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# THE PLAIN MEANING RULE AND TRANSITIONAL PROVISIONS IN LEGISLATION: OCCASIONAL MISUNDERSTANDINGS

BILIKA H SIMAMBA<sup>1</sup>

Attorney at Law, Consultant Legislative Counsel

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## Abstract

In the Cayman Islands, a British Overseas Territory, the Grand Court, purportedly applying the plain meaning rule, held that the Health Services Authority Law barred suits against government hospitals unless there was bad faith. Within about six weeks, the Government amended the provision to expressly add negligence as a ground of suit. An attempt to apply the amended legislation to the case that led to the amendment failed. This note examines whether the plain meaning rule was properly applied and the extent to which matters pending before courts and other public authorities can be affected by new legislation.

**Keywords:** presumption against retrospectivity; transitional; procedural legislation; vested rights; pending; immediate effect; Hansard; retrospective; retroactive.

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## [A] INTRODUCTION

Section 12 of the Health Services Authority Law (HSA Law),<sup>2</sup> Cayman legislation, provided that the Authority, which runs government hospitals, was ‘not liable in damages’ unless there was ‘bad faith’. Despite nuanced arguments contending that negligence was not, in law, excluded, Justice Richard Williams decided in *Thompson v Health Services Authority* (2016: 93) (*Thompson 1*) that the authority was protected unless there was bad faith. Following that decision, the court had to determine whether section 12, so interpreted, was incompatible with the right to life protected

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<sup>1</sup> I am an Instructor, Graduate Diploma in Legislative Drafting, Athabasca University, Alberta, Canada (as an independent contractor). The views expressed here are mine alone.

<sup>2</sup> Before the coming into force of the Cayman Islands Constitution (Amendment) Order 2020 UKSI 1283, which renamed the Legislative Assembly as Parliament, what are now called ‘Acts’ were called ‘Laws’.

by section 2 of the Constitution of the Cayman Islands 2009.<sup>3</sup> This was heard as *Thompson v Health Services Authority* (2018: 442) (*Thompson 2*). By the time the second phase was heard, the Government had passed the Health Services Authority (Amendment) Law 2016 (the 2016 amendment) to expressly include negligence as a ground of suit. The plaintiff amended the pleading to take advantage of the change but was unsuccessful.

*Thompson 2* decided that there was no violation of the right to life as the material facts took place before the Bill of Rights came into force in 2012. As to the 2016 amendment, it was held that it did not apply to the case at hand as there was nothing in the amendment that evinced an intention to make the legislation retrospective or retroactive.

At this time, there were cases which had been filed, and it was thought that there were others that could have been filed and were still within the three-year limitation period for negligence prescribed by section 13 of the Limitation Law (1996 Revision). The issue whether the 2016 amendment could apply to cases which had not been decided at the time of enactment has never been decided by the courts. Despite that, the issue remains important as some of these matters were never formally dismissed.

Thus, the purpose of this article is to examine whether the plain meaning rule was properly applied in *Thompson 1* and whether, in *Thompson 2*, the court took the right approach to the application or otherwise of new legislation to pending matters. It will be posited (a) that the plaintiff's arguments regarding the meaning of section 12, even if they could have been better supported by authorities, were nonetheless better, and (b) that the court's approach to retrospectivity and the related issue of transitional provisions was also flawed.

The significance of all this lies in the fact that the defendant admitted in *Thompson 1* that, in the period from 2005 to 2015 when it was heard, there were 'around 17 claims', eight of which were settled (paragraph 100). In a jurisdiction with a population of 56,672 (World Bank: 2010) mid-way through that 10-year period, this was a significant number of claims. Further, even with the restricted meaning that had been given to section 12, if the courts had had an opportunity to hold that the 2016 amendment applied to matters pending before the courts but in which no decisions had been rendered, a significant number of litigants would have benefited from the change. Also, persons still within the limitation period but who had not filed actions would have benefited.

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<sup>3</sup> Schedule 2 to Cayman Islands Constitution Order 2009, UKSI 2009/1379. In such a case, section 23 of the Constitution requires a declaration of incompatibility to be made. However, this does not prevent 'the continuation in force and operation of the legislation'.

## [B] MISAPPLICATION OF THE PLAIN MEANING RULE

In *Thompson 1*, the plaintiff, a girl who was ten years old at the time of the hearing, was from birth bed-ridden, unable to stand, walk, talk or eat solid food. It was claimed that this was due to poor pre-natal care and delivery. The defendant invoked section 12 which stipulated that the defendant was not liable in damages unless there was bad faith. No bad faith was alleged.

The plaintiff advanced three main categories of argument. First, there was the internal context argument. It was said that section 12 had to be read in light of other provisions of the HSA Law, especially section 5(2), which obliged the defendant to ‘maintain and promote the health and wellness’ of patients. Second, in relation to the external context, reference was made to one statute *in pari materia*. It was argued that the section also had to be read consistently with section 15(2) of the Health Practice Law (HP Law) which required all medical practitioners, both in the private and public sectors, to take out malpractice insurance. At the material time, there was no distinction as to the level of coverage required. Third, still in the external context, the court was invited to take account of the Cayman Islands Legislative Assembly Official Hansard Reports to buttress the plaintiff’s arguments as to the intention of the legislature.

Williams J rejected these arguments in the following words:

[W]hen I consider the primary reading of the words in s.12, construed in the context of and with reference to other sections in the HSAL 2004, I find the words to be clear and that there is no ambiguity or absurdity which requires the court to apply any other rules of statutory interpretation, or any external aid, including the highlighted parliamentary statements (Thompson1: paragraph 89).

This approach to the plain meaning rule is contradicted by a long line of cases, some of which will be given here. One of the most quoted words in this regard are those of Lord Wensleydale in *Grey v Pearson* (1857) who said:

In construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency *with the rest of the instrument*, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity, repugnance and inconsistency but no farther (106 emphasis added).

The High Court of Australia in *WACB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) has followed the same approach stating :

[W]here the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, it must be given its ordinary and grammatical meaning (190, 200).

The same approach is also seen in the leading Supreme Court of Canada case of *Re Rizzo and Rizzo Shoes Ltd* (1998: 27). There, the issue was whether employees who lost their jobs through the bankruptcy of the company had a right to severance pay under Ontario's Employment Standards Act (RSO 1980, c 137). Section 40 of that Act provided that, subject to certain conditions, where employment was 'terminated by an employer', the employer was to 'pay severance pay'. The Ontario Court of Appeal, purportedly applying the plain meaning rule, accepted the argument that this applied only to regular terminations and not termination through bankruptcy.

On appeal, the Supreme Court of Canada rejected the approach. Iacobucci J said:

Consistent with the finding of the Court of Appeal, the plain meaning of the words of the provision here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete (*Rizzo*: 40).

He went on to say:

Although the Court of Appeal looked to the plain meaning of the specific question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA [Employment Standards Act], its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized (*Rizzo*: 41).

Accordingly, the Supreme Court of Canada held that persons losing their jobs due to bankruptcy were also entitled to severance pay. These authorities were not cited to Justice Williams, nor were any others which take the same approach.

All that said, the plain meaning ship was somewhat steadied in Cayman by Justice Ingrid Mangatal in *BDO v Governor in Cabinet* (2019: 457). Relying on various UK court cases as well as *Bennion on Statutory Interpretation* (2013),<sup>4</sup> she rejected the approach in *Thompson 1* regarding the plain meaning rule, in particular, that a statute does not need to be read in its internal and external context if it is clear and unambiguous. She took the approach, well established in some jurisdictions, that even if

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<sup>4</sup> Edition by O Jones, for example s 363, at 1058; s 195, at 507-508; s 193, at 504.

a statute appears to be clear and unambiguous at first blush, it still must be read in its entire context. If, at that stage, an ambiguity emerges which was not apparent when the relevant provision was read in isolation, the court must try to find a meaning that reconciles the provisions. If this approach had been well argued in *Thompson 1*, it would have been more challenging for the defendant in that case to succeed. It is hoped that this article will contribute towards a better understanding of the rule, especially that the dichotomy between *Thompson 1* and *BDO* regarding the plain meaning rule has never been ruled upon by the Cayman Islands Court of Appeal.

## [C] PRESUMPTION AGAINST RETROSPECTIVITY

### General Approach to Retrospectivity

As a prelude to considering what should have been the effect of the 2016 amendment on pending court cases, and because issues of transition are related to issues of retrospectivity, it is necessary to consider the correct approach to the latter in general as well as in relation to specific subject-matters.

It was argued by the defendant that holding the Authority liable in damages would make the statute retrospective. First, it was rightly contended that retrospectivity is permitted in law only where the language is clear and unambiguous. Second, and more relevantly, the defendant, again rightly, argued that the presumption does not generally apply where the change is procedural. These two approaches are aptly summarized in the following oft-quoted passage found in the Privy Council case of *Yew Bon Tew v Kenderaan Bas Mera* (1982: 833 at 836). There Lord Brightman, delivering the judgment of the Board, had this to say:

Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is however said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed. ...

Whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the wording of the statute, having regard to the normal canons of construction and to the relevant provisions of any interpretation statute.

Rules of evidence are of course considered to be procedural. An example is the case of *Diaz (Anthony) v The State* (1989: 425) decided by the Court of Appeal of Trinidad and Tobago. There, the appellant was convicted of rape. At his trial, evidence was admitted by the court of how the prosecutrix complained to a neighbour about the rape. The neighbour gave evidence of the complaint and the victim's distressed condition. Since the alleged rape, section 31 of the Sexual Offences Act 1986 had abolished the English common law rule that allowed evidence of a recent complaint to be admitted in evidence. That Act came into force on 11 November 1986. The issue was whether this aspect of the Act applied to the case since, at the time of the alleged rape, the rule had not been abolished. The Court of Appeal of Trinidad and Tobago held that, in the absence of a clear statutory provision to the contrary, that rule of evidence applied to all cases that had not been determined by that date, even where the rape took place before the amendment. Accordingly, because evidence of recent complaint had been admitted, the appeal was allowed. To put it another way, it was held that there was no vested right in a rule of evidence.<sup>5</sup>

Returning to *Thompson 2*, even if the 2016 amendment were to be viewed as removing any immunity (assuming it existed at all before), it is submitted that the correct interpretation is that this was a procedural change, and, therefore, the amendment should have been held to apply also to cases where the material facts occurred before the amendment.

Further, on retrospectivity in general, Lord Reid gave a relatively more recent summary of the legal position. He said in *Sunshine Porcelain Potteries Pty Ltd v Nash* (1961):

Generally, there is a strong presumption that a legislature does not intend to impose a new liability in respect of something that has already happened, because generally it would not be reasonable for a legislature to do that ... (927)

But this presumption may be overcome not only by express words in the Act but also by the circumstances sufficiently strong to displace it (938).

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<sup>5</sup> See also *William (Early) v The State* (1994) (CA of Trinidad and Tobago), as well the Eastern Caribbean Supreme Court case of *Richardson and Others v Richardson* (1995) (from Anguilla). Retrospectivity was also considered in *A G Ebanks v R* (2007) (CA of the Cayman Islands), where the introduction of a mandatory sentence was held not to amount to a 'heavier penalty'. For a more comprehensive study, see Sampford & Ors (2006).



Also, courts have held that they can take into account acts committed before a statute is passed in deciding current issues. For example, the English Court of Appeal held that legislation that prohibited convicted persons from working with children was applicable to offences committed before the legislation was passed. This argument was presented by counsel for the Secretary of State in the following terms and approved by Kay LJ in *R v Field* (2003):

Assuming that a disqualification order is not a criminal penalty, the Secretary of State's interpretation does not offend against the presumption against retrospective legislation. That presumption is based on concepts of fairness and legal certainty, which dictate that accrued rights and the legal status of past acts should not be altered by subsequent legislation. But the effect of a disqualification order is entirely prospective, because it affects only future conduct ... (769)

Finally, the purpose of section 28 is plainly to protect children. That purpose would be severely undermined if a disqualification order could only be imposed in relation to offences committed after the section came into force. The courts should take a more relaxed approach to a potentially retrospective element in legislation where its intended purpose is to protect the public (982-983).

Extrapolated to the facts of *Thompson*, therefore, it is safe to say that the application of the amended section 12 to pending matters was, properly conceived, to be entirely prospective, because it affected only future judgments for damages, this for a breach of duty of care that existed even before the amendment. The purpose of the amendment, which was clearly to correct an egregious omission, would have been severely undermined if the section were to apply only to facts occurring after the amendment.

Finally, on retrospectivity in general, the mere fact that legislation affects existing rights does not technically make it retrospective. This was clarified a long time ago by Buckley LJ in *West v Gwynne* (1911) in the English Court of Appeal in the following terms:

Retrospective operation is one matter. Interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case ... As a matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so to speak, a presumption that it speaks only as to the future. But there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, do interfere with existing rights (11).

## Approach to Pending Actions

Regarding pending actions, Langan has noted in his edition of the classic work *Maxwell on the Interpretation of Statutes* (Langan 1976) that:

In general, when a substantive law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights.

...

But if the necessary intendment of a statute is to affect the rights of parties to pending actions, the court must give effect to the intention of the legislature and apply the law as it stands at the time of the judgment even though there is no express reference to pending actions (220-221).

So, the mere fact that the amendment (or Hansard) is silent about pending actions does not *per se* imply that it will not apply to pending actions.

In support of that quote, he further states that this principle was applied to the Landlord and Tenant (Rent Control) Act 1949 in *Hutchinson v Jauncey* (1950: 574) where the English Court of Appeal expressed the view that the holding in an earlier case (that only express words could alter the rights of the parties in relation to pending rights of action) was incorrect.

## Approach to Damages and Costs

Langan also deals with the general rule as to procedural legislation, which is relevant to the question whether the awarding of damages is a procedure or not (Langan 1976: 222 *et seq*). It is worth noting in this regard that costs have been held to be a procedure for purposes of the law of retrospectivity. An account is also given of *Wright v Hale* (1860: 227).<sup>6</sup> There, section 34 of the Common Law Procedure Act 1860 deprived the plaintiff of costs if they recovered, by the verdict of a jury, less than five pounds sterling. The section was held to apply to actions begun before the Act had come into operation, but which were tried afterwards. Significantly, in the same *Wright* case, Baron Wilde also said: 'where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act' (*Wright*: 232).

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<sup>6</sup> (1860) 6 H & N 227. Also found in 30 LI Ex 40 and 158 ER 94. Page 232 quoted further down is from 6 H & N.



The only aspect of this which was disavowed, as noted above, is the fact that a contrary intention cannot be implied. In *Kimbray v Draper* (1868: 160), it was similarly held that section 10 of the County Courts Act 1867, which dealt with orders for security for costs in county court actions, applied to pending actions. These cases show that what is considered to be procedural is liberally construed.

## Immediate Effect and Retrospective Effect

There is also the need to distinguish between immediate effect and retrospective effect. Sullivan states in *Sullivan and Driedger on the Construction of Statutes* (2002) that:

Where a provision is found to be purely procedural, it is given immediate effect. It is *not* given retroactive effect. The presumption against the retroactive application of legislation applies to procedural provisions as it does to all legislation, without exception. Thus, any attempt to apply a provision to a stage in a proceeding that was completed before the provision came into force would be refused, subject to a legislative direction to the contrary (587 emphasis in the original).

In this regard, the legislature in the Cayman Islands showed how immediate it wanted the 2016 amendment to have effect:

- ◇ 19 February 2016: the judgment in *Thompson 1* is rendered and a public outcry follows;
- ◇ 1 April 2016: the HSA (Amendment) Bill 2016 is published;
- ◇ 20 June 2016: the resulting legislation, the 2016 amendment is published and comes into force, 40 days (5 weeks and 6 days) after judgment.

Therefore, it is submitted that this suggests that the Legislative Assembly intended the legislation to have immediate effect in all cases that had not been finally determined. However, admittedly, since the assembly did not determine what immediate effect was in relation to the different categories of cases, the interpretation of ‘immediate effect’ remained for the court to determine.

Further, a court must consider the kind of amendment that is being introduced. If the amendment is just an improvement on an old provision in a non-fundamental way, the court might consider that the introduction of the measure need not be immediate. However, where an amendment is one which was correcting an egregious ‘error’, as in the *Thompson* cases, that is, one that went to a fundamental concept in the administration of justice, the court must take a liberal approach and allow the legislation

to come into effect immediately so that the largest number of people can benefit. And, in so doing, the HSA would not have been prejudiced as it always had a duty of care.

## [D] LEGISLATION AFFECTING MATTERS ON THE GROUND

Reference was made above to how legislation is sometimes intended to affect matters on the ground. In *R v Levine* (1926: 342), the accused was charged under the Manitoba liquor licensing legislation with being in possession of liquor on premises of a kind not allowed under the Act. At the time she acquired the liquor, it was lawful to have that liquor on that kind of premises. The Act was amended, making it an offence to have liquor exceeding a certain quantity on such premises. The Manitoba Court of Appeal upheld the conviction despite the liquor having been lawfully acquired and therefore lawfully possessed before the commencement of the amending Act. Prendargast JA, in a majority judgment, said that such application of the amendment did not make it retrospective. He further explained:

The existence or presence of the liquor on the premises only refers to its existence or presence there on the 27th. Of course, the appellant's status was altered by the amendment, and certain rights which she previously had, came thereby to an end. But that is the effect and in fact the function of most, if not all, public enactments of a regulating character (*Levine*: 348-349).

So, the mere fact that there is a matter that is already in the courts, or whose material facts have already taken place, does not necessarily imply that new legislation cannot apply to it.

## [E] STATUTORY PROVISIONS RELATING TO TRANSITION

Most jurisdictions in the Commonwealth have an Act in the nature of an Interpretation Act or Legislation Act that deals with some of the more common issues relating to transition. Many of these Acts are, at least in this respect, based on, or are similar to, section 16 of the UK Interpretation Act 1978.<sup>7</sup> The Interpretation Act (1995 Revision) of Cayman, which is similar to the UK provision, is fairly typical in relation to the effect of repeals and the related issue of transitional matters:

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<sup>7</sup> Interpretation Act, RSC 1985, c I-21 (Canada) section 43; Interpretation Act 1987 (New South Wales) section 30; Interpretation Act 1999 (New Zealand) section 17.

- 25** (1) Where any Law repeals and re-enacts, with or without modification, any provision of any Law in force, reference in any other Law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted.
- (2) Where any Law repeals any other enactment, then, unless the contrary intention appears, the repeal shall not—
- (a) revive anything not in force or existing at the time at which the repeal takes effect;
  - (b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed;
  - (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed;
  - (d) affect any penalty, fine, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or
  - (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, fine, forfeiture or punishment as aforesaid; and any such investigation, legal proceedings or remedy may be instituted, continued, or enforced, and any such penalty, fine, forfeiture or punishment may be imposed as if the repealing Law had not been passed.<sup>8</sup>

This section is of course only a default position.

## [F] BEFORE AND AFTER THE 2016 AMENDMENT

### Position before the 2016 Amendment

The judge in *Thompson 1* readily recognized that the defendant did not enjoy immunity against all forms of legal process as, in addition to suit in tort based on bad faith, it could be sued in judicial review proceedings (paragraph 75). Though the court did not elaborate on this, one can easily envisage how the spouse of a terminally ill patient could seek a declaration, injunction, prohibition or *certiorari* from a court of law, depending on circumstances.

Having appropriately recognized what was implicit in the section in relation to judicial review, the court then failed to recognize what was probably the next logical step, which is that the word ‘liable in damages’ spoke to the prohibition of a particular form of remedy rather than legal process. Instead, it took a blunderbuss approach by holding that, by

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<sup>8</sup> In Interpretation Act 1978 for the UK, in paragraph (e), the portion after the semi-colon is not part of the paragraph and goes out full to the left.

implication, there was also immunity from legal process in cases of negligence.

For analytical purposes, the process in a civil matter can be divided into the following parts. First, a suit is received by a court. Second, the court conducts a trial and makes a declaration as to the rights of the parties, as required by section 7 of the Constitution of the Cayman Islands. Third, in an appropriate case, it awards damages. Viewed through this prism, section 12 took away only the third of these stages, leaving intact the validity of the legal process and the declaration of the rights. This conclusion would have been supported by the rule, for which no authority need be cited, that courts are slow to interpret a statute as abolishing the common law unless there are clear words to the contrary.<sup>9</sup>

This approach could be criticized as unduly mixing issues of tort and those of public law. But this argument would be misplaced. Whenever the common law is overlaid with statute law, the result can be unusual and even awkward, but that has to be accepted as the effect of the statute. What is more, some of the old distinctions between different kinds of proceedings have to some degree been eroded. For example, Order 53 rule 7 of the UK-inspired Grand Court Rules allows an application for judicial review to be endorsed with a claim for damages. Also, under rule 9 of the same Order, the court has power, in certain circumstances (where the relief sought is a declaration, an injunction or damages) to order the proceedings to continue as if they had been begun by writ rather than refusing the application. Even more significant is Order 15 rule 16 which provides that:

No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

Thus, the position advocated above would not be a novelty within the current civil procedure regime.

## Position after the 2016 Amendment

As stated above, following the decision in *Thompson 1*, the Legislative Assembly passed the 2016 amendment to make it clear that one could sue also for negligence. As to whether that amendment applied to acts committed before the change, the court in *Thompson 2* said that: 'The

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<sup>9</sup> See short discussion in Simamba (2016: 146).

cause of action arises at the time of the alleged negligent act and s. 12 excluded liability and has effect from that time’ (paragraph 105).

Accordingly, it rejected the notion that the plaintiff could benefit from the 2016 amendment. The court reasoned that if the defendant was to be held liable for things that happened before the amendment, that would have made an act retrospectively illegal. Essentially, the principle the court applied was similar to that applied in criminal matters, namely that one cannot be found guilty of an offence that did not exist at the time of commission of the act.

In so holding, the court misdirected itself. In criminal cases, needless to say, there is no duty to obey a law that did not exist at the time of the act, and therefore no obligation existed not to commit the particular act. That was not the case with *Thompson 2*. In that case, there was always a cause of action under common law even before the 2016 amendment. What is more, section 5(2) of the HSA Law imposed on the Authority a declaratory duty to provide for the ‘health and wellness’ of its patients. So, even if the court were to hold that no damages could be awarded for negligence under the old provision, the correct interpretation would have been that, even before the amendment, a litigant could obtain a declaration that the duty of care was breached in relation to them.

The repeal and replacement of section 12 (to add negligence) only removed the procedural impediment to suing the defendant not only for prospective actions but also for matters whose material facts took place before that date. It was wrong in law to conflate the cause of action, that is, legal process, and the exclusion of a particular form of remedy, namely, damages.

So, it is submitted that, if section 12 were to be held to confer immunity of some kind, then it would have been immunity only from damages, but not from the duty of care, which continued to exist by virtue of section 5(1) of the Law. The immunity having been removed, one could now sue and recover damages in the same way that the removal of immunity from a diplomat would make him or her amenable to prosecution for anything done while they enjoyed immunity.

In answer to the plaintiff’s argument in *Thompson 2* that the 2016 amendment must be interpreted as being intended to be for the public benefit and therefore be given retroactive effect, the court stated:

I accept that a significant benefit to the wider public without detriment can be evidence of an intention of the Legislature. However, it is also clear that the Defendants would suffer detriment if their statutory defence was removed retroactively (*Thompson 1*: paragraph 109).

Again, the court in *Thompson 2* treated the limitation of remedies as if it were a substantive defence. This too was wrong in law. The holding would have been correct if, for example, there had been no duty of care and the 2006 amendment was introducing a duty of care but that was, of course, not the case. Accordingly, there was no substantive defence that was available before 2016 that was not available after the amendment. There was only a procedural impediment.

## [G] RELEVANCE OF HANSARD

Parliamentary material is relevant to this discourse because there was reliance on it in both *Thompson* cases. It is therefore important to appreciate the proper approach to Hansard. In particular, it will be argued in relation to *Thompson 2* that the debates were misunderstood in a manner that adversely affected the plaintiff's case.

Before *Pepper v Hart* (1993: 593) there was a rule excluding reference to parliamentary material as an aid to statutory construction. The rule was later relaxed so as to permit such reference where:

- (a) legislation was ambiguous or obscure or led to absurdity, (b) the material relied upon consisted of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as was necessary to understand such statements and their effect, and (c) the statements relied upon were clear (*Pepper*: 'Headnote').

In the same case, Lord Griffiths, speaking for the majority, stated the doctrine of purposive interpretation as follows:

The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted (*Pepper*: 617).

Thus, in light of the plain meaning rule and its caveat, coupled with the purposive approach to statutory interpretation, parliamentary material has assumed greater importance, though, admittedly, courts have been cautious in referring to them.

Regarding the rule in *Pepper*, the following must be noted in relation to the *Thompson* cases. The back and forth of the debate as reported in Hansard (both at the time of passage of the original Law and the 2016 amendment) shows that the views of the Members of the Legislative



Assembly (MLAs) were not confluent as to what was intended in the principal Law. Significantly, MLA Alden McLaughlin, then in opposition in 2004, but Premier in 2016, in a detailed submission, questioned the correctness at the time of imposing such a blanket immunity if the section was passed.<sup>10</sup>

The differences of views in these debates, some of them summarized in *Thompson 2* (paragraphs 110 and 113) is the reason that for a long time the courts did not resort to these reports: you can never be sure that all the members of the legislature agreed on the meaning of the words they used or the intention of the legislature as a group. Thus, the words in the legislation remain the primary purveyors of meaning. To put it another way, this is so because the legislature enacts legislation using the letter of the law (from which the spirit can be gleaned) and not through the letter of Hansard.

In particular, the court in *Thompson 2* noted that, during the second reading of the HSA (Amendment) Bill on 29 April 2016, the Premier said that the legislation would not be retroactive (paragraph 113). But this is not quite accurate. What he actually said in part was that:

We have no way of knowing how many potential claims are out there. ...

The insurance policies which have been obtained by the Health Services Authority over that period and the premiums paid would have been and were on the basis of this immunity provided for in the legislation. ...

And so, for those reasons, as empathetic as the Government is to potential plaintiffs who have been shut out by the legislation which has been in place since 2002 until now, almost 14 years, it is not a policy decision that we can take to make this legislation retroactive (Hansard, Friday, 29 April 2016, page 19).

The first issue in this regard is that it is not clear what the Premier meant to convey. All that he can safely be taken to have said is that he did not want the amendment to allow *all persons* attended as far back as 2002 to have a right to sue. It would not be a fair interpretation to hold that every category of case during that time *should* be excluded.

What is more, the following issues were never expressly mentioned:

- ◇ Did the Premier mean to also convey that cases where the material facts had already taken place but where no proceedings had been filed at the date of the amendment would not benefit (even if the three-

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<sup>10</sup> See Cayman Islands Legislative Assembly Official Hansard Report of 28 April 2016 from 56 to 60, and 29 April 2016, which also quote extensively from debates which took place in 2004.

year limitation period under the Limitation Act had not expired), but those where suits had been filed would benefit?

- ◇ Did he mean to say that even among those which had been filed, only those where no ruling had been made on the issue would benefit? In other words, was he saying that *Thompson 1* (where the ruling had been rendered) could not benefit but that a case before the courts (where no ruling had been made) would?

To put it another way, there were various categories of cases in that 14-year period:

- a) there were those cases where the limitation period had expired by the time the law was amended;
- b) there were those where the limitation period had not expired but suits had not been filed;
- c) there were those where the limitation period had not expired and suits were filed but *had been determined* on the issue; and
- d) there were those where the limitation period had not expired and suits were filed but *had not been determined* on the issue.

It is unclear from the debates how the legislature intended to deal with especially categories c) and d).

What is more, the Premier's statement as to the implications for insurance must be interpreted with caution. The judgment in *Thompson 1* disclosed, as noted above, that in the ten-year period ending in 2015 there were around 17 claims and at least eight were settled (paragraph 100). In any case, insurance was an internal matter for the Authority. That had no direct bearing on whether or not the Authority would be liable as this is a matter of statutory interpretation. Besides, if the application of the provision were to be limited to cases whose limitation period of three years had not expired, filed or not filed, there would have been no major exposure of the defendant to claims not covered by insurance.

If the Legislative Assembly intended that the 2016 amendment (which was intended to correct an egregious and fundamental apparent omission in the HSA Law) was to have such a limited application and totally exclude all categories of cases that were still alive in one shape or form, the Assembly should have used words that are clear and unambiguous. Following the rule in *Pepper*, one cannot rely on the words of the Premier in Hansard, which were themselves vague as to the intended scope of the amendment, to limit the fair meaning of the words used in the legislation.

## [H] CONCLUDING REMARKS

A proper application of the plain meaning rule would probably have resulted in negligence being also actionable even before the 2016 amendment or, at the very least, have led to a holding that a declaration could be made as to the rights of the parties, a right protected by section 7 of the Constitution of the Cayman Islands. Also, a proper understanding of the potential of the amendment to apply to cases that had not been decided would have enabled more people to credibly sue with a reasonable likelihood of success on the application of the amendment.

It is also worth noting that it is not the general practice in many jurisdictions to grant immunity to government agencies in cases where a private individual can be held liable, although there can be cases where, for budgetary or policy reasons, it may exist. Where it is granted, this is often in relation to regulatory bodies. For example, consider what would happen if a hotels licensing board did not enjoy immunity or a high threshold for being sued such as bad faith. This would mean that, if it denied a licence to an investor who later won a judicial review case, the investor might be able to successfully sue for loss of profits. Closer to home, if a lawyers' licensing body did not enjoy the same protection, a lawyer who is denied a licence but is able to obtain it following a successful court challenge may be able to recover damages. Needless to say, this would greatly impair regulatory bodies in the exercise of their functions. Protection of government hospitals against suits for negligence does not fall into this category.

Following *Thompson 1*, the attempt in the 2016 amendment to correct what was seen as a mistake was not entirely satisfactory. Though negligence was added as an additional ground for suing, the change did not deal with the different categories of cases that have been outlined above. Whereas there may have been good reasons why this was not done, those would be outside the scope of this article. One has to accept them as reflecting the realities of enacting legislation on a subject-matter that is not only potentially emotional but in which there were many vested interests.

As a practical note, it has to be remembered that, where there is an issue of transitional provisions, one needs to examine the pertinent legislation to see if there is a specific provision. This provision is often towards the end of the legislation, but this is also determined by the legislative practice in the jurisdiction concerned. In the absence of such provisions, as noted above, the Interpretation Act, Legislation Act or equivalent will usually prescribe the default position. If that too is silent or the application of

the default position is unclear, case law, where it exists on the point, becomes the place of last resort. All in all, the extent to which a default position or specific provision in particular legislation will apply is always subject to a higher legal norm such as the Constitution of the Cayman Islands.<sup>11</sup>

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- County Courts Act 1867
- European Convention on Human Rights
- Employment Standards Act, RSO 1980, c 137 (Ontario, Canada)
- Health Practice Law 2002 (Cayman)
- Health Services Authority (Amendment) Law 2016 (Cayman)
- Health Services Authority Law (2003 Revision) (Cayman)

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<sup>11</sup> Also, the European Convention on Human Rights applies to the Islands and the European Court of Human Rights is the final court of appeal in human rights matters. See *Ebanks v the United Kingdom* (2010).

Interpretation Act 1978 (UK)  
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