparison described by the Court is somewhat more closely considered, it will hardly appear conclusive. Under the Workers' Compensation Act 1956, as every lawyer knows, liability arises automatically if a worker sustains injury by accident arising out of and in the course of his employment. That being so, a notice which specified, as is required by s.52(3) of the Workers' Compensation Act 1956, 'in ordinary language the cause of the injury and the date and place at which the accident happened', would give the employer (and consequentl his indemnifier) all the information that he might reasonably be expected to need. The receipt of such a notice would be followed in the vast majority of cases by the payment of compensation in accordance with the Workers' Compensation Act 1956.[1] Furthermore, the employer himself is bound by the s.96 of the Act to give notice to his insurer of accidents causing personal injury to or the death of any worker. Notices under the Workers' Compensation Act 1956 do not afford any useful basis of comparison with notices under s.23(1) (a) of the Limitation Act 1950.

Shorland J. gave no other reason for concluding that the notice should indicate that 'certain attendant circumstances therein specified constitute negligence towards or breach of duty owed to the claimant by the public authority. It may be possible to lessen the authority to be attached to that view of the Court of Appeal by classifying it as obiter dictum, since there was admittedly no notice in writing at all given by the claimant in Brewer v. Auckland Hospital Board.

1. The statistics in respect of accidents in State-owned coal mines during the period from 1 January 1957 to 31 December 1959 are set out in Marsh v. Attorney-General [1961] N.Z.L.R. 111,116

The opinion of the Court of Appeal had been foreshadowed by Turner J. in Madders v. Wellington Technical School Board [1955] N.Z.L.R. 157, the judgment in which was delivered on the same day as the same learned Judge delivered judgment in Thomas v. Nelson Harbour Board [1955] N.Z.L.R. 154, another case on the application of s.23 of the Limitation Act 1950. In Madders v. Wellington Technical School Board the accident occurred to a pupil leaving the school premises at 9 p.m. on 18 March 1952 after attending a class on drawing. Thereafter two letters, which might fairly be described as informative and courteous communications, were written by the claimant to the Director of the School setting out the circumstances of the accident. They were dated 21 and 24 March 1952. Neither letter, so the Judge held (at 159), gave any indication that a claim for damages was intended to be made or was even probable. That omission was fatal. The learned Judge said (at 159):

> It may be noticed that the section does not distinctly say (as it might have done) that the notice should contain an intimation that it is intended to bring an action; it merely directs that notice should contain reasonable information of the circumstances 'upon which the proposed action will be based'. I am of opinion, nevertheless, that the notice must contain an intimation that it is intended that an action should be brought and that it should further contain reasonable details of the cause of action alleged, and of the facts which are alleged to support them.

After discussing the reply given by the School's Director to the two letters written by the claimant and observing that it contained no reference to any understanding by the Director that a claim for damages might be made, the earlier holding was re-affirmed in these words (at 160):

> In these circumstances, I have no difficulty in concluding that no notice of the plaintiff's intention to bring an action, such as is necessary by virtue of s.23(1)(a), was given.

This is judicial legislation with a vengeance. Former legislation often specifically required a claimant in his notice clearly and explicitly to state the cause of action [1]

1. For a striking recent example of comparable current legislation and its effect, see Scoles v. Commissioner for Government Transport (1960) 104 C.L.R. 339.

There can be no justification in deducing such an exacting requirement from the words 'reasonable information of the circumstances upon which the proposed action will be based' appearing in s.23(1) (a) of the Limitation Act 1950. Double injury is done to the claimant when he is called upon, as happened in Madders v. Wellington Technical School Board [1955] N.Z.L.R. 157, 158-9, to show that the public authority against which he claims was not materially prejudiced by his failure to include in his notice under s.23(1) (a) information which the statute did not oblige him to give.

The same interpretation of the requirements of s.23(1) (a) was taken again by Shorland J. in Watch Tower Bible and Tract Society v. Huntly Borough [1959] N.Z.L.R. 821. In that case, which was brought to obtain an injunction restraining the defendant Borough from breaking its contract to let the Huntly War Memorial Hall to the plaintiff Society, a letter dated 26 March 1959 had been written by a firm of solicitors to the Borough a few days before the action was brought. In that letter the plaintiff's solicitors had requested confirmation that the Council would carry out the terms of the contract for the letting of the Hall. The letter was held to be insufficient notice. Shorland J. said (at 823):

> . . . while, no doubt, it is a question of fact whether a letter or notice complies with the requirements of s.23 (1)(a), I am of opinion that in so far as the letter of March 26, 1959, is not either expressly or impliedly an intimation that the present plaintiff intends to take action or bring a claim, that no such notice as is required by s.23(1) (a) was given in the present case.

An appreciation of the nature of the claim in the case makes it difficult to understand why it was thought that the letter of 26 March 1959 should constitute a notice under s.23(1) (a), assuming such a notice was necessary.[1] There was a contract between the plaintiff Society and the Borough for the letting of the hall on 1, 2, and 3 May 1959. Before 1 May 1959 the only claim which might lie against the Borough in respect of that contract would be either for an injunction or for damages for anticipatory breach. Such a claim would only be available if the Borough showed by conduct or words an unequivocal intention to repudiate its obligations. The letter of 26 March 1959 was written for the

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1. An assumption made only for the purpose of the present discussion. No notice was necessary in any event, as will be discussed later.

express purpose of seeking definite information about the attitude of the Borough. It was only after a plain intimation had been received from the Borough (at 822) that the Hall would not be available that the plaintiff Society would in law be entitled to take action. To search for an indication that action would be taken in a letter which was written before it was clear beyond doubt that any cause of action had accrued was a vain task. In holding that no notice had been given as prescribed by s.23(1) (a) of the Limitation Act 1950, and as is here assumed, the learned Judge was right, but for the wrong reasons. The real reason was that there was no evidence at all that any notice had been given after the plain intimation by the Borough that the Hall would not be let to the plaintiff Society in accordance with the contract.

The fullest consideration of this aspect of the notice required by the section is to be found in the careful judgment of Henry J. in O'Malley v. Waipiata-Patearoa Rabbit Board [1959] N.Z.L.R. 437. The learned Judge shows (at 440) that if the section required notice of an intended action, then there could be no notice until an intention or proposal had been formed to bring an action. He said (at 440):

> If the subsection will properly yield to a meaning which does not require notice of an intention to bring the action and does not prevent its operation, either as to circumstances or persons, until such an intention is formed and actually exists, then I think such a construction ought to be adopted and that contended for rejected. With respect, I am not prepared to follow Madders v. Wellington Technical School Board [1955] N.Z.L.R. 157, if it means[1] that an express notice of an intention to bring the action is necessary . . . . I prefer to construe subs.(1)(a) in the sense that the expression 'the proposed action', is a convenient term used for describing the action which is ultimately brought and that the terms 'prospective plaintiff' and 'prospective defendant' are convenient descriptions of the ultimate parties to such action. So read, the subsection does not require notice of the intended action. It requires the notice in writing to give reasonable information of the circumstances upon which the action is ultimately based, and it also provides that the then plaintiff is the person who should give such notice, while the then defendant is the person to whom such notice should be given. This construction

1. As it does.

> is consonant with its intention and avoids reading into the subsection more than it expressly provides for.

This cogent analysis of the requirements of s.23(1) (a), which seems to have been passed over by Shorland J. in Watch Tower Bible and Tract Society v. Huntly Borough [1959] N.Z.L.R. 821, 823 as merely dealing with a question of fact, has not been the subject of sustained consideration in any subsequent case. It has been referred to in subsequent cases without criticism. Unfortunately, in Pearse v. Attorney-General [1961] N.Z.L.R. 196 Hardie Boys J. attempted to reconcile it with Madders v. Wellington Technical School Board by cutting down its application to cases 'where negligence was clearly charged in the notification to the defendant'.[1] Then, Hardie Boys J. said (at 198), O'Malley v. Waipiata-Patearoa Rabbit Board [1959] N.Z.L.R. 437, 440 held

> that it was unnecessary . . . to say in terms that action was contemplated

The moral is, blame the defendant in the notice.

The present position is most unsatisfactory and a thorough examination of the section by the Court of Appeal is called for.[2] Better still the requirement of giving notice should be abolished so that actions against the Crown and public authorities, whatever their basis, might be placed on the same footing as other actions.[3] Until there is either clarification or reform, notices under s.23 (1) (a) should notify the defendant that action will be brought.

(c) 'Reasonable information of the circumstances'

What is reasonable is a question of fact and will vary from case to case. The section does not appear to call for an exhaustive

1. There is no justification in O'Malley v. Waipiata-Patearoa Rabbit Board [1959] N.Z.L.R. 437 for any such restriction upon its scope
2. It should be mentioned that there are dicta which expressly or impliedly support the view that the notice should contain an intimation that litigation is intended: see Thomas v. Nelson Harbour Board [1955] N.Z.L.R. 154; McCullough v. Attorney-General [1956] N.Z.L.R. 886, 888; Silvius v. Feilding Borough [1957] N.Z.L.R. 713, 714. The views of North J. in Petrie v. Ashburton Electric Power Board [1961] N.Z.L.R. 762, 765 (C.A.) might presage a relaxation in this and other respects of the severe attitude of the courts.
3. Cf. Flynn v. Strachan [1959] N.Z.L.R. 1223, 1224.

catalogue of particulars together with a comprehensive statement of the causes of the injury or damage on which the proposed action will be based.[1] But judicial application of the section has imposed a heavy burden upon the intending litigant.

(d) The name and address of the prospective plaintiff and of his solicitor or agent (if any)

This requirement provides fertile ground for subtleties. Until the statutes prescribing the giving of notice also made provision for excusing non-compliance, the Courts showed a tendency to construe the notice liberally. 'Notices of action', it was said by Sir Robert Collier in Union S.S.Co. of New Zealand Ltd v. Melbourne Harbour Trust Commissioners (1884) 9 A.C. 365, 368 (J.C.), 'are not to be construed with extreme strictness'. Because of the dispensing power now to be found in s.23(2) of the Limitation Act 1950 the need to reach a definite conclusion on this requirement rarely arises.

In Young v. Christchurch City Corporation (1907) 27 N.Z.L.R. 729 a notice under earlier comparable legislation was treated (at 730, 731) as being defective because, although it gave the claimant's solicitor's address, it failed to give her own address. The use of the word 'and' in s.23(1) (a) of the Limitation Act 1950, which in this respect is similar to s.402(1) of the Municipal Corporations Act 1900, would seem to show that if a solicitor were acting for a claimant the notice must give the required information both about the solicitor and about the claimant. In O'Malley v. Waipiata-Patearoa Rabbit Board [1959] N.Z.L.R. 437, 440-1 Henry J was able to adopt a more constructive approach. Drawing freely upon the principles enunciated in bankruptcy cases, the learned Judge treated the question whether the name and address which appeared on the notice before him were a sufficient compliance with s.23(1) (a) as depending primarily upon the substance and meaning of the section and not merely upon the words used. Henry J. said (at 441):

> Now, what is the position here? The reason for requiring the name and address appears to me to be twofold: first, to identify the claimant; and, secondly, to enable the public authority effectively to communicate with him in connection with the circumstances upon which the action will be based. It was proved, and not denied, that the defendant did lay poison on the plaintiff's farm.

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1. Petrie v. Ashburton Electric Power Board [1961]N.Z.L.R. 762,765 (C.A.)

> Accordingly, that fact was known to the defendant. Attention was drawn to that as a known matter in the opening sentence of the . . . letter. The name given as 'P.P.O'Malley & Son', together with the reference to the defendant's poisoning operations, would establish the identity of the plaintiffs. The said letter then quite clearly indicated that the matter was in the hands of the solicitors who asked if the defendant would advise them[1] as to the view of the Board and whether or not it was prepared to accept liability. That, I think, clearly gave the defendant notice that the plaintiffs could be communicated with at or through the address of their solicitor. I cannot see that a communication so addressed would not be adequate for all the purposes of the Act, so I conclude that the letter did give an address which was sufficient for the purposes of the Act. The matter is not free from difficulty, but, in the circumstances and facts proved in this case, I am of opinion that notice was given of a sufficient name and address in respect of the plaintiffs.

Claimants may welcome that relaxation from strict compliance with the requirements of s.23(1) (a), but the case was a borderline one and there might with equal force have been a decision against the sufficiency of the notice in its failure to give the address of the plaintiffs and their solicitors.

(e) The notice must be given as soon as practicable after the accrual of the cause of action

(i) Point of commencement of period

Under the Public Authorities Protection Act 1893 the restricted period of limitation ran from 'the act, neglect, or default complained of'. The starting-point of the period of limitation under the special legislation in New Zealand relating to public authorities was similar. Thus, in s.361(2) of the Municipal Corporations Act 1933 (repealed) the action was to be commenced 'within six months next after the act or thing complained of is done or omitted'. Under s.21 of the Limitation Act 1939, and consequently under s.23 of the Limitation Act 1950, the accrual of the cause of action was chosen as the time for the commencement of the period of limitation.

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1. Emphasis in the original.

In many cases where the cause of action accrues simultaneously with the act, neglect, or default complained of, the change in the wording will be of no practical importance. But where damage is the gist of the action, situations may readily occur where the act, neglect, or default precedes the accrual of the cause of action, as may happen in nuisance.[1]

The section makes special provision for the case where the act, neglect, or default referred to earlier in the sub-section is a continuing one. In such a case,

> no cause of action in respect thereof shall be deemed to have accrued, for the purposes of this section, until the act, neglect, or default has ceased:

A literal interpretation of that proviso may indicate that it is dealing with cases where a cause of action might be deemed to have arisen and not with cases where a cause of action has actually arisen. But the better view would seem to be that the proviso means that 'a cause of action shall be deemed not to have accrued' until the act, neglect, or default complained of has ceased. There is no reported New Zealand case on this aspect of the statute, but the British decisions show that the effect of the enactment is to preserve the rule that, 'in cases where damage is the gist of the action, the fact that the damage continues does not by itself extend the period.[2] It is the act, neglect, or default which must continue before the proviso comes into operation so that time does not begin to run.

In two New Zealand cases the effect of the proviso might have been discussed. In Watch Tower Bible and Tract Society v. Huntly Borough [1959] N.Z.L.R. 821 the act or default complained of was the unilateral repudiation by the Huntly Borough of its obligations under a contract to let a Memorial Hall to the plaintiff Society. That act or default was necessarily a continuing one, at least until the date for the performance of the contract had arrived. Accordingly it would appear that no notice under s.23(1) (a) of the Limitation Act 1950 would have been required. This argument does not appear to have been raised

1. See Shadbolt v. The King (1909) 28 N.Z.L.R. 1026, (a case under s.37 of the Crown Suits Act 1908); and Khyatt v. Morgan [1961] N.Z.L.R. 1020, 1024-6 (a case of private nuisance where no public authority was involved).
2. Preston & Newsom, Limitation of Actions (3rd ed. 1953), 213.

by counsel nor was it discussed by the learned Judge. Secondly, in Maori Trustee v. Walker [1961] N.Z.L.R. 120 it might have been open to counsel to have argued that, if s.23(1) of the Limitation Act 1950 did apply to the claim, the failure of the Maori Trustee and the Crown to pay the defendant the moneys allegedly due to him under a contract was a continuing act, neglect, or default which did not bar his counterclaim under s.23(1) of the Act. No such argument appears to have been put forward. The decision that the claim itself fell outside the provisions of s.23(1) removed any necessity for a consideration of the point.

Finally, it should be observed that even where an act, neglect, or default continues a claimant may, if he wishes, give the notice prescribed by s.23(1) (a). Cautious claimants would need no reminding that the giving of such a notice is advisable in all cases where there may be doubt whether the act, neglect, or default complained of is a continuing one.

(ii) Point of expiry of period.

It is one thing to fix the starting-point for the period within which the notice must be given: it is another to determine when that period has expired. The statute provides that the notice must be given as soon as practicable after the accrual of the cause of action. This appears to be a reasonable condition and will in every case be a question of fact. But there are some difficulties in determining the question whether due notice has been given which might justify further consideration.

In the first place, the time within which the notice should be given will depend to a certain extent upon the contents of the notice.[1] Thus, to take an obvious example, it is impossible, and consequently impracticable, to give a notice to a person when it is not known which person should receive the notice. Ignorance will not prevent the accrual of the cause of action, as is shown by the judgment of Streatfeild J. in R.B.Policies at Lloyd's v. Butler [1950] 1 K.B. 76, but it does make the giving of notice impracticable. In Miles v. Attorney-General [1957] N.Z.L.R. 547 a claimant did not discover for almost two years that if anyone was liable for the damages which he had sustained it was the Crown. In the meantime he had commenced proceedings against a defendant which he reasonably believed to be responsible. It was not argued at all that the giving of notice to the Crown

1. Petrie v. Ashburton Electric Power Board [1961]N.Z.L.R.762,765 (C.A.)

before the mistake was discovered would have been impracticable. Instead the Court's dispensing power under s.23(2) of the Limitation Act 1950 was invoked, upon the ground that the failure to give the notice 'as soon as practicable' had been 'occasioned by mistake or by any other reasonable cause'. Stanton J. considered (at 548) that there was reasonable cause for the failure and gave leave for the action to be commenced out of time.

The attitude of the Courts to the question whether a notice under s.23(1)(a) of the Limitation Act 1950 has been given as soon as practicable may be seen in a number of decisions. In McIvor v. Brown & McCheane Ltd (Te Awamutu Electric Power Board, Third Party) [1958] N.Z.L.R.60, Shorland J. said (at 63):

> The present provision introduces a variable element by relating the time within which notice must be given to the practicabilities. . . . 'Practicable' is defined in the Oxford Dictionary as 'capable of being carried out in action' or 'feasible'. It is difficult to see how it can be practicable for a person to give notice of certain circumstances until he has knowledge of those circumstances.

After discussing the provisions under s.14(1) of the Workmen's Compensation Act 1925 (U.K.) in which the same expression was used, relating to the giving of notice, and the explanation of the cases under those provisions to be found in Evans v. Pen-Maen-Mawr & Welsh Granite Co.Ltd. (1931) 24 B.W.C.C. 443, 447, Shorland J. continued (at 64):

> Although I am of opinion that much the same construction is to be placed upon the words 'as soon as practicable' in s.23 (1) of the Limitation Act 1950, I would not be prepared to go so far as to hold that knowledge or absence of knowledge is necessarily conclusive in establishing whether it was practicable at any given time for the notice to be given. In my view 'as soon as practicable after' is to be construed as meaning as soon as the claimant and his advisers either knew or ought to have known or to have ascertained the circumstances which provide the alleged cause of action relied upon.

That construction of the words was expressly approved and adopted by Henry J. in O'Malley v. Waipiata-Patearoa Rabbit Board [1959] N.Z.L.R.437, 441-2, where in the circumstances of that case he held that a notice given on 21 February 1958 was given as soon as

practicable after a cause of action which had accrued on or about 6 October 1957. The introduction of the element of reasonableness, couched in the familiar formula 'he knew or ought to have known', may itself seem reasonable. But the effect is to construe s.23(1) (a) as if it read 'as soon as reasonably practicable' or 'as soon as it ought to have been practicable'. Thus construed the words will generally find the claimant in default. Furthermore an adverse finding on this point may prejudge the question, which usually then arises,[1] whether the claimant's failure to give the notice as soon as practicable was occasioned by reasonable cause. A finding that a claimant ought reasonably to have given earlier notice usually leads to a finding that there was no reasonable cause for his giving a late notice.

There is one final problem which arises out of the interpretation placed by the Courts upon the words 'as soon as practicable after'. It is a problem which becomes apparent when that interpretation is considered in the light of the authorities which favour the view that the notice under s.23(1) (a) should given an indication that litigation is intended. If notice must be given that an action will be brought arising out of the public authority's act, neglect, or default, when is it practicable to give such notice? It is possible to ascertain when a person decides to embark upon litigation, but no one has ever attempted to discover the point of time when a person ought to have decided to embark upon litigation. If a decision to take legal proceedings is necessary, clearly such a decision must precede the giving of notice that action will be taken. And, if the notice under s.23(1) (a) must give an indication that proceedings will be taken, clearly it is not practicable to give such a notice until a decision has been made to commence an action. This is the conclusion which seems to follow from combining the interpretation of the section relating to the contents of the notice with the interpretation of the section relating to the time when the notice should be given. The decisions seem to show a desire to have it both ways. On the one hand, the notice must given an indication that legal action will be taken: on the other, notices which have been given only after the claimant has decided to take action have not been given as soon as practicable.[2] There are two ways of resolving the

1. Under s.23(2) of the Limitation Act 1950.
2. See, for example, the facts in Tett v. Attorney-General [1957] N.Z.L.R. 1063, 1064.

the inconsistency: either abandon one of the interpretations, or, preferably, abandon them both.

(f) The mechanics of giving the notice

There are two distinct situations envisaged in s.23 for effecting service of notices. First of all Service upon the Crown and secondly, service upon other persons.

(i) The Crown

Notwithstanding that the Attorney-General is, under s.14(2)(c) of the Crown Proceedings Act 1950, the appropriate defendant in most cases in which proceedings are brought against the Crown, the notice under s.23(1)(a) of the Limitation Act 1950 must be given to the Solicitor-General. It is provided in s.23(3) that:

> Where notice has to be given to the Crown under this section it shall be given to the Solicitor-General.

There would seem to be three ways of effecting service of the notice. Firstly, there is nothing to prevent a claimant against the Crown from delivering a notice under s.23 to the Solicitor-General in person. Secondly, the claimant may leave it at the office of the Solicitor-General in Wellington. Thirdly, and for those claimants who do not live in Wellington, the most common method, he may send the notice by post in a registered letter addressed to the Solicitor-General at his office in Wellington. If that last method is used, the notice will be deemed to have been given at the time at which the letter would have been delivered in the ordinary course of post.

(ii) Other persons

Almost without exception the other persons against whom claims will be made to which s.23 applies will be public authorities. There is not a single reported New Zealand case in which action has been brought against a natural person for an act, neglect, or default under s.23 of the Limitation Act 1950. That being so, the Legislature might have been expected to have suggested a somewhat more realistic method of giving notice to public authorities other than the Crown. Three modes are set out in s.23(4) of the Act. The first is to deliver the notice 'to the person to whom it has to be given'. The second is to leave it 'at the usual or last known place of abode in New

Zealand of that person'. The third and last mode is to send it by post to the person in a registered letter addressed to him'at his usual or last known place of abode in New Zealand'. Fortunately, the modes of service indicated in s.23(4) are not exhaustive. Where public authorities are concerned, the notice may be served, as is usually done, by letter. If greater certainty is needed that the notice will reach the public authority, the notice may be served in the same way as legal proceedings are served: see, for example, s.380 of the Municipal Corporations Act 1954.

V. The Commencement of action

Once a claimant has satisfied the requirement of giving due and sufficient notice he must comply with the second condition prescribed in s.23(1) (b) of the Limitation Act 1950 before he may bring an action to which that section applies. No such action shall be brought,

> unless -
> . . .
> (b) The action is commenced before the expiration of one year from the date on which the cause of action accrued:

The demands of that provision are exacting and raise few problems.

(a) The rationale of the requirement

In Bradford Corporation v. Myers [1916] 1 A.C.242, 260, Lord Shaw of Dunfermline explained the importance of s.1 of the Public Authorities Protection Act 1893, which fixed a limitation period of six months, by saying, that:

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

This is hardly a shining example of Lord Shaw's usual good sense. Of course, the limitation prevents belated actions: that is what it says. Whether it prevents unfounded actions no one ever knows. No action can be dismissed as unfounded until it has been tried. Perhaps, if the analogy of ordinary actions which come to trial

is adopted, the law of probabilities would justify some estimate of the number of actions against public authorities which would fail. What may safely be asserted is that the limitation prevents some well-founded actions and furthermore relieves the public authority from any obligation to consider any well-founded claims where no action has been commenced within time. The suggestion that the period of limitation allows a safer periodical budget, however accurate it may have been in 1915 when the case was decided, is unfounded now. By the payment of a single insurance premium the public authority may relieve itself of all financial liability for individual claims, whether prompt or belated. The only real beneficiar of a period of limitation is the public authority's insurer. Insurance not a period of limitation, allows the safer periodical budget and secures the steadiness in municipal and local accounting which Lord Shaw considered so important. The view that the limitation period prevents one generation of ratepayers from being saddled with the obligations of another seems, with respect to Lord Shaw, to be absurd. The contemplation of a new generation of ratepayers arising every six months free from all financial burdens is ridiculous. Even if it were true to speak of one generation as bound to discharge the liabilities of an earlier generation, Lord Shaw seems to have overlooked that such a process, for which scriptural support might be cited, would be a continuing one. There is, in truth, no satisfactory explanation for the privileged position of the Crown and other public authorities. The protection is given as a matter of policy. What is given may be taken away as a matter of policy. The protection has been taken away in the United Kingdom: there is no reason why it should remain in New Zealand.

(b) The action is commenced

Two expressions are used in s.23 for beginning legal proceedings: firstly, 'no action shall be brought', 'to bring such an action'; and secondly, 'the action is commenced'. The terms are synonymous. Usually to bring or to commence an action is to make the proceedings of record in the appropriate Court. The most frequent method of commencing actions in the Supreme Court is by the issue of the sealed writ of summons.[1] But there are two situations in which problems might arise: they are third party proceedings and proceedings to add a defendant.

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1. Barrett v. Kalaugher & Co.Ltd [1959] N.Z.L.R. 411, 414 per McCarthy J. ('The issuing of the writ commences the action. It is then "brought"').

(i) Third party proceedings

In Flynn v. Strachan [1959] N.Z.L.R. 1223 Henry J. did not find it necessary (at 1225) to express a considered opinion on the question whether or not third-party procedure is an action under s.23(1) of the Limitation Act. 'Action' is defined in s.2(1) as meaning 'any proceedings in a Court of law other than a criminal proceeding'. The term 'proceeding' is not defined in the Act, nor is it defined in the Judicature Act 1908, but a reading of the Rules 95-99M, which in various places refer to 'third-party proceedings' leaves little doubt that third-party procedure is an action.[1] The commencement of a third-party proceeding is by the issue of a third-party notice under Rules 95-98 of the Code of Civil Procedure.

Resort to third-party procedure is most frequently made where it is desired to enforce a right of contribution or indemnity. In such cases the cause of action will accrue, under s.14 of the Limitation Act 1950,

> at the first point of time when everything has happened which would have to be proved to enable judgment to be obtained for a sum of money in respect of the claim.

That provision, for which there is no counterpart in the Limitation Act 1939 (U.K.), together with the insertion of the words 'in time' in s.17(1)(c) of the Law Reform Act 1936,[2] a section which binds the Crown,[3] makes the law in New Zealand quite different from English law in relation to limitation in proceedings for contribution or indemnity against public authorities.

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1. In McIvor v. Brown & McCheane Ltd (Te Awamutu Electric Power Board) [1958] N.Z.L.R. 60 and in Maori Trustee v. Walker [1961] N.Z.L.R. 120 third party notices must have been assumed to commence an action to which s.23(1) of the Limitation Act 1950 applied.
2. 'Any tortfeasor liable in respect of damage suffered by any person as a result of a tort may recover contribution from any other tortfeasor who is, or would if sued in time have been, liable in respect of the same damage . . .'
3. Crown Proceedings Act 1950, s.8(2).

(ii) Adding defendants

When is an action commenced against a defendant who is added after an action has been brought? In Barrett v. Kalaugher & Co.Ltd [1959] N.Z.L.R. 411 McCarthy J. suggested (at 414) that the answer was when an order was made under Rule 92 of the Code of Civil Procedure adding him as a defendant. The opening words of Rule 93 ('Where a defendant is added'), which deals with service on the added defendant of a copy of the 'order joining him' and of the statement of claim in the action reinforce that suggestion.

(c) The action must be commenced 'before the expiration of one year from the accrual of the cause of action

Generally, at common law where a period is fixed within which a person must act or take the consequences of failure the day of the event from which the period runs is not counted against him. In New Zealand the difficulties which arose in Marren v. Dawson Bentley & Co. Ltd [1961] 2 Q.B. 135 on this point[1] are removed by s.25(b) of the Acts Interpretation Act 1924, which provides:

> If in any Act any period of time dating from a given day, act, or event is prescribed or allowed for any purpose, the time shall, unless a contrary intention appears, be reckoned as exclusive of that day or of the day of that act or event.

(d) The defendant may consent to the bringing of an action out of time

The third proviso to s.23(1) of the Limitation Act 1950 deals with the consent of the defendant to the bringing of an action covered by the section out of time. It provides that:

> . . . any such person may consent to the bringing of such an action at any time before the expiration of six years from the date on which the cause of action accrued, whether or not notice has been given to the prospective defendant as aforesaid.

It would be wrong to give the impression that the Crown and public

1. See also Stewart v. Chapman [1951] 2 K.B. 792 (D.C.)

authorites always claim the protection of the Act. Where there is reasonable cause for the failure of the claimant to commence his action within the time limit prescribed by the section, the Crown and public authorities often show a disposition to consent to the bringing of the action out of time rather than to force the claimant to invoke the dispensing power of the Court under s.23(2) of the Limitation Act 1950. The decision whether or not to grant consent rests entirely within the discretion of the defendant. In some cases the defendant may be bound by its obligations under its policies of insurance not to waive the requirement that the action should have been brought within one year after the accrual of the cause of action. If so, the position is unsatisfactory.

The power to consent is itself limited. It may be exercised only within the period of six years from the date of the accrual of the cause of action. The period of six years is the standard period of limitation in the Act and would apply to the vast majority of actions which would lie under s.23(1) of the Limitation Act 1950. One difficulty might possibly arise through the overlapping of s.4(7) and s.23(1) of the Act. Under the earlier provision it is provided that:

> An action in respect of the bodily injury to any person shall not be brought after the expiration of two years from the date on which the cause of action accrued.

There is a proviso, which is almost identical with s.23(2) of the Act, relating to the dispensing power of the Court. There is, however, no provision in s.4(7), as there is in the third proviso to s.23(1), allowing the defendant to consent to the bringing of an action to which s.4(7) relates out of time. Thus if A sustains bodily injury through a neglect by a public authority of a public duty, and brings an action in respect thereof two and a half years after the accrual of the cause of action, does the consent of the public authority under s.23(1) relieve A from the necessity to obtain the leave of the Court under s.4(7)? In Petrie v. Ashburton Electric Power Board [1961] N.Z.L.R. 239 through the delay in hearing an application under s.23(2) of the Act the two years prescribed by s.4(7) expired before leave to bring the action had been given. Barrowclough C.J. expressed the view (at 240) that an order under s.23(2) would suffice to allow an action to be brought even if no application were made under the proviso to s.4(7). The giving of consent under s.23(1) is analogous. Once consent is given, there should be no need for a claimant to apply under some different section of the Act for leave to bring the action out of time.

There is no requirement prescribing the form whereby the defendant may consent to the bringing of the action. In every case it will be a question to be decided in all the circumstances whether the consent was actually given. If a problem is likely to arise, Roberts v. Uawa County [1957] N.Z.L.R. 460 shows that it will arise over the authority of the person who consented to bind the public authority. In that case the consent was given by the general solicitor to the County: in the circumstances it was a consent which could not be impugned or repudiated.

In the next part of this article the provisions of s.23(2) of the Limitation Act 1950 will be considered in the light of many decisions which have been delivered touching upon the exercise by the Courts of their power of dispensation under that provision.

G.P.BARTON *

*Editor