TONGA
LAW REPORTS
1998

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Editor: Ms Janine Ford LLB

**A publication of the Ministry of Justice,
Nuku'alofa, Kingdom of Tonga**

**Printed and published by
Government Printer 2003**

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MODE OF CITATION

The mode of citation of this volume is [1998] Tonga LR

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Supreme Court, Vava'u
Lewis CJ
Cr 465/1997

1, 2, 3 December 1997; 3 December 1997

Criminal law — manslaughter by negligence — driving while intoxicated
Criminal law — driving taxi without correct licence
Sentencing — not guilty plea — no reduction in sentence
Practice and procedure — declaration of hostile witnesses

On 29 March 1997 the defendant drove his father's taxi and hit a van. This caused the death of a young boy. The defendant was charged with manslaughter by negligence and driving without a licence. The prosecution relied upon a combination of negligent acts as constituting the failure of a duty of care: driving while intoxicated, the use of excessive speed, and failure to keep a proper lookout. Two witnesses were declared to be hostile. The defendant was driving a taxi without a taxi licence. However, the taxi was not being used as a taxi.

Held:

1. The driving of the intoxicated defendant speeding as he was on the incorrect side of the road for his direction of travel was the proximate cause of the collision and the cause therefore of the death of the child.
2. The defendant breached the duty of care he owed to other road users. The degree of negligence was of the highest order.
3. The defendant was driving a vehicle registered as a taxi but it was not being used as a taxi in that there were no fare paying passengers.
4. Manslaughter: imprisonment for four years.
5. Disqualified from holding or obtaining a driving licence for seven years.

Cases considered:

Andrews v Director of Public Prosecutions [1937] AC 576; [1937] 2 All ER 552
R v Bateman (1925) 19 Cr App R 8; [1925] All ER Rep 45

Statutes considered:

Criminal Offences Act Cap 18
Evidence Act Cap 15
Traffic Act Cap 156

Counsel for prosecution : Mr Cauchi
Counsel for defendant : Mr Vaipulu

Judgment

The accused has pleaded not guilty to charges of manslaughter by negligence and driving without a licence. The particulars of the offending alleged against him in count 1 in the indictment are that he on or about 29 March 1997 drove a vehicle number T278 on the road at Ha'alaufuli and without due care hit vehicle no. L325 and thereby caused the death of 'Emosi Hefa. The taxi licence plate no. was amended to T272 at trial.

In count 2 the particulars allege that he on 29 March 1997 drove vehicle no. T278 on the road at Ha'alaufuli without having been licenced to drive that class of vehicle.

This has been a trial by Judge sitting alone and the verdicts and reasons for them I now set out.

In a case such as this one the prosecutor carries the burden of proving the guilt of the accused beyond any reasonable doubt from beginning to end. The accused person carries no such burden. He is if he so chooses entitled to give evidence and call evidence and if he does it is the duty of the Court to consider the evidence he has led. The Court must then ask whether, having regard to the whole of the evidence, what the defendant has said about the matter is a reasonable possibility. If it is a reasonable possibility that what the accused says in his defence is true then it will mean that the prosecution has not proved its case beyond a reasonable doubt and the accused must be acquitted and discharged. If the defence raised by the accused is not a reasonable possibility from the whole of the evidence then in those circumstances the finding will be one of guilty as charged beyond any reasonable doubt and a verdict entered accordingly. In this the accused neither gave nor called evidence and relied upon the submissions of his counsel in his defence.

The elements of the offence of manslaughter by negligence are derived from the provisions of s 86(1)(b) and s 92 of the Criminal Offences Act Cap 18 which provide as follows:

> 86(1)(b). Culpable homicide consists of the killing of any person … by omission without lawful excuse to perform or observe towards such person any legal duty …
>
> 92. Culpable homicide which does not amount to murder is manslaughter and if such homicide was caused by negligence the offence is only manslaughter by negligence.

The elements of the offence of manslaughter by negligent driving are therefore that the prosecution must prove beyond any reasonable doubt that:

- the accused
- on or about the 29 March 1997 near the road at Ha'alaufuli
- was the driver of a motor vehicle
- and by reason of his negligent driving

— by breaching the duty of care owed by him to the other persons using the road
— directly caused the death of another person using the road.

Intention is not a requisite element of the offence. Intention to cause harm or injury or death is not relevant to the proof of a charge under s 86(1)(b).

Negligent driving means negligence arising by a failure of the driver to exercise the duty of care owed by him toward other people using the road. In order to secure a conviction the Crown must prove a very high degree of negligence.

In *R v Bateman* (1925) 19 Cr App R 8; [1925] All ER Rep 45, it was said, "… in order to establish criminal liability the facts must be such that, in the opinion of the Jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment".

The degree of negligence is not necessarily the same as that which is required for proof of the offence of dangerous driving. On the one hand there are acts which are unlawful irrespective of the manner in which they have been performed, on the other hand there are acts such as driving a motor car which are only unlawful when they are performed in a particular manner, when they are performed negligently.

Andrews v Director of Public Prosecutions [1937] AC 576; [1937] 2 All ER 552 establishes the proposition that where the act is of a class unlawful only when performed negligently then if a person dies as the result of the performance of such an act the question whether the accused has committed the crime of manslaughter shall be considered exclusively on the basis of the negligent manslaughter doctrine.

As Lord Atkin said in *Andrews*, "Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established".

The Facts

Turning to the facts of the present case. The prosecution rely upon a combination of negligent acts as constituting the failure of duty of care owed by the accused to the deceased namely, the use of excessive speed, failure to keep any proper lookout and finally most seriously dangerous driving by driving at a time when the accused was so much affected by intoxicating liquor or a drug so as to be incapable of exercising effective control over the motor vehicle which he was driving. The particulars of the charge accompanying count 1 in the indictment do not spell out the case with such particularity but neither were further and better particulars sought by the defendant and the negligent omissions appeared from the evidence.

The Crown allege that the defendant in company with three others, Uilisoni Taufa, Lemaki Fainga'a and one Mele Moa, were travelling in a motor vehicle owned by the father of the accused. It bore a taxi registration plate T272. I so find.

The evidence is that the three men, Ului, Uilisoni and Lemaki had consumed a large amount of whisky. The volume consumed between them seems to have been about 2.5 litres. It had been consumed between about 1.30 am on the morning of the day of the collision [Exhibit P7 A. 11]. It was consumed on the accused's account of things by himself and four others. I so find. There is no doubt that the defendant was

very drunk when he was first seen by Police Corporal Tonga. I will consider that late in this judgment.

The Witnesses' Uilisoni Taufa and Mele Moa Finding of Hostile Witness.

Moa and Taufa for a reason or reasons, which have not become apparent, both changed the account of events, which they had given to Police very soon after the accident. The Crown Prosecutor applied to have them declared to be hostile witnesses within the meaning of the Evidence Act Cap 15, s 147, which provides:

> 147(1) a witness may neither be cross examined nor his credit impeached by the party calling him except by permission of the Court which permission shall only be granted when in the opinion of the Court the witness has shown himself to be a hostile witness.
>
> (2) A hostile witness for the purpose of this and the following section shall mean a witness who from the manner in which he gives his evidence, shows that he is not desirous of telling the truth to the Court.

I made the declaration sought in each case. I did so on the undertaking of the Crown Prosecutor who assured the Court that their evidence was at serious variance on highly material issues with the signed witness statement, which was in his possession. The prosecutor then impeached their credit pursuant to s 148 of the Act. Both witnesses were cross-examined on their earlier statement. Both then reverted to the account, which they had given following the collision.

In departing from their witness statements given to Police shortly after the accident each witness demonstrated a capacity to mislead the Court and to tell untruths on their oath. They therefore became inherently untrustworthy witnesses about this very serious matter. Therefore I make it clear that I have only relied upon the evidence which they gave about any matter when evidence co-exists from some other witness whom I have found to be reliable which confirms the evidence of Moa and Taufa in a material particular about any issue.

Intoxication

The prosecution has alleged that a cause if not the main cause of the collision which brought about the death of the child 'Emosi Hefa (the death of the child being a fact I find proved beyond any reasonable doubt [Exhibit P12]), was intoxication from the effects of alcohol being experienced by the accused both leading up to and at the moment of the collision.

Strict proof of intoxication is required of the prosecution. I am satisfied beyond any reasonable doubt that at the time of impact and at the time of events leading up to the impact that the accused was so much affected by alcohol that he was incapable of exercising effective control of the motor vehicle of which he had charge.

I am so satisfied because apart from the fact that the accused admitted the fact that he was drunk [Exhibit P7 Q & A 17 and Q & A 34] and further in the confession statement [Exhibit P10] "... I was drunk when I was driving", there is the evidence of Police Corporal Tonga albeit that the Police officer's observation was some time after the collision. Tonga says:

> "… from my working experience I knew the accused was very drunk … the accused was drunk. He was swaying and his eyes were red and there was an odour of liquor from him … "

Tonga saw the accused at the Police station after viewing the body of the deceased child and before going to the scene. There are no times given. While it may have been more helpful had the timing been related to the court, the inescapable inference is that the intoxication of the accused at some intensity persisted from his having consumed whisky from about 1.30 am right up until the moment of impact and the degree of intoxication grew as he consumed more whisky.

The accused through his counsel made the observation that it cannot be known what volume of the liquor was consumed since there were four persons (on the evidence) drinking the same 2.5 litres. The argument cannot hold. It is not quantity consumed which is the measure of intoxication for present purposes rather it is the observations of others and the confession of the accused which will prove his condition just before and at the moment of collision.

The witnesses Moa and Taufa gave evidence that the accused had been consuming alcohol as he drove the vehicle to a point quite near to impact. I so find. Taufa said in addition "we were all drunk and we were speeding" and added (albeit after some cross-examination by Mr Cauchi who had had him declared hostile) — "I wanted 'Ului to keep to his lane I knew he was drunk".

There are other passages but the passages I have quoted are sufficient to persuade me that at all material times the accused was incapable of properly controlling the taxi he was driving.

Speed

The Crown case consists of the further allegation that the accused breached his duty of care to others using the road by driving at speeds which were excessive in the circumstances. I am satisfied that he did. The witnesses who were passengers in the vehicle being driven by the accused speak of it. Moa says that she "noticed he was speeding and as we passed Ha'alaufuli village he accelerated". The accused told Tonga that he was travelling at 65 kph [Exhibit P7 Q & A 19]. The speed of the vehicle just before impact cannot be properly determined. But I am satisfied that it was an excessive speed and the accused owed to motorists not to be on the road at all in his condition leaving aside driving at 65 kph.

The Vehicle of the Accused on the Incorrect Side of the Road for Travel

During the interview with Tonga [Exhibit P7 Q & A 18] the accused said:

> "We are driving on the (Eastern road) I was uncertain of the side of the road we were driving on because I was very drunk and as we were going uphill I dodged a van which was driving the opposite direction and I ran into this van."

If one commences with the assertion of the accused of his uncertainty of which side of the road he was on by reason of his drunkenness and then considers the evidence of the driver of the van, 'Inoke Taulani and the evidence of the witness Haitelenisia Hefa, it is compelling evidence of the fact that the car driven by Naupoto was on the incorrect side of the road for travel almost immediately before the impact.

It is true that the evidence of the two witnesses differs about whether the van driver Taulani had been distracted by the mother of the child Haitelenisia immediately before impact but that is not to the point, both place the car on the incorrect side of the road for lawful travel. It is true that Haitelenisia when asked in re-examination said that the van in which she was passenger was on the right hand side of the road before the van moved to the right, however she appears to have altered her evidence to that which it was in examination in chief, namely on the left hand side of the road before impact, later in re-examination.

I find that at all material times but in particular during the period leading up to impact with the van, the car driven by the accused was travelling on the incorrect side of the road for its travel and just before impact moved to its left and came into collision with the rear right hand side of the van causing the van to turn on its side thereby causing the death of the child 'Emosi who died as a result of head injuries sustained by him in the collision.

I find that the driving of the intoxicated accused speeding as he was on the incorrect side of the road for his direction of travel was the proximate cause of the collision and the cause therefore of the death of the child.

From the whole of the evidence before the Court I am satisfied that the accused breached the duty of care in the driving of the car which he owed to others who used the road. I am satisfied that the degree of negligence was of the highest order. It is difficult to imagine a higher degree of negligence. The accused was very drunk during the period which led up to the collision and for a considerable time beforehand. The degree of his reckless driving, not caring who was on the road or whether they would be injured by him, is of the highest order.

He had been warned to stay on the correct side of the road and to take care but he continued to aggravate his intoxication by consuming alcoholic liquor right up to the impact on his own account of things.

I enter a verdict of guilty of manslaughter by negligence in respect of count 1 in the indictment.

As to the second count namely driving without a licence. The Crown case is that he had no taxi licence [Exhibit P7 Q & A 23]. Mr Vaipulu submits that the offence is not proved and that while the accused is demonstrated to have been driving a vehicle which was registered as a taxi it was not being used as a taxi as there were no fare paying passengers. I so find.

I am of the opinion that the Legislature intended by the passage of Traffic Act Cap 156 to regulate for the necessity of the registration of vehicles intended to be used as taxicabs in the commercial sense. The Act does contemplate the banning of the vehicle for recreational use and insisting upon its exclusive use as a taxi. Therefore when the vehicle is used for recreation as compared with commercial use no offence is contemplated. I would add that I would urge that this matter be considered by the LA LRC and considered so that prosecution can be made plain. I so rule. I enter a verdict of not guilty of the charge in count 2 in the indictment.

Sentence

Ului Leakona Naupoto:

You are a young man with no previous convictions alleged against you.

Its encouraging to hear that you and the family of the deceased have resolved some differences and grief. Unfortunately for you it is not as simple as extending leniency to resolve the circumstances of this office.

You may have been entitled to have as much as two-thirds of the sentence imposed upon you reduced had you acknowledged your guilt at the earliest time. However, you did not do so. I cannot bring that into account.

260 Your driving was so atrocious. The drunkenness so serious that a clear warning must go out from this Court to all the people who would behave in the way in which you have done. The behaviour will not be allowed to pass unnoticed. The offending calls for a severe penalty.

I have listened for three days. I have heard an awful story of your reckless self-indulgence which brought about the death of an innocent young boy.

I have brought into account all that has been said in your counsel's submissions on your behalf. I am accepting of your previous good record.

If driving like your driving is allowed to continue in this community, none of us are safe.

270 1. Manslaughter: Imprisonment for a period of 4 years.

2. Disqualified from holding or obtaining a licence to drive a motor vehicle for a period of 7 years commencing forthwith.

Lei v Tonga Electric Power Board

Supreme Court, Nuku'alofa
Finnigan J
C 829/96

1, 2, 3, and 5 December 1997; 15 January 1998

Tort — no person has any legally protected interest in the life of another
Damages — pecuniary loss caused by death of deceased

On 28 August 1995 a motor vehicle broke the pole holding the line that supplied power to the plaintiff's house. This caused the line to break and power to be cut off in the plaintiff's house and the neighbour's house. The plaintiff worked for the defendant Power Board and when he came home he disconnected the electricity. Two employees of the defendant arrived and re-erected the broken pole and joined the wires with a piece of smaller wire. The plaintiff made a connection of the new wire to the existing line. After helping with the testing of the soil, the plaintiff then left to go elsewhere. The defendant's senior linesman and his assistant reconnected the line, the assistant made a test of the earth and they both left. The plaintiff's wife resumed her interrupted clothes washing, using her electric machine, and was immediately electrocuted. She died leaving seven children between 3 and 15 years of age. After she died the workers returned three more times to finally correct the fault. The plaintiff claims damages solely in tort.

Held:

1. The death of the plaintiff's wife was caused wholly by the negligence of the defendant's employees.
2. There is a rule of the common law that no person has any legally protected interest in the life of another so this claim cannot be brought in tort at all. This claim is simply before the Court only be reasons of concessions which the defendant has generously made.
3. The Fatal Accidents Act provides that damages may be recoverable to compensate for the pecuniary loss caused to the dependants by the loss to them of the deceased as dependants, not as grieving relatives.
4. Defendant to pay damages to the plaintiff of $20,000 for loss of economic support and to pay damages as set out to each of the children. The defendant is also to pay the plaintiff's costs.

Cases considered:

Admiralty Commissioners v SS Amerika [1917] AC 38; [1916-17] All ER Rep 177

Davies v Powell Duffryn Associated Collieries Ltd [1942] AC 601; [1942] 1 All ER 657

Statutes considered:

Civil Law Act Cap 25

Fatal Accidents Act Cap 34

Tonga Electric Power Board Act Cap 93

Regulations considered:

Electric Power Board Regulations

Counsel for plaintiff : Ms Tonga

Counsel for defendant : Mr L Foliaki

Judgment

This is a claim for damages based on the alleged negligence of the defendant's employees, which is said to have caused the death of the plaintiff's wife. The plaintiff sues on his own behalf and on behalf of the seven children of the marriage. At the time of the events in question those children were aged between 3 (the youngest) and 15 (the eldest).

The Statement of Claim pleads (at para 12) negligence of four general but similar types, particularly that the employees concerned while carrying out repair work wrongly connected electrical wires, ie, phase to neutral and neutral to phase and in doing so, among other things failed to exercise proper care and attention. It pleads further that negligence is proved by the facts themselves.

Most of the relevant allegations, particularly those at para 12, are denied by the defendant in its Statement of Defence and Counterclaim, and the defendant pleads also that the plaintiff himself contributed to what occurred by assisting in the work in question without proper authorisation, by failing to take proper and any care in doing what he did, by failing to use or properly use the equipment provided for the work, by interfering with the work of the proper workers sent by the defendant to do the work, and by failing in particular to take proper and reasonable precautions to ensure that the wires had been properly connected after the repair had been done.

The defendant relies also on s 72 of the Tonga Electric Power Board Act Cap 93, which provides that no consumer shall have any claim against the defendant in the event of any failure of the supply of any energy through accident, drought, or other unavoidable cause.

It is important to state at the outset that this claim should not have been brought in tort, ie, at common law, at all. This claim is prohibited by the common law. It should have been a statutory claim under the Fatal Accidents Act Cap 34. Neither party pleaded that in their pleadings. The case proceeds only by the defendant's concession in submissions that it may be dealt with as if it had been properly brought.

The Facts

The plaintiff and his family live on a side road. Electricity comes to their house by a line connected to the main supply which runs along the main road. The point of connection is called pole 2086. In the side road there are three poles; pole 18 from which electricity runs onto a property occupied by a store, pole 19 beyond that from which electricity runs to a house occupied by a family called Tovi, and pole 20 beyond that, from which electricity runs to the plaintiff's house. The electricity is supplied by the defendant.

On 28 August 1995, while the plaintiff's wife was using the washing machine, a motor vehicle broke pole 19. When it fell the line broke between pole 18 and pole 19. Power was still running to the store, but was cut off in Tovi's house and in the plaintiff's. The plaintiff works for the defendant as it happens. He came home from work and found the broken pole and broken wire. He immediately disconnected the electricity so that the broken wire ceased to be a danger. He did this by climbing pole 2086. On that pole the side-line originated, and it consisted of two wires twisted together to form one: of the two wires one carried electricity to the store and the two houses (the "phase" wire) and the other carried the electricity back to the generator (the "neutral" wire). The plaintiff stopped the flow of all electricity down the side road, by disconnecting the phase wire at pole 2086.

Soon two employees of the defendant arrived. The broken pole, shorter now, was then re-erected and because it was shorter the two ends of the broken wire between pole 19 and the previous one (pole 18) did not meet. A short piece of new wire, supplied by the defendant's two workers, was used to connect them. The new wire was made up of coloured smaller wires, including red for "phase", so that at each end one could easily tell which was phase and which was neutral. This however was of no practical use, because the original twisted wire had no colours and from looking at them nobody could tell which was the phase wire that conveyed the electricity to Tovi's house and to the plaintiff's.

The plaintiff made a connection of the new wire to the existing line, both phase and neutral, at the break nearer to pole 19. The defendant's senior linesman connected the other end of the new piece to the other end of the broken wire. There was no way to know at that time whether the red "phase" wire in the new line was re-connecting the broken phase wire in the older twisted line, or was connecting the phase wire to the neutral wire.

The defendant's employees and the plaintiff addressed that question immediately. The defendant's senior linesman climbed pole 2086 and reconnected the phase wire there, so that electricity immediately flowed down the side line. The other employee then conducted a test. He tested the soil around the store. The test showed electricity in the soil. The plaintiff was not satisfied, and with his own test meter tested the soil at the store. He was satisfied there was a mistake, so the senior linesman switched the wires at pole 2086. The soil was then tested at the store and was found to be without electricity. The plaintiff then left for he had business elsewhere.

The line from pole 19 to Tovi's house had earlier been disconnected by the senior linesman at pole 19. He and his assistant then reconnected that line and the assistant made a test of the earth at Tovi's house. The assistant said the soil was alright, and they both left.

After this the plaintiff's wife resumed her interrupted clothes washing, using her electric machine, and was immediately electrocuted. She died, but before she died she called to her children to disconnect the power. She was at that time 40 years of age.

Conclusions from the Facts

From those facts it is not difficult to draw a conclusion that the defendant's workmen were negligent. No other major relevant facts were proved in evidence, other than some I shall shortly mention. I shall refer later to some other evidence but these facts presently stated would probably on their own have been enough by themselves to prove negligent breach of the defendant's duty of care to the plaintiff's wife. She, after all, waited in trust while the defendant's workmen restored electricity to her house and when they did so she immediately resumed her washing and, because the repair was done incorrectly, the electricity killed her.

However, there was other evidence, and I must consider all of the relevant evidence.

After the plaintiff's wife was electrocuted, the defendant's workmen returned to the scene, not once but two more times. The first time, the senior linesman disconnected the lines at pole 2086 and reversed them. This caused the test of the soil at the plaintiff's house to show no electricity, but it caused the soil and building of the store once more to become alive. That fact was discovered later by an independent witness, a former trained electrician who had a tester.

The defendant's workmen then came a third time and, in a way that I do not fully understand, corrected everything so that both the store and the plaintiff's house were properly connected.

It seems that the explanation might lie partly in the state of the earth rod at the plaintiff's house. An earth rod is a steel rod driven into the soil, and to it is fastened a wire that conducts safely into the soil any excess electricity that might escape from any electrical appliance in the house if there is a wiring fault. If any electricity is wrongly present in an appliance it must flow into the soil, and if it has no other route it might flow to the soil through the body of a person who touches the appliance and is touching the soil or connected to the soil. If however, an earth rod is connected to the wires in the house, dangerous electricity will flow harmlessly through that rod down into the soil.

When the defendant's senior linesman went to the plaintiff's house for the first time, which was on his second visit to the scene, after the plaintiff's wife had been electrocuted he found the earth wire at the plaintiff's house was not connected to the earth rod. He gave evidence that he knew the wires had become reversed when he took hold of the earth wire and tapped it on the earth rod. This caused sparks, and after he reversed the wires again at pole 2086, tapping the wire on the rod caused no sparks.

In evidence this workman acknowledged that in leaving the plaintiff's house wrongly connected after his first visit, he had not fully given effect to his responsibilities. On his second visit, his work caused the store to become live and required his urgent recall for a third visit to correct the electricity flow at the store. It is clear that on the second occasion just as on the first he had not fully given effect to his responsibilities.

Any doubt about that, was dispelled by his senior officer, now the General Manager of the defendant, who also gave evidence. His evidence was that the

defendant's workmen had made errors which caused the wrong connection and had made an unreasonable assumption in leaving the plaintiff's house untested at their first visit. He said that there had been several shortfalls and breaches of procedure which had resulted in their leaving that house incorrectly connected. His evidence was detailed.

Light is thrown on all this by not only his explanations but also those of the independent former electrician. The latter witness told the Court that if the phase and neutral wires in a house were switched, electricity will still flow unless there is an earth connection. If there is an earth connection at the plug and an appliance is switched on, then the electricity will flow to the soil and a fuse at the switchboard will disconnect and stop electricity flowing. It is the main purpose of the iron rod and of the wire fastened to it to act as a safeguard, and if there is some error in the current then the wires will short-circuit the current to the soil. The fuse would burn out or turn off and the appliance — such as the washing machine in the present case — would cease operating. If there is no earth connection the appliance will continue to operate in a dangerous condition, and earthing of the current may occur through that appliance and any person touching it.

This evidence raised a serious question whether there may have been some contributory negligence by the plaintiff himself in allowing his earth rod to become disconnected. I mention this as a matter that I have noted, but it is not part of the defendant's pleading of contributory negligence nor is it raised in submissions and I take it no further.

From all of this, clear conclusions are now possible. In reaching these conclusions I rely only on the evidence but I am guided by the comprehensive, written submissions made about the facts by counsel for both parties. These submissions, have become the fully considered basis of what I am about to say.

First, there was on the facts and on the pleadings and submissions, no contributory negligence by the plaintiff. The state of his earth rod connection is not part of the case against him and I draw from it no conclusions which are unfavourable to him. His part in proceedings was to connect one end of the new wire to the broken wire between poles 18 and 19. He did this first. The correctness of his work was neutral until the senior linesman made his connection at the other end of the new piece of wire. It was for the latter to ensure correctness. This is proved by the actions of the senior linesman himself, who allowed the plaintiff to go, ie, saw no further responsibilities for him, after he had himself completed joining the broken wire and reconnected the plaintiff's disconnection at pole 2086 and, after the testing at the store, reversed that connection. It was for the senior linesman, and his assistant, after the plaintiff was no longer required, to complete the connections to all three properties on the side road and to test that the three connections were correct. The events leading to not one return visit but two showed that what caused all the problems starting with the electrocution, were caused by first, the reconnections at pole 2086 and pole 19 and second, the failure of the defendant's two workmen on duty to test properly at the store, at Tovi's house, and at the plaintiff's.

Was there negligence by the defendant, as pleaded in para 12 of the Statement of Claim? I have concluded that there clearly was, and I rely upon the candid realistic and helpful submissions of Mr Foliaki on behalf of the defendant as well. He has acknowledged, correctly in my view, that the defendant owed a duty of care to the plaintiff's wife, to exercise proper care in reconnecting the electrical wires that led to

her house. He has acknowledged further, also correctly in my opinion, that this duty of care was breached in the present case by the defendant's employees' negligent acts. He has acknowledged again, also correctly in my view, that the death of the plaintiff's wife was caused by the incorrect connection made and by the failure to test at the plaintiff's residence for correct connection.

The evidence leads, in the view which I have reached after carefully considering counsel's submissions, to one conclusion only. The death of the plaintiff's wife was caused wholly by the negligence of the defendant's employees, as pleaded in paragraph 12 of the Statement of Claim.

The Statutory Defence

I turn to the plea and the submissions that the defendant, as a first ground of defence, is immune from this claim by reason of s 72 of the Tonga Electric Power Board Act Cap 93. In Mr Foliaki's submission he urges the Court to read s 72 in conjunction with clause 30 of the Electric Power Board Regulations as to conclude that in the words of the Act, Parliament's intention was broad and not confined to liability for failure to supply.

I do not think it necessary to set out the words of those provisions.

In reply, Ms Tonga has submitted that s 72 is clearly on its face intended to exempt the defendant from claims arising out of a failure to supply which has been caused by acts of nature. She relies upon the words "other unavoidable cause".

In my view Ms Tonga's submission is correct. The words of s 72 on their face carry a clear and unmistakable meaning. The Court cannot construct anything out of uncertainty, because there is no uncertainty. The words are not ambiguous, they are not unclear. The Regulation, as delegated legislation, does not help interpret what Parliament said before the Regulation was made. The essential concept in s 72 is a failure to supply. The present cause of action does not arise out of failing to supply in any event, but out of supplying negligently. In my view this defence cannot prevail.

The General Defences

Mr Foliaki submits that there can at law be no successful action in tort which is based on negligence when the loss claimed has been caused through the killing of another. He cites two authorities for that proposition. He then argues that to have a viable cause of action the plaintiff must rely on the Fatal Accidents Act Cap 34. He concedes that the failure to plead that Act is not fatal to the plaintiff's case because he has met its requirements, but submits that the plaintiff's remedies are limited by that Act. In arguing for those limits he relies upon the measurement of damages under a similar English statute in *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601; [1942] 1 All ER 657.

As for this defence, Ms Tonga submits in reply that it is not necessary for the plaintiff to plead the law and that in any event the defendant's concession that the plaintiff has met the requirements of the Fatal Accidents Act disposes of any defence there might be in this point.

To the submission that there can be no claim in tort arising out of negligence when the loss claimed has been caused by the killing of another, Ms Tonga did not reply.

The Damages Claims

The damages claimed are claimed solely in tort, and are itemised in para 15 of the Statement of Claim. They are as follows:

a) House keeping expenses for the children until the younger child attains the age of 18 years of age — $5,800;
b) Compensation for pain suffering for each child $600 ($42,000);
c) Lost of consortium $16,000;
d) Pain and suffering for the plaintiff $16,000;
e) Disturbance and disruption to life of plaintiff;
f) Lost of economic support $20,000; and
g) Punitive or general damages $40,000.

WHEREFORE THE PLAINTIFFS PRAY FOR:

i) Judgment in the sum of $202,000;
ii) The costs of and incidentals to these proceedings; and
iii) Such further or other Orders as this Honourable Court may deem just.

Very little was added to these pleadings or the plaintiff's evidence by Ms Tonga in submissions. She has simply submitted that the damages claimed are justified and should be accepted.

All of the claims were challenged in submissions by Mr Foliaki, and in Ms Tonga's submissions these challenges were ignored. The only issue on which counsel joined argument was a new claim, for funeral and wake expenses of $20,000 which was not included in the claims pleaded. Mr Foliaki's submission that this claim cannot be part of the case has not been answered, and Ms Tonga responded only on a topic not mentioned even in evidence, whether in Tonga a grieving widower pays these expenses or whether the extended family contributes. I cannot weigh those submissions without evidence.

The Law

At this point I must ask myself, what is the law in Tonga that governs this claim? Mr Foliaki has made submissions which I have summarised above. Ms Tonga has not ventured into the law at all. No cases previously decided on such claims in Tonga have been drawn to my attention.

From my own research I am satisfied that Mr Foliaki is largely correct and that this claim is simply before the Court only by reason of concessions which he generously has made. This claim cannot be brought in tort at all. There is a rule of the common law that no person has any legally protected interest in the life of another. That rule has been criticised, and I cannot pass on without reflecting on the pungent comment on that criticism by Lord Parker of Waddington in *Admiralty Commissioners v SS Amerika* [1917] AC 38; [1916-17] All ER Rep 177, (a case to which Mr Foliaki referred) at pp 42 and 43:

> "If it were any part of the functions of this House to consider what rules ought to prevail in a logical and scientific system of jurisprudence, much might no doubt be said for this criticism …

> This House, however, is bound to administer the Law as it finds it. The mere fact that the Law involves some anomaly is immaterial unless it be clear that the anomaly has been introduced by erroneous legal decision …"

As His Lordship went on at length to show, the rule indeed arises out of no erroneous legal decision. It is sound law. It is still the law. It stands against the claim that has been made in the present case.

Any claim therefore that the plaintiff may have against the defendant must rest elsewhere. In Tonga, as in England, it rests on a statute that has created exceptions to the common law rule and established the basis for claims arising out of a death. The statute in Tonga is the Fatal Accidents Act Chapter 34. That statute provides, at ss 2 and 3:

> 2. Whensoever the death of a person shall be caused by wrongful act, negligence or default and the act, negligence or default is such as would (if death had not ensued) have entitled the party injury (sic) to maintain a civil action and recover damages in respect thereof, then in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to an offence under the Criminal Offences Act.
>
> 3. Every such action shall be for the benefit of the wife, husband, parent or legitimate child of the person whose death shall have been so caused, and shall be brought in the name of the executor or administrator of the person deceased, and in every such action the court may award such damages as they may think fit having regard to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought: and the amount so recovered in damages shall be divided amongst the parties for whose benefit the action is brought in such shares as the court may direct.

It is clear from the authorities that the cause of action given to the plaintiff by those provisions is a statutory exception to the common law prohibition on fatal injury claims. It is a right to claim, as a dependant and on behalf of the deceased wife's other dependants, for the loss of their dependency on her. It is not a survival of any personal damages claims she might have had if she had lived. It is not a right to sue for the pain and suffering that he and the children have endured in their bereavement. It is not even a right to sue for recovery of the funeral expenses. These last two can be recovered in England because the English Statute, at ss 1A and 3, provides that, but those provisions are not in force in Tonga pursuant to s 4(a) of the Civil Law Act Cap 25 to which Mr Foliaki referred me. Damages recoverable under the Act are to compensate for the pecuniary loss caused to the dependants by the loss to them of the deceased as dependants, not as grieving relatives. If the widower (the plaintiff here) was a dependant, he may recover such damages. The other dependants (the children here) likewise.

The pecuniary loss suffered need not be only money which the dependants received or reasonably expected to receive. It may also include the loss of services that had been rendered by the deceased — though not compensation for the pain caused by that loss — so long as the loss can be expressed in terms of money value. A husband can claim therefore for the loss of this wife's services in the home so far as these can be valued in money, and the children may likewise be compensated for the loss of the daily care and work which their mother gave them. They cannot gain compensation for her love, care, and affection, now gone for ever, but they can recover money for benefits lost which are able to be calculated in money terms.

The Court has to make a difficult assessment of what, but for the death of the deceased, would have happened in this family in the future, guessing (for want of a better word in the present case) what would have happened in the future if the deceased had continued to live and to provide the (calculable) benefits that now are lost. In particular, in respect of each dependant the court must try as best it can to assess how long dependency would have continued.

The Statute does not distinguish between special damages (which usually are particularly pleaded and proved) and general damages, which may be implied and need not be particularised or even quantified. There is clearly however no way of suing under the statute for punitive or exemplary damages. Any dependant claimant may join in the claim but only to recover some financial loss, and if he or she cannot show some financial loss no action should be commenced.

The Claims in the Present Case

Mr Foliaki has accepted that the claims may be accepted as claims under the Fatal Accidents Act Cap 34. He has submitted that the plaintiff may nonetheless recover only if the Court accepts that the deceased earned an income and that, if the Court accepts that her earnings were $3,000 per year as the plaintiff claimed in evidence then that sum multiplied by her presumed life expectancy is the limit of what may be awarded.

That in my view is an acceptable even commendable approach, but the submission in my view is an unnecessarily restrictive view of the Law. I am sure that a Court in a case such as this may look at the needs of the dependants, each in turn, to see what was supplied by the deceased and what is now lost. If what has been lost can be assessed in money terms then monetary compensation should be awarded. I now turn to the plaintiff's claims.

> Claim a) is for $5800, as housekeeping expenses for the children until the youngest reaches 18 years of age. Mr Foliaki has generously assumed this to be intended as an annual figure; that is not the claim either in the pleadings or in the plaintiff's submissions, but I will proceed on that common-sense basis.
>
> Claims b) to e) inclusive and g) are outside the parameters of what may be claimed.
>
> Claim f) is for $20,000 for loss of economic support. Again Mr Foliaki has generously assumed a common-sense basis for this claim, as being a lump sum drawn from the evidence that the deceased contributed in money to the family $3,000 per year. He

> referred to the principles stated by Lord Wright in *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601; [1942] 1 All ER 657, so I assume he accepts that the figure allows for multiplication of $3,000 by a presumed life expectancy, with deduction from the resultant total for contingencies. I believe that has to be the approach. Assuming a life-expectancy of 20 years and a resultant total of $60,000.00 the contingencies deduction of $40,000 seems excessive to me, but $20,000 is all that is claimed and I believe that this amount can be easily supported without further mathematical analysis. I would award that amount.

I return to claim a), which is for $5,800 per annum until the youngest child, 3 at the time of the death, turns 18. That is a period of 15 years. During that period each of the other children will have passed 18 and, by definition in the claim itself, will have ceased dependency on their mother, one after the other.

This claim is entirely unsupported by direct evidence. The only support for it is from assumption and deduction. From the plaintiff's evidence that he earns, and presumably earned at the time of the death, $7,400 per year, which he spent on his and his family's needs, one may deduce that the cost of supplying the children's needs may have been $5,800 per year, or about 78% of his income. If his wife's earnings, which he said were spent on family needs, were $3,000 per year and are added to his, then $5,800 is about 56 % of the total family income.

I would not dispute that in money terms the cost of replacing what the children have lost could be represented by a sum of $5,800 per year at the time of the death. It is as reasonable an assessment as any that one might imagine and it does arise directly out of the evidence. It cannot however be the figure of loss in each year but must be reduced as each child in turn attains 18 years.

From the evidence, the eldest child Meleane turned 18 on 13 November 1996, 1 year 2 1/2 months after her mother died.

The next child 'Alamita will turn 18 on 9 April 2000, ie, after 4 years 7 1/2 months.

The next child Sitiveni will turn 18 on 10 August 2001, ie, after 6 years.

The next child Mele Vanika will turn 18 on 9 May 2003, ie, after 7 years 8 1/2 months.

The next child Fifita Ma'u Lolo will turn 18 on 20 February 2006, ie, after 10 years 6 months.

The next child 'Omanisita will turn 18 on 13 December 2007, ie, after 12 years 3 1/2 months.

The youngest child Malia Falaviena will turn 18 on 15 June 2010, ie, after 14 years 10 months.

Taking the amount of calculable loss of each child to be 1/7 of $5,800 per year until 18, the amount for each child is $829 per year in rounded figures.

On that basis the total calculable loss, in money terms, for each child is as follows:

Meleane	($829 x 1 3/12) (Multiplier 1.25)
'Alamita	($829 x 4 8112) (Multiplier 4.66)

	Sitiveni	($829 x 6) (Multiplier 6)
	Mele Vanika	($829 x 7 9112) (Multiplier 7.75)
	Fifita Ma'u Lolo	($829 x 10 6/12) (Multiplier 10.5)
	'Omanisita	($829 x 12 4112)
450		(Multiplier 12.33)
	Malia Falaviena	($829 x 14 10112) (Multiplier 14.83)

These calculations yield respectively the following sub-totals:

For Meleane	$1,036.25
For 'Alamita	$3,863.14
For Sitiveni	$4,974.00
For Mele	$6,424.75
For Fifita	$8,704.50
For 'Omanisita	$10,221.57
460 For Malia	$12,294.07

These added produce a sum total in claim a) of $47,518.28.

Conclusion

In my view of the law and of the evidence, and by my calculation, the plaintiff has made out a claim on his own behalf in the sum of $20,000 and on behalf of the children of himself and the deceased in the sum of $47,518.28, the latter sum to be awarded for each of the children respectively in the lesser amounts that I have set out.

I adopt the precedent which Ms Tonga appended to her submissions and order that the defendant pay damages to the plaintiff in the sum of $20,000 and further that the defendant pay damages to each of the children of the plaintiff and the deceased
470 the following sums:

Meleane	$1,036.25
'Alamita	$3,863.14
Sitiveni	$4,974.00
Mele	$6,424.75
Fifita	$8,704.50
'Omanisita	$10,221.57
Malia	$12,294.07

and further I order that the damages payable to the minor children, ie, all of the said children except Meleane, be paid into Court and the said funds be invested for the
480 benefit of the said minor children pending further order.

And further I order that the defendant do pay the plaintiff's costs which if not agreed are to be taxed by me.

Na'ati v Motu'apuaka

Land Court, Nuku'alofa
Lewis CJ
L 3/91

20, 21, 22, & 23 January, 3 February; 2 March 1998

Land — registration — alleged misrepresentation
Land — title — proprietory estoppel claimed

In 1945 the plaintiff accepted land and was told by the first defendant that he would be given the allotment. The plaintiff improved and cultivated the land. In 1979 the plaintiff went to Samoa and allowed the second defendant's father to occupy the land until 1982. In 1982 the plaintiff instructed 'Vili to occupy the land. The first defendant directed 'Vili to leave and the second defendant's father returned. In 1986 the second defendant attempted to register the land in his own name with the signature of the first defendant. The plaintiff discovered this and sought a conference with the Minister of Lands. The Minister instructed the second defendant to withdraw the application. However, in 1991 the succeeding Minister of Lands granted the 'api to the second defendant. The defendants submitted that the plaintiff had not complied with the statutory requirements prescribed by the Land Act for obtaining title to the 'api. The second defendant had title to the land. The plaintiff alleged that a misrepresentation was made to the Minister that the land was vacant or abandoned. The plaintiff also alleged that he was denied natural justice. The plaintiff further contended that the issue of proprietory estoppel existed.

Held:

1. The Land Act provides that land shall be granted to eligible subjects by the Minister of Lands. It is not a power possessed by an estateholder so estateholders may not make a grant to subjects. Therefore, the first defendant did not grant the land to the plaintiff in 1945. At no time had the plaintiff achieved good title to the 'api in compliance with the provisions of the Land Act.
2. Second defendant's title to the land must be seen as complete. The plaintiff had not demonstrated that a misrepresentation was made.
3. The plaintiff himself acknowledged his opportunity to put his case to both Ministers of Lands and he gave evidence that he did so. That brought an end to any submission of a denial of natural justice.
4. If proprietory estoppel existed it would mean that the Minister of Lands was bound by a promise to which he was never a party and importantly that he would be bound by promises of estateholders of the Kingdom.

Such a proposition was untenable. Estateholders should follow the decisions of the Minister.

5. The plaintiff failed in his claim. There is no order as to costs.

Cases considered:

Kalaniuvalu v Free Wesleyan Church (No 2) [1995] Tonga LR 101
To'a v Veikune [1974 – 1980] II Tonga LR 107
Tokotaha v Minister of Lands (1958) 2 Tonga LR 159

Statutes considered:

Evidence Act Cap 15
Land Act Cap 132

Counsel for plaintiff	:	Manu Kaufusi
Counsel for first and second defendants	:	Laki Niu
Counsel for third defendant	:	'Alisi Taumoepeau

Judgment

The following narrative represents the facts as I find them to be in this Land Claim. The plaintiff has carried the burden of proof of his claim. His obligation has been to persuade this Court of the correctness of the claim.

In February 1945 the late Motu'apuaka, Estateholder of Te'ekiu told the plaintiff that he would be given the allotment Lot 34 (Te'ekiu) Block 80/87 the subject of this claim. The plaintiff occupied the 'api and improved and cultivated it over many years. He grew coconut, mango, ifi and pandanus trees. He dug a well on the land.

Between 1945 and 1979 the plaintiff made approaches to the Estateholder the late Motu'apuaka asking permission to register the land in his own name. He probably visited Motu'apuaka on seven occasions. On each visit, his request was refused. In 1979 the plaintiff went to Samoa.

That year, 1979, by an agreement made between the wife of the plaintiff and father of the second defendant Tongia, the second defendant's father was permitted to enter into occupation of the land. Once there, he grew crops. He complied with traditional obligations associated with the land due by the occupier to Motu'apuaka. He remained in occupation until 1982. That year the plaintiff instructed one "Vili from Fahefa" to occupy and farm the 'api and the plaintiff directed the second defendant's father to vacate the 'api.

The late Motu'apuaka got wind of the entry of Vili from Fahefa on to the 'api and directed him to leave. Vili left and the second defendant's father resumed occupancy and husbandry of the 'api.

Much of the evidence called on both sides here, would ordinarily be inadmissible on the basis that it offends the rule against hearsay created by section 88 of the Evidence Act Cap 15. However I accept the submissions of counsel that in Tofia cases in this jurisdiction and by parity of reasoning, in all claims determining title to land, an exception exists. The basis for the exception to the hearsay rule may be found in *Kalaniuvalu v Free Wesleyan Church (No 2)* [1995] Tonga LR 101 and in

To'a v Veikune [1974 – 1980] II Tonga LR 107. I say no more about the admissibility question save that I admit the evidence in issue.

By application dated 19 June 1986 Manase Tongia, the second defendant, applied to the Minister to have the land registered in his own name. Motu'apuaka must be taken to have consented by virtue of his undisputed signature of consent appearing on the application. It bore the date 10 March 1986. The plaintiff discovered the attempt to register in late 1988 or in early 1989.

On discovering the attempt, the plaintiff sought conference with the Minister. There followed a series of meetings between the plaintiff, the second and third defendants, and the Minister. The evidence of the witnesses as to the composition and precise timing of the meetings is irreconcilable as between the witnesses. Doing the best I can from the evidence I find that on balance it is probable that there were two meetings at which the plaintiff and the second defendant's father were present.

The first meeting was probably in 1989 when Hon. Tuita was the Minister of Lands. The outcome of that meeting was that Hon. Tuita directed the second defendant's father to withdraw his application for registration of the land in issue. There is an entry by one Paula Moala duly noted on the application form Exhibits D1 and D2.

> "I am told by the acting Minister of Lands to withhold the Registration - Manase Tongia is to surrender the 'api so that a new grant can be made."

Manase Tongia took no action. A second meeting took place in early 1991 at the instigation of the plaintiff. By then a new Minister of Lands had taken the Portfolio, one Ma'afu Tupou. At this second meeting, the plaintiff, the second defendant's father and the Town Officer were present. The Minister announced that he would uphold the decision of his predecessor Hon. Tuita.

Notwithstanding all that had passed before and for reasons which have not been discovered at this hearing the 'api was granted to the second defendant by the same Minister, Hon. Ma'afu Tupou on 9 January 1991. The 'api was registered in the name of the second defendant on 27 February 1991.

These being the material facts as I find them to be I turn now to a consideration of the legal principles which apply.

The three defendants join in submitting that the plaintiff has not complied with the statutory requirements prescribed by the Land Act Cap 132 for obtaining title to the 'api. It is argued that the plaintiff has not received a Deed of Grant and accordingly no registration of the 'api in his name.

The Land Act (hereinafter "the Act"), s 19 provides that land shall be "granted" to eligible subjects by the Minister of Lands. That power is reserved for the Minister since he represents the Crown in all matters pertaining to land in the Kingdom. It is not a power possessed by an estateholder. An estateholder may not make a grant to subjects. The Act provides in s 34(1):

> "the Holder of an hereditary estate shall admit into possession any person who has been granted an allotment on his estate by the Minister …"

Therefore Motu'apuaka did not grant the land to the plaintiff in 1945. The best that can be said of the 1945 transaction is that he was evincing his consent to the grant of

the ‘api to the plaintiff - no more than that. As to the repeated requests of the plaintiff to the late Motu’apuaka for the estateholder’s consent to a grant in the following years they were all consistently refused. Perhaps it was the consistent refusals which deterred the plaintiff from applying directly to the Minister for a grant and registration. The second defendant’s father was certainly not deterred.

Since there was no grant of allotment by the Minister to the plaintiff, there could logically be no registration of the grant provided for in ss 120 and 121 of the Act. Therefore I find that at no time has the plaintiff achieved good title to the ‘api in question in compliance with the provisions of the Act.

What of the second defendant? The witness Samisoni Pone, Registrar of Land testified that an application for the land in question was received on 19 June 1986. It bore the consent of the estateholder Motu’apuaka as evidenced by Motu’apuaka’s signature affixed on 10 March 1986.

Pone testified that the Land Office Records show (as I find they do show) that the ‘api was registered in the name of the second defendant Manase Tongia on 27 January 1991. A Deed of Grant issued.

In *Tokotaha v Minister of Lands* (1958) 2 Tonga LR 159 at 160 Hammet CJ said:

> “For the title of an allotment Holder to be complete it is necessary for him to be issued with a deed of grant and for the deed of grant to be registered.”

In the absence of fraud or misrepresentation, the second defendant’s title to the land must be seen as being complete. There is a legitimate grant and there is registration from the whole of the evidence before this Court of that grant. The plaintiff has no title, merely the repeated promise of title by the late Motu’apuaka. However in this case the plaintiff does allege fraud.

The plaintiff’s allegation appears in para 12 of the statement of claim. There the plaintiff alleges that a misrepresentation was made to the Minister by the second defendant and his father that the land was vacant or abandoned. In my view, the plaintiff has not demonstrated that the misrepresentation was made. The evidence does not support the allegation in para 12(d). Para 12(e) and (f), similarly, the allegations are not borne out by the evidence on the plaintiff’s case or at all.

I turn to the claim that the plaintiff was denied natural justice in that he was denied the right to state his case to the Minister. The plaintiff was asked about it in cross examination at page 6 of the transcript by Mrs Taumoepeau.

> “Q: on both times of your meetings with the Minister did you explain or tell them everything you want of the ‘api?
>
> A: Yes
>
> Q: So after both meetings with the Ministers you were satisfied that both Ministers were aware of the situation?
>
> A: Yes.”

The frustration and confusion of the plaintiff can well be imagined when, after the second meeting and following the assurances he had been given by both Ministers and the Estateholder the ‘api was registered in the name of the second defendant.

However the plaintiff's acknowledgement of his opportunity to put his case to both Ministers and his evidence that he did so must bring an end to any submission of a denial of natural justice.

The plaintiff has submitted the issue of proprietory estoppel exists. Equity developed as a response to the need for the law to mitigate some harsh consequences of the application of some principles of the common law.

Estoppel is defined in the Evidence Act Cap 15, s 103(2):

> "If a person, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it is acted upon in that way in the belief of the existence of such a state of facts to the damage of him who believes and acts, the first is estopped from denying the existence of such a state of facts."

Here the plaintiff submits that Motu'apuaka promised in 1945 that the plaintiff could have the land, that the promise was a representation within the meaning of s 103(2), and that the first defendant is precluded from denying his promise of 1945.

Were the submission so it would mean that the Minister of Lands is bound by a promise to which he was never a party and importantly that he would be bound by promises of estateholders of the Kingdom. Such a proposition is untenable. Section 34 of the Land Act suggests the opposite (with certain provisos) is the case, that is, that estateholders should follow the decisions of the Minister.

I am driven to the conclusion that the plaintiff must fail in this claim. As so often is the case in this jurisdiction there is an apparent injustice wrought by the outcome here but that must be seen against the need for the application of necessary and strict compliance with the provisions of the Act relating to application and grant and finally, registration.

The plaintiff's claim is dismissed. The justice of this case it seems to me would dictate that I make no order as to costs.

‘Alofi v Fine

Land Court, Nuku’alofa
Finnigan J
L 39/1997

12 and 13 January 1998; 5 March 1998

Land ownership — estoppel by representation — long occupancy
Estoppel — personal restriction on person estopped

Many years ago the first plaintiff allowed the brother of the first defendant and his wife to live on part of his tax allotment. After a time the first defendant came to live there. The brother and his family eventually moved on and the first defendant remained. He married about 1983 and with his wife (the second defendant) lived on in the house which he had built there. He made many improvements which he valued at $40,000. He claimed the first plaintiff had told him that the piece of land concerned would be his. He had fenced it and done other work with that promise in mind. The plaintiff however claimed that while he had such a promise in mind, he wanted the first defendant to take care of his whole tax allotment for him because he lived elsewhere and did not convey that promise to him. To the contrary, he became dissatisfied with the first defendant’s care of the property and told him to leave. The two defendants refused to leave. The plaintiffs sought an eviction order. The defendants sought dismissal of the eviction claim and an order that the plaintiffs were estopped from taking possession.

Held:

1. The plaintiff was estopped by his representation from disturbing the existing situation and the eviction order was declined.
2. The second plaintiff was not bound by any estoppel so the defendants had no equitable rights against him for occupancy.

Cases considered:

Matavalea v Uata [1989] Tonga LR 101 (PC)

Statutes considered:

Evidence Act Cap 15
Land Act Cap 132

Counsel for plaintiffs : Ms Tonga
Counsel for defendants : Mr Tu’utafaiva

Judgment

This is a claim by the registered owner of a tax allotment (the first plaintiff) and by his eldest son (the second plaintiff). The plaintiffs seek an order giving the first plaintiff possession of the tax allotment and evicting the defendants. The defendants seek to have that claim dismissed and a determination that the plaintiffs are estopped from seeking the order sought.

The facts of the matter are disputed to a degree but in essence, they are these: many years ago the first plaintiff allowed the brother of the first defendant ie Tevita Fine and his wife, to live on part of his tax allotment. After a time the first defendant came to live there. Tevita and his family eventually moved on and the first defendant remained. He married about 1983 and with his wife (the second defendant) lived on in the house which he had built there. He made many improvements which he values at $40,000. He claims the first plaintiff had told him that the piece of land concerned would be his. He had fenced it and done other work with that promise in mind. The plaintiff however claims that while he had such a promise in mind, he wanted the first defendant to take care of his whole tax allotment for him because he lived elsewhere and did not convey that promise to him. To the contrary, he became dissatisfied with the first defendant’s care of the property and told him to leave. The two defendants have refused to leave. They want to stay there and enjoy the improvements that they have built up during the last 15 years, and if they are to go they want to be compensated for what they must leave behind. The second plaintiff says he wants to inherit the whole tax allotment, and will not consent to that.

The submissions of counsel have been detailed particularly as to the disputed facts. As stated by Ms Tonga on behalf of the plaintiffs the proof of legal ownership which the plaintiffs gave (through the Registrar of Lands) is by itself enough at law to create an unanswerable case for eviction unless on the facts the first plaintiff is estopped by his words and/or actions from claming that legal right.

Mr Tu’utafaiva on behalf of the defendants made it clear at the hearing and in submissions that the defendants seek only dismissal of the claim to have them evicted, and an order that the plaintiffs are estopped from taking possession of that part of the tax allotment where they live.

That relief, if granted, is equitable relief. It would have the effect of suspending some of the provisions of the Land Act Cap 132 that govern this piece of land, and for an indefinite period.

What would be the period? There are no submissions about that. As for the Land Act, Ms Tonga submits that it is a complete code. Mr Tu’utafaiva however relies on a decision of the Privy Council No 3/1988 which makes it clear that estoppel is available in claims under the Land Act. Estoppel by representation is governed, Mr Tu’utafaiva submits, by s 103 of the Evidence Act Cap 15 and he submits that the evidence establishes an estoppel by representation.

The decision of the Privy Council, *Matavalea v Uata* [1989] Tonga LR 101 upheld the application of s 103 of the Evidence Act in a claim under the Land Act, but in doing so declared that nobody can acquire title to land by estoppel. The only effect of an estoppel in such a case is to impose a personal restriction on the person estopped but that person still has a legal title to the land.

Thus, at law, an estoppel would restrict only the first plaintiff while he is owner of the land. What happens then would be for future consideration.

In the facts of that case the estoppel was raised, and was upheld, by the facts (among others) that the land-holder, a widow with a life tenancy under s 74 had offered to register a lease if given some money, and money had been paid; the occupiers did substantial construction work not unlike that in the present case; and the original grantor of permission to occupy (the widow's husband) had allowed occupation for 15 years then for 3 years then until his death, a further 3 years later - a total of 21 years.

There are similarities between that case and the present. In both, the unregistered occupiers were invited to occupy, with a view to assisting them. In both the occupation could have terminated but the plaintiff land holder allowed it to continue. In both the occupier did substantial construction work including building a house and related earth-works. The only substantial differences are (i) that in the former case the widow took money on a promise to register a lease then did nothing, whereas in the present case the plaintiff did no such thing and there is a dispute about whether he promised registration or not; and (ii) that in the present case the heir has not consented.

Each case where equitable relief is sought must be carefully considered in itself to see where justice lies; but similar cases should be taken into account so that the law is consistent.

After carefully considering the facts of the present case I am of the opinion that the first plaintiff made to the first defendant a representation that if he cared for the whole property he would be rewarded, by being given the part on which he lived. That is a clear inference from the conduct of both parties. There is however no evidence from either party about how the land would become his or for how long. To me the evidence suggests that the first plaintiff was willing to have the defendants occupy part of his land so long as it was his, and he had stopped short of offering registered title. He now feels that he has not had what he wanted from the bargain because the other part was not well cared for.

This in my view is insufficient reason for disturbing the long occupancy which he allowed to the defendants, particularly in view of their contribution to the part where they live.

In my opinion the first plaintiff is estopped by his representation from disturbing the present well-established situation, ie, from evicting the defendants off his tax allotment. The orders which he seeks are therefore declined.

The second plaintiff in my view has only limited standing in this case. He is not bound by any estoppel under s 103 of the Evidence Act. The defendants have no equitable rights against him for occupancy. When he succeeds to title he will inherit the whole tax allotment. The defendants will have no rights to occupy, and if those rights are not granted to them under the Land Act they will have to leave. They may wish to make some claims of their own at that time against the second plaintiff and the parties may wish to prepare some agreement about that.

The plaintiff's claim for relief is declined.

R v Pohiva

Supreme Court, Nuku'alofa
Finnigan J
Cr 530/95

2 - 5 February 1998; 5 March 1998

Criminal law — defamation of the King — acquittal

In April 1994 the defendant (well-known as a politician and an activist) gave an interview to a journalist from the Wall Street Journal. On 23 August 1994 the Wall Street Journal published an article about the defendant. In this article the defendant was quoted as saying "The King is a dictator" and he was purported to have made a number of accusations against the King. On 2 December 1994 the Minister of Justice and Attorney General wrote to the defendant. The purpose of the letter was to seek an explanation in writing for the article, an apology from the defendant, and a retraction to be published in the Wall Street Journal. The defendant owned a newspaper (*Ko e Kele'a*) and published the Minister's letter as well as a reply from the defendant. The defendant was charged with two counts of defamation of His Majesty the King contrary to section 3 of the Defamation Act (Cap 33).

Held:

1. It was necessary for the Crown to establish only: that words reasonably conveying the defamatory meaning or words like them were said by the accused; that the accused intended to say those words, or words like them; that those words or words like them were published; and that the publication damaged the reputation of the King and/or exposed him to hatred, contempt or ridicule. All of that must be established as a single whole beyond reasonable doubt.
2. In its entirety the article was the journalist's own account constructed from what he was told. The only evidence of what he was told was that of the accused during the trial. The journalist's words were not a sufficient basis for the criminal charge that the accused spoke defamatory words as alleged in count 1. On that charge he was acquitted.
3. The questions raised were, did the accused say what was alleged and, if so, had he published "matter damaging the reputation of [the King] or exposed him to hatred, contempt or ridicule or caused him to be shunned"?
4. In all that he wrote there were no words which, as a matter of fact, imputed corruption, dishonourable conduct, or dishonourable motives to the King or words which damaged the reputation of the King or exposed him to

hatred, contempt, or ridicule, or caused him to be shunned. On count 2 the accused was also acquitted."

Cases considered:

Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104; 124 ALR 1
Stephens v West Australian Newspaper Ltd (1994) 182 CLR 211
Lange v Atkinson [1997] 2 NZLR 22

Statutes considered:

Constitution of Tonga Cap 2
Criminal Offences Act Cap 18
Defamation Act Cap 33
Evidence Act Cap 15

Counsel for prosecution	:	Mr Waalkens & Miss Bloomfield
Counsel for defendant	:	Mr Tu'utafaiva & Mrs Taufaeteau

Judgment

Introduction

His Majesty the King rules the Kingdom of Tonga, and in doing that he is governed by the Law. The parties and all witnesses in the present case agree that the King governs Tonga in accordance with the Constitution and the Law. To say that he is a dictator is factually and legally wrong. The primary Law of Tonga is the Constitution (Cap 2) and it makes that clear in many places. Section 34 prescribes the oath, which His Majesty took upon succeeding to the Throne. An oath to govern in conformity with the Constitution and the Laws. See also Sections 31, 32 and 34, and section 17. The Constitution protects from oppression by royal prerogative many freedoms (see sections 4, 5, 7, 9 and following).

By s 50 His Majesty the King is bound to appoint a Privy Council to assist him in his important functions. If the King and Privy Council make ordinances, such ordinances are subject to the signature of the Minister concerned and subject to the Legislative Assembly, which may confirm amend or rescind them. The King by himself may therefore make no Laws. He may however, by s 56, refuse to sanction any Law which has been put to him by the Legislative Assembly.

The balancing of that is the Constitutional prerogative of His Majesty the King to appoint the Privy Council, the Ministers and thus the majority in the Legislative Assembly (ss 49, 50, 51, 59 and 60). This gives a great deal of power to the King, but the source of that power is the Constitution. By definition in the Constitution (s 31) the form of the government of Tonga is a Constitutional Government under His Majesty the King.

The Supreme Court has jurisdiction in all cases in law and in equity arising under the constitution and the laws of the Kingdom and in all matters concerning treaties with foreign states and in all cases effecting public ministers (s 90). The judges are sworn to act impartially and like the King to uphold the constitution and

the laws (s 95). Any citizen alleging dictatorship may require the Supreme Court to uphold the constitution. Neither are the judges above the constitution they also are bound by it.

The Facts: Count One

A journalist sought an interview with the accused who was well known as a politician and an activist seeking political change in Tonga. The accused was willing and for reasons not significant in the case they met at Honolulu in the United States. This was in April 1994. The accused answered questions and expounded his views. In evidence he told the Court the things he says were discussed and some of the things he said. Some months later, the journalist published through his newspaper (the Wall Street Journal of 23 August 1994) an article about the accused. Immediately several people sent copies of the article to Tongan Representatives both abroad and on Tongan soil. It quickly became known in Tonga.

From the article I shall set out, without their contexts, those parts which have caused the charge to be laid in Count 1. Those parts of the article are as follows.

In Laid-Back Tonga,
A Gadfly Commits
Crime of Being Rude
****

The Monarchy Doesn't Like
Akilisi Pohiva's Manner
Or His Reformist Attacks

BY MICHAEL J. YBARRA
Staff Reporter of THE WALL STREET JOURNAL

> NEIAFU, Tonga - This remote and far-flung Pacific archipelago has been ruled by royalty for most of its 3,000-year history, the last thousand years by the same family.
>
> Gadfly Akilisi Pohiva would like to change that by curbing the king's power and promoting democracy, but he knows it will take time. "Ten years, 20 years," he says. "We're not going to get change overnight."…
>
> Mr Pohiva, a 52 year-old former school teacher, says he is no radical. But he has accused King Taufa'ahau Tupou IV and his nobles of financial legerdemain, and he has called for the formation of a democratic party to run Parliament and share power with the monarch. "The king is a dictator," he says …
>
> Open criticism is perhaps the biggest tapu in the nation that gave English the very word taboo. "No bad moral habit appears to a native of Tonga more ridiculous, depraved and unjust than publishing the faults of one's acquaintances and friends," observed William Mariner, a British sailor held captive here

almost 200 years ago. 1t is better, they think, to assassinate a man's person than to attack his reputation."…

One of his first attacks was on the king's practice of selling passports to foreigners, allegedly in violation of Tonga's citizenship laws. But being a near-absolute monarch gave the king certain leeway here. In 1991, he simply had the passport laws changed. And he ignored Mr Pohiva's demand for an accounting of what became of the $27 million supposedly raised by the passport sales. …

More recently, Mr Pohiva has castigated the king for letting his daughter, Princess Salote Pilolevu Tuita, set up a private company with rights to launch satellites into orbital slots in space claimed by Tonga. Last year, Tongasat Ltd, began leasing its place in space to a U.S. concern, Rimsat Ltd., of Fort Wayne, Ind. Mr Pohiva asserts that most of the profit goes to the princess and her American partners, and just a sliver to Tonga. The king ignored Mr. Pohiva's demands for an accounting …

On those statements the Crown bases Count 1, which it has undertaken to prove beyond reasonable doubt:

STATEMENT OF OFFENCE
(Count 1)

DEFAMATION of His Majesty the King contrary to section 3 of the Defamation Act (Cap 33) as amended in Act 15 of 1993.

PARTICULARS OF OFFENCE:
(Count 1)

SAMUELA 'AKILISI POHIVA on or about August 1994 did defame His Majesty the King by telling Michael J. Ybarra, which was later published in the Wall Street Journal of 23 August 1994, any one or more of the following defamatory statements:-

— The King is a dictator

— The King and his nobles are guilty of financial legerdemain

— The King has ignored requests to account for the funds from the sale of Tongan Passports.

In addition the innuendo of these words was that 1. The King has concealed or has been a party to the concealing of funds derived from the activities of the sale of Tongan Passports; and/or 2. The King has done something improper with the funds derived from the sale of Tongan Passports.

— The King has ignored requests to account for the funds from the activities of Tongasat.

In addition the innuendo of these words was that 1. The King exercises control over the activities of Tongasat, and/or 2. The King has concealed or has been a party to

> the concealing of funds derived from the activities of Tongasat; and/or 3. The King has done something improper with the funds derived from the activities of Tongasat.

One citizen in particular was upset. She was Mrs Papiloa Foliaki. In 1978 she had been elected to the Legislative Assembly for one term and she considers herself a colleague and friend of the accused. She told the Court that she was shocked, sad, disappointed and angry. To her mind the article was very dangerous, very malicious and an article that would disturb the peace. She said she was very, very deeply hurt and was praying, hoping it was a mistake. She said she had no evidence the King had ever grabbed anything without asking and that she thought of Idi Amin. She approached the accused, but what he said to her is not the subject of any charge against him.

Mrs Foliaki said she began to have doubts. The accused, she reasoned, knows more about these things than she did. Although she did not believe the King is a dictator, perhaps there was some substance to what had been published. She wanted the matter settled.

Mrs Foliaki and other women organised a petition which was signed by about 425 women. They took the petition to the Legislative Assembly asking Parliament to stop the accused from making statements like those that the journalist had published. The accused was one of 3 people's representatives who presented the petition. This was on 10th November 1994. Although it was not in evidence, I was shown a translation of the petition. It protested at statements of the accused generally, including but not confined to what was reported in the Wall Street Journal. The Legislative Assembly voted approval of the petition but took no other action.

The Facts: Count Two

On 2 December 1994 the Minister of Justice and Attorney General wrote a letter to the accused. It is the basis of what followed and I set most of it out here:

> 2nd December, 1994.
> Mr A Pohiva
> Sopu
> Nuku'alofa
> TONGA
>
> Dear Sir
>
> **Re: Article in the Wall Street Journal — Tuesday,23 August 1994**
>
> I have had drawn to my attention an article which appeared in The Wall Street Journal on the 23rd of August 1994. You will recall that this article caused a petition to be lodged and discussed in the Legislative Assembly on the 10th November 1994 and a copy of the article was given to all members including yourself.
>
> The entire article makes a very serious slur on His Majesty and the monarchy as well as His Royal Highness Crown Prince Tupouto'a and others. Its tenor is also extremely derogatory of the Kingdom of Tonga.

At this stage I merely emphasise some of the points arising in the article as follows:

(a) In the first column the article recites your accusation of His Majesty and his nobles "of financial legerdemain". The word legerdemain refers to an act of trickery or deception. The word is often used coexistent with the phrase "sleight of hand". A criticism of financial legerdemain is a very serious criticism.

(b) That same paragraph ends with the phrase "The King is a dictator" — a quote from you. The word dictator connotes a sinister meaning referring to an oppressor or a tyrant.

(c) …

(d) The third column refers to "… the King's practice of selling passports to foreigners …", and later to an allegation that His Majesty has failed to account for the funds. This clearly infers His Majesty has, or may have, misappropriated the funds. As you know these funds have been audited and the results made public. This allegation is sinister in its intent.

(e) The same column refers to Tongasat — again asserting that His Majesty ignored a request for an accounting — and infers misappropriation by His Majesty. This is without any basis and is quite untrue.

(f) …

Your conduct has been so high handed in this instance that I consider you have committed an offence against the state by speaking seditious words in breach of Section 47 of the Criminal Offences Act — an offence that carries imprisonment for a period of up to 7 years.

In addition, a serious criminal defamation has taken place of His Majesty King Taufa'ahau Tupou IV and His Royal Highness Crown Prince Tupouto'a and others. At this stage I am particularly concerned with regard to your criticism of His Majesty the King and the Crown Prince.

My purpose in writing to you is to seek immediately from you an explanation in writing. In addition, I expect an apology from you in terms to be settled with me. I consider a retraction should be published in The Wall Street Journal.

I must assure you that this matter is regarded as extremely serious and I require your immediate written response within 14 days from the date of this letter.

Yours faithfully

Sgd. D. Tupou
(Hon. David P. Tupou)

Attorney General & Minister of Justice

DPT/mf

The accused responded to that letter by publishing it and with it his reply. This was in a newspaper of his own, *Ko e Kele'a* and the reply was dated 6th December 1994. His reply was in Tongan but in an agreed English translation it was (in part) as follows:

6 December 1994

Minister of Justice and Attorney General,

Concerning your letter dated 2nd of December 1994, there are 6 separate accusations against me in regards to my statements in the American newspaper, "The Wall Street Journal" in the August 1994 edition.

The intention of your letter is to request a reply from myself to your accusations.

You also wanted me to write a letter of apology to be published in "The Wall Street Journal" in reference to the statements that I made in that newspaper.

Response to the 1st accusation (a):

— Please refer to the Letter of Petition (yellow cover, 69 pages) which I submitted to His Majesty on the 4th of November 1988. On page 3 of the Letter of Petition it bears the names of the Nobles and Ministers of the Crown who are alleged to have unlawfully obtained money from Government funds. The Nobles and Ministers in Parliament are appointed by His Majesty. As yet of today, no response has been received from His Majesty as to the wrongful and incompetent actions of his appointees, nor has any disciplinary actions been implemented against them particularly the Hon. Minister of Finance which the people requested to be impeached in their Letter of Petition.

— Please refer to the statement of confession made by the Hon. Veikune which appears in the "***Kele'a***" edition of January 1990.

— Please also refer to the video tape which I have enclosed with my letter. The video contains an interview of His Majesty in 1990 by the "60 Minutes" programme on New Zealand's TV3. The interview contains His Majesty's response about the passport money. The interviewer asked His Majesty as to why the Passport money (Trust Fund) has not been deposited in the Bank of Tonga rather than in San Francisco.

— His Majesty's response was as follows — "Should the money be deposited in Tonga Parliament will use it for a

pay rise. The interviewer went on to ask whether he does not trust his appointed Ministers. His Majesty's answer was, "Yes …"

I want to remind you Honourable Minister of Justice it was His Majesty's direction to deposit the millions of dollars from the Passport money in America. Also take note that the managing of these funds were not organised since 1981 until 1991 when the Government Auditor was finally able to travel overseas and audit the money derived from the selling of Passports to foreigners in 1991. The question is, why wasn't the Passport money in Tonga and overseas audited since 1982 and gazetted in accordance with the law, instead of it being done in 1991?

There is a lot of other information that I possess from different sources — from the Churches, Government Departments and private individuals that relate directly to the answering of accusation 1.

Response to the 2nd accusation (b):

(1) Please refer to the Government Gazette No. 3 of 15 February 1991. This gazette clearly shows how the Government is ruled.

You are well aware that the issuing and selling of the Passports was unlawful. Even if the King was not aware of this, it was already known by some of the Ministers. Please refer to the letter by Sinilau Kolokihakaufisi to the Accountant General of 8 January 1987. This letter clearly sets out that the Government had done something unlawful.

(2) It is important that you note that I repeatedly questioned this matter in Parliament and in my letters to the Hon. Minister of Police for him to clarify whether the right to be a Tongan subject and a Tongan Passport holder was being granted and sold. The Minister's response was that there was nothing of the sort.

Please refer to the Minutes of Parliament of 26 October 1988 between 3.15 pm and 4 pm. It clearly shows my question and the answer given by the Minister of Police. Note that my question to the Minister of Police in Parliament was in October of 1988 but the sale and issuing of Tongan passports was done before that.

Please note the letter by Sinilau of 8 January 1987. The truth is that the Minister of Police lied.

I have no doubt whatsoever Hon. Minister of Justice, that the procedure by which Tongan Passports were sold from

the beginning of 1982 up to 1991 was secretive and dictatorial. Not just that but also the creation of laws by His Majesty and Privy Council to legitimise this unlawful and secret activity, was dictatorial in nature.

(3) I would like to direct your attention to the yellow covered Petition, 68 pages that I put to His Majesty on the 4th November 1988 and I witnessed the petition reaching His Majesty. In this Petition it included a separate letter asking His Majesty to dismiss the Minister of Finance, James Cecil Cocker. Not only that but it was also detailed in this petition, amounts of money which 25 of the honourable Parliamentarians received unlawfully. This Letter of Petition was also submitted together with more than two thousand signatures of people who support this Letter.

Take note Hon. Minister the fact that there has been no response from the King or the Privy Council is a sign of no consideration for the people and dictatorship.

(4) In March 1991 another Letter of Petition was submitted to His Majesty. More than a thousand people marched to the Palace Office calling for the Minister of Police to be impeached because of the unlawful granting and selling of Tongan National Passports to 426 foreigners. As yet of today there has been no response from His Majesty. This is a sign of no consideration for the people and dictatorship.

(5) Hon. Minister please refer to the judgment of the Supreme Court of Tonga passed on 6 May 1988 concerning the unlawful dismissal of 'Akilisi Pohiva by the Kingdom of Tonga or the Crown and the Prime Minister. On page 13 of the judgment it bears these words:
"The circumstances of Mr Pohiva's dismissal encompass all three elements — it was oppressive, arbitrary and unconstitutional …"

Please refer to the judgment of the Court attached herewith.

(6) Concerning the Orbital Satellite Slots. Take note Hon. Minister such assets are not His Majesty's assets nor is it for a few to have absolute authority over. You may recall that we requested (People's Representatives) in 1990 in Parliament to resubmit into Parliament all the agreements and Privy Council and Cabinet decisions concerning the Government's approval of the request made by Tongasat to act as an agent of the Government regarding the leasing

> and advertising of Tonga's Orbital Satellite Slots. We also requested to alter Tonga's financial share from this project. The government subsequently approved this request. As yet, there has not been any response to our requests that were made in Parliament in 1990.

To me Hon. Minister such practices are dictatorial in nature. Even though the Privy Council has the authority to make such decisions, consideration must be given to the people's interests and that the People's Representatives be allowed to participate in the negotiations of such project because it involves the people's general assets.

Hon. Minister perhaps I have given sufficient response to the lst accusation against me even though there are still more illustrations for me to use to support the statement that I have made.

Lastly your Hon. Minister I want to clarify that our constitution is undoubtedly of a dictatorial nature. On that basis my statements were not directed at His Majesty's individual capacity but it was His Majesty's status under the constitution and the exercise of that authority that I am concerned with.

Response to the 3rd Accusation (c): …

Response to the 4th Accusation (d):
The truth is we talked about the selling of passports. I told the reporter that one of the things that I was concerned with was that not all the money from the selling of passports were audited and not gazetted in the Government Gazette in accordance with the law. I stated in my statement that since the selling of passports commenced in 1982 up to 1990 the money from the sale of passports have not been audited or published in the Government Gazette. I did not inform the reporter that the money from the sales of passports has been audited and gazetted in 1991 after the march to his Majesty with the Letter of Petition.

The truth is the statement I made were based around the year of 1982 up to 1991 which was the year when section 29 of the Constitution was amended and the march to His Majesty was held. The complete financial statement about the passports money and its auditing and gazetting was done after the amendment to the Constitution and the march to His Majesty with the Letter of Petition. Please refer to my press release about the meeting with George Chen, Honorary Counsellor for Tonga in Hong Kong mid-last year which was distributed to the reporters here in Tonga.

Response to the 5th Accusation (e):
In the Parliament of 1990 I requested together with a few of the people's representatives that the Tongasat's financial activities should be audited and reported to Parliament. The basis of the request was the understanding that orbital slots are general assets of the people and the people are entitled to know the financial activities of Tongasat to ensure that the profits derived from the country's assets are allocated orderly and accurately. This request was refused.

The importance of this request we made in Parliament was further boosted by the statement that appeared in the magazine, "Forbes" on 12 September 1994. If this statement regarding the estimation of Princess Pilolevu's share is accurate, which is $25m than it is most appropriate for His Majesty and the Privy Council to reconsider our request to have the Company's activities audited. The statement in "The Wall Street" was not intended to accuse His Majesty for misusing money obtained from the Satellite Project but it was intended to proclaim our concern that the Company had no audited statement about its financial activities to be submitted to Parliament.

Response to the 6th Accusation (f): …

All in all, Hon. Minister I believe there is no ground for me to make an apology as you requested.

The statements I made were done independently based on factual occurrences.

I believe the response made by 'Inoke Faletau for the government is sufficient. So we should continue with our work and attempt to read just the things that I have touched on, and I believe that the aforementioned shortcomings should receive special attention from the government, myself and my fellow representatives of the people of the land.

I believe Hon. Minister I shouldn't be the centre of your concern. I believe you the Hon Ministers and Nobles, the servants of His Majesty are the ones that we should be most concerned with because you are the ones that are responsible for the administration and governing of the government and the land. The proper and accurate exercise of your duties will reflect the good image of His Majesty to the people of the land and the world as a whole. The security and enduring peacefulness of the country will then be guaranteed.

Lastly Hon. Minister I wish to draw your attention to one of the minor works that I have done in Parliament since 1982 until today

based on my willingness to help and consideration for the security and general welfare of the Government and the land.

Please refer to my letter to the Accountant General on 1 November 1988 and was copied to:

1. His Majesty
2. Minister of Finance
3. Deputy Prime Minister
4. Speaker of the Parliament
5. Clerk of the Parliament

With respect,

…….

sgd. S. ‘Akilisi Pohiva

The accused published other material in that edition of ***Kele’a*** as well. He took the opportunity of making a response to the terms of Papiloa Foliaki’s petition. It is now necessary to set out (the agreed translation of) that article by the accused.

RESPONSE TO THE PETITION BY PAPILOA AND KEITI FUSIMALOHI AND 426 OTHERS.
(The Chronicle refused to publish this response)

The petition imputes ‘Akilisi Pohiva saying: “‘Akilisi told the Wall Street Journal newspaper that the King is a dictator.”

RESPONSE: Yes, what the King wants, that shall be done, whether the Hon Ministers or public like it or not.

EXAMPLE:

i. Whoever the King wants to be Minister shall be Minister. He will hold that office for life whether or not the public like it or not, unless the King rules to the contrary.
ii. In 1988 a petition was lodged with the Palace Office calling for the dismissal of the Minister of Finance for unlawful disbursement of the government money to 25 members of the Parliament in 1986. As yet, no response has been received from the King concerning that petition. Refer to the 1986 Salary Table of the Fono. The Minister of Finance was allocated $5,812.91 even though he attended the fono for six days only.
iii. In 1991, more than 1000 people marched to the palace with a petition calling for the dismissal of the Minister of Police for unlawful issuance of Tongan passports to 426 foreigners. The said petition was refused by the King despite evidences proving that section 29 of the Constitution was breached by the Minister of Police. As to date no response has been received regarding that matter.

iv. Between 1982 and 1990 the Privy Council approved naturalization applications by some foreigners. This decision was dictatorial in nature as it contradicted section 29 of the Constitution.

v. In 1991 the King in Privy Council ordered to make an amendment act amending section 29 of the Constitution so as to legalise the unlawful approval of naturalisation applications of 426 foreigners. The petition called to revoke that order but to no avail. To date, no response has been received concerning that petition.

vi. In 1988 the King in Privy council approved the application for registration of the Company namely TONGASAT. Princess Pilolevu, a shareholder is the agent for the Government of Tonga to the satellites orbital slots. The people's representatives in 1990 appealed to reconsider the shares so as to increase the shares of the government hence reducing the shares of Pilolevu and the company respectively. As yet, no response has been received to that effect. It is significant for the public to know that this resource is not for the benefit of a few. As claimed by the well known magazine, Forbes on 12 September it is estimated that the shares of the Princess will amount to US$25m.

vii. Big projects of the Government such as the establishment of the National Airline, Shipping corporation, securing of properties and overseas construction like the one in Pagopago, proposed projects at Sarawaki, sending troops to Bouganville etc., were all initiated at the Privy council. The people have no power to intervene in these.

viii. The concept of selling Tonga passports and granting the rights of nationals came from the King and the Privy Council. This was approved by the Ministers despite it was unconstitutional. The concept to deposit the proceeds from the sales of passports in America came from the King also.

Perhaps the above examples are enough even though there are more examples to be given. Papiloa and Keiti please note that almost every Orders in Council bear the following words: "ORDER BY HIS MAJESTY THE KING OF TONGA"…

With due respect to His Majesty and the public I hereby submit this response. I hope that this will clarify the contents of the article in the said newspaper. The King of Britain is not a DICTATOR since he is not involved in law making and the executive. One of the reason why the British dynasty switch to the position of Honorary King was to avoid criticisms from the public as to their involvement in executive position.

> The only way for the King to evade criticisms is a total isolation from law making and the executive position to become an Honorary King like the King of Britain and other dynasties in Europe.
>
> The only leader in the Universe that can not be subjected to criticisms is Jehovah, the King of Kings and Lord of Lords. His reign is righteous and flawless. His leadership is free of prejudice and unchallenged.

These two articles written by the accused are the cause of Count 2 which except for date and newspaper is identical to Count 1, but I shall set it out in full:

STATEMENT OF OFFENCE:
(Count 2)

> DEFAMATION of His Majesty the King contrary to section 3 of the Defamation Act (Cap 33) as amended in Act 15 of 1993.

PARTICULARS OF OFFENCE:
(Count 2)

> SAMUELA'AKILISI POHIVA on or about December 1994 in Nuku'alofa did defame His Majesty the King in that you stated and published in your newspaper the ***Kele'a*** Volume 9, Number 15 of October/November/December 1994 any one or more of the following defamatory statements:-
>
> — The King is a dictator
>
> — The King and his Nobles are guilty of financial legerdemain
>
> — The King has ignored requests to account for the funds from the sale of Tonga Passports.
>
> In addition the innuendo of these words was that 1. The King has concealed or has been a party to the concealing of funds derived from the activities of the sale of Tongan Passports; and/or 2. The King has done something improper with the funds derived from the sale of Tongan Passports.
>
> — The King has ignored requests to account for the funds from the activities of Tongasat.
>
> In addition the innuendo of these words was that 1. The King exercises control over the activities of Tongasat; and/or 2. The King has concealed or has been a party to the concealing of funds derived from the activities of Tongasat; and/or 3. The King has done something improper with the funds derived from the activities of Tongasat.

Two witnesses gave evidence that they read what was in ***Kele'a,*** and were upset. One was Sione Masima, a farmer. He remembered in particular the response to the petition. He said he was disappointed and upset and shed a tear while reading the ***Kele'a*** article. He felt that the Royal family's tradition of reliability would be lost. For

him, to say the King is a dictator is incorrect. The King has never ordered him to bring any asset or goods; he is not an absolute ruler and had never ordered anything of the witness. In cross examination he said that the article claimed the King has absolute power in the country, but he did not believe it. The King had never given him an order or taken absolute power over his goods at home so that he became a slave. He said he was amazed at the statement that the King practised trickery.

The other similar witness was Salesi Kauvaka, also a farmer. He also was upset but he continues to trust the King. He knew nothing about Tongasat but felt nobody should interfere with it and about the passport money he said he does not know what the King wants but the article was interference with it.

The Offences Alleged: Preliminary Comments

Defamation of His Majesty the King is an offence created specifically in section 3 of the Defamation Act Cap 33 as amended in 1993, Act 15. The relevant sections are in part as follows:

> 2. (1) Defamation of character consists in speaking or in writing, printing or otherwise putting into visible form any matter damaging the reputation of another or exposing another to hatred, contempt or ridicule or causing him to be shunned.
>
> (2) The repetition by any person of defamatory matter concerning another also constitutes defamation of character.
>
> 3. Every person who shall defame the character of the King or any member of the Royal Family shall on conviction thereof be liable to a fine not exceeding $400 and in default of payment to imprisonment for any term not exceeding 2 years.
>
> 9. No criminal or civil proceedings for defamation of character shall be maintainable in respect of any matter stated—
>
> (a)…
>
> (b)…
>
> (c)…
>
> (d) in any communication made in pursuance of his official duty by any official of the Government to the Privy Council, the Cabinet or another Government official.
>
> 10. No criminal or civil proceedings for defamation of character shall be maintainable in respect of any communication made bona fide by any person in discharge of a legal, moral or social duty or in reference to a matter in which he has an interest and the person to whom such communication is made has an interest in hearing it unless it is proved that the person making such communication was actuated by anger, ill-will or other improper motive.

11. (1) Whether a communication was or not made under any of the circumstances mentioned in either section 9 or section 10 hereof shall be decided by the judge at the trial.
(2) If the judge rules that the communication was made under any of the circumstances enumerated in section 9 hereof he shall enter judgment for the defendant.
(3) If it is ruled by the judge that the communication was made under any of the circumstances mentioned in section 10 hereof then if there is no evidence that the defendant was actuated by anger, ill-will or other improper motive the judge shall direct a verdict for the defendant.

12. No criminal or civil proceedings shall be maintainable in respect of the publication contemporaneously and without malice in any periodical published at intervals not exceeding one month of-

(a) fair and accurate reports of-
(i) proceedings in the Legislative Assembly;
(ii) proceedings publicly heard before any Court having judicial authority;
(iii) proceedings of a public meeting:
(b) fair comments upon facts truly stated and in reference to matters of public interest.

Provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter:

Provided also that the protection intended to be afforded by this section shall not be available as a defence in any proceedings if it shall be proved that the defendant has been requested to insert in the periodical in which the matter complained of appeared a reasonable letter or statement by way of contradiction or explanation of such matter and has refused or neglected to insert the same.

The charges faced by the accused are no different from any other criminal charges. They are laid by the Crown, for the sake of good government and for the benefit of all the people. They are not personal to His Majesty.

In laying the charges, the Crown undertakes to prove them beyond reasonable doubt. All elements of each charge must be sufficiently made out so that when all are put together the proof of them leaves no reasonable doubt that the whole offence charged was committed. In the present case the "Particulars of Offence" are important, as they indicated in advance to the accused what it was that the Crown claimed it would prove had occurred, beyond reasonable doubt.

At no stage has the accused been required to say anything at this trial. He is entitled to submit that the Crown's proof falls short. He is also entitled to raise positive defences and, in general, those defences are provided for him by the Defamation Act (above) at sections 9, 10 and 12. He has chosen to raise those defences. He is not required to prove any of those defences beyond reasonable doubt, a lesser standard of proof is sufficient to raise a reasonable doubt. The onus remains

throughout on the Crown both to prove its charges and to rebut any defence raised by the accused. Section 108 of the Evidence Act Cap 15 applies.

In its "Particulars of Offence" the Crown has cast its net wide. It has alleged what it has called, both before and during the trial, an "extremely serious" offence but in particularising that offence it has alleged not one but "any one or more" of four identified statements. First it undertakes to prove that the statements were made and were made twice, ie, once in respect of each charge, but it makes in each count an alternative charge on the basis that all of the statements alleged may not be proved or, if proved, may not amount to the offence. So it alleges first that the offence was committed by not just a particular statement but any one of them, and then alleges that if that is not proved then it adds to the evidence a second, then a third, then a fourth statement in its bid to establish its charge (in each count) beyond reasonable doubt. All this casts a heavy burden on the Crown and on the accused. No issue was made of this by counsel for the accused so I say no more about it.

Finally as a preliminary comment, I hope to avoid adding unnecessarily to the already lengthy narrative. I hope that by setting out in full all the relevant material I have helped to make the outcome clear.

Decision of Count One

This count rests on the words published in the Wall Street Journal on 23 August 1994. They were written by a journalist, Michael J. Ybarra. The question is, in this publishing by the Wall Street Journal of words written by Ybarra did the accused defame the King?

The offence charged is publication within the Jurisdiction of words uttered whether outside the jurisdiction or not, and I see no need to refer to the authority which was relied on by the Crown for reaching out to what was said in Honolulu. The accused accepts the position advanced by the Crown that on this publication by the Wall Street Journal, which was read in Tonga, the accused may be found responsible at law in Tonga and therefore either guilty or not guilty. This seems to be correct by reason of Section 2 of the Defamation Act.

"Defamation" is clearly defined in Section 2 and the authorities make it clear that words which damage the reputation of the King and/or expose him to hatred are not only words which do so on their ordinary and natural meaning but also words which are capable of being understood in a defamatory sense. I accept Mr Waalkens' submission on behalf of the Crown that the decision of what is conveyed by any particular words is to be made by an objective test, ie, by the meaning which an ordinary reasonable person would take from them, including an ordinary reasonable person with knowledge of particular facts that make the meaning defamatory to that person. I accept the statements of principle to which Mr Waalkens referred me in ***Gatley*** on **Libel and Slander** [9th Edition, 1998], and in ***Carter-Ruck*** on **Libel and Slander** [4th Edition]. What the accused intended to convey is immaterial.

I accept the Crown's further submission about the ingredients of the offence and in my view it is necessary for the Crown to establish only:

(i) That words reasonably conveying the defamatory meaning or words like them were said by the accused;
(ii) That the accused intended to say those words, or words like them;

(iii) That those words or words like them were published; and
(iv) That the publication damaged the reputation of the King and/or exposed him to hatred, contempt or ridicule.

All of this must be established as a single whole beyond reasonable doubt before the special defences of the accused are considered and must remain beyond reasonable doubt after they have been considered.

In evidence the accused denied telling Ybarra "The King is a dictator". Instead he says he told him "the King rules under a Constitution which is dictatorial". He told the Court he was talking to the journalist about the Constitution. In respect of the Government's actions over passport revenues etc and Tongasat revenues he told the Court that he did not to Ybarra accuse the king of financial legerdemain, but rather told him the whole history of the passport business from 1982 until 1991. He said he omitted the steps taken by the government (which to some degree had rectified his complaints) in and since 1991. What he told Ybarra, he said, was that His Majesty and his Ministers had failed to submit to the House a full audited report of the money received from the sales of passports even though he had tried several times in the House to get an account of those revenues, this all being for the period until 1991. The issue itself continued to exist for him at the time of the interview in 1994. He said he told Ybarra about Tongasat that His Majesty and his Ministers had completely failed to submit to Parliament any audited financial report of the money the Tongan Government had received from Tongasat.

Now, there is other evidence of what the accused told Ybarra. This is (1) what he said to Papiloa Foliaki and (2) the account written by the accused much closer to the time, which he published in December 1994 in ***Kele'a***. In that article he said he was intending to clarify and explain what it was he had expressed to Ybarra. It is to those words that I have turned to decide the primary question whether the published account of Ybarra was what the accused had said.

I have no doubts that in 1994 the accused was thinking and saying "The King's actions and inactions are dictatorial, he acts like a dictator, see what he has done/not done about the passports and about Tongasat". His words to Mrs Foliaki and in ***Kele'a*** leave no room for any reasonable doubt. I am sure that he said those words or words like that to Ybarra. If he meant to discuss only the Constitutional position of the King within the Constitution that is irrelevant. The issue I have to decide is, what did he say to Ybarra? However, I cannot believe on the evidence presented to me that for all his fervour the accused told Ybarra that selling passports was "The King's practice" as reported by Ybarra. Nor can I believe after hearing the accused give evidence that he told Ybarra that in 1991 the King "simply had the passport laws changed"; nor can I find after considering all the evidence that the accused said anything to Ybarra that properly could be paraphrased as "he accused the King and his Nobles of financial legerdemain". Whatever the complaint to Ybarra, it was clearly detailed, but the words "financial legerdemain" are the journalist's own summary of what he had understood. The complaint of the accused to Ybarra as I understand it from the evidence does not present to me as a complaint of sleight-of-hand, rather as a complaint of insufficient accountability.

Finally, it is well established to my mind that the accused did tell Ybarra that the King had ignored his demands for accounting about both the passports revenues and

the Tongasat revenues, these statements after all were from the accused's own experience and by public knowledge true.

There is no allegation by Ybarra in the article that the accused told him the King is breaching the constitution. There is no allegation by Ybarra in the article that the accused told him the King is in breach of any of his duties as King. There is no allegation by Ybarra in the article that the accused told him the King is a despotic dictator like Idi Amin. There is no allegation by Ybarra in the article that the accused made any such claims to him except his purported "The King is a dictator". It is not shown to my satisfaction that the accused actually said that, but if he did then, in their context those words can only mean "The King is an authoritarian ruler who ignores my repeated request for accountability by himself and his Ministers". If he said this, it appears to me to be the truth. Taking account of the evidence by the accused during the trial it appears to me not surprising that his attempts to obtain accountability in a system of government which does not provide for it are ignored.

There is a claim by the prosecution that the accused said to Ybarra "The King is a dictator", and that this in its ordinary and natural meaning is the same as "The King is a malignant despot like Idi Amin or Adolf Hitler". I am afraid I have to reject that. It is contrary to the evidence.

There is a claim by the prosecution and by the journalist Ybarra that the accused said "King Taufa'ahau IV and His nobles have committed financial legerdemain" or words to that effect. I do not believe after hearing the evidence that these words of Ybarra are accurate, having seen and heard the accused.

Having seen and heard the accused I do accept that the accused told Ybarra that the King had ignored his request that the King account for the funds from the sale of Tongan passports and I do accept that he told Ybarra that the King had ignored his request to account for the funds from the activities of the Tongasat, as claimed in Count 1. I find however that the innuendo from those words claimed in the indictment is unsupported by any evidence at all. That innuendo was not stated in the article nor is apparent to me as a reasonable deduction. The article is about the campaign by the accused for accountability in Government and absence of any reaction to that by His Majesty the King.

With the exception of "the King is a dictator" and one other alleged quotation, the journalist does not even claim to be quoting the accused. In its entirety the article is the journalist's own account constructed from what he was told. The only evidence of what he was told is that of the accused during this trial. The journalist's words in my view are not a sufficient basis for the criminal charge that the accused spoke defamatory words as alleged in Count 1. On that charge he must be acquitted.

Decision of Count Two

I turn now to Count 2. This is a charge that the accused repeated personally within the jurisdiction the same defamatory remarks that are charged in Count 1. The evidence in support of the charge is the published words of the accused himself, in the December 1994 edition of ***Kele'a***.

First, I shall deal briefly with the special defences pleaded in respect of Count 2, each in turn. The first special defence pleaded is that these words were a fair comment on a matter of public importance. The matter is indeed one of public importance but, to be fair comment they must be based on facts that are themselves truly stated. This special defence was raised by the accused at the outset when he

replied to the Minister in ***Kele'a***, "The statements I made were … based on factual occurrences". However, this defence, pursuant to section 12(b) of the Defamation Act (above) is not available in respect of the ***Kele'a*** article itself as ***Kele'a*** is published at intervals exceeding one month.

The second special defence is one of qualified privilege pursuant to Section 10. That section is set out above. I have noted the submissions of Counsel. I do not believe that these words written by an activist for change can, objectively viewed, be described as a "communication made bona fide by [the accused] in discharge of a legal moral or social duty, or in reference to a matter in which he has an interest [with] the person to whom such communication [has been] made [having] an interest hearing it". This defence would fail if it had to be relied on.

The third pleaded defence is justification, ie, that the words in their ordinary and natural meaning are true and their publication was for the public benefit. I am inclined to think that the offence charged is one of strict liability and that this civil law defence is omitted from the Defamation Act defences for that reason, but this was not an issue raised before me and I find it unnecessary to consider this defence in any event.

The accused relies also on section 7 of the Constitution which allows him freedom of speech but that freedom is expressly stated in the Constitution to be subject to the laws of defamation, official secrets and the laws for the protection of the King and the defence of the Constitutional rights to freedom of speech can not avail him on this occasion.

None of these defences in my opinion are available for Count 2.

The Crown alleges that the accused has said in ***Kele'a***:

1. The King is a Dictator.
2. The King and His nobles are guilty of financial legerdemain.
3. The King has failed to account for the proceeds of the passport sales, which carried particular innuendoes.
4. The King has failed to account for the proceeds from Tongasat activities, which also carried particular innuendoes.

Is that true? In respect of the first alleged statement, nowhere in ***Kele'a*** did the accused say "The King is a Dictator" and nowhere did he imply that directly except in his response to the petition by Mrs Foliaki and others which I shall deal with shortly. In ***Kele'a***, he says that his comments are based on facts and gives examples which he alleges show that the King's actions and/or inactions are "Dictatorship" or "Dictatorial in nature". He states that the constitution gives dictatorial powers. In response to this allegation in the Minister's letter, which is allegation (b), he states:

> "Lastly, Your Hon. Minister I want to clarify that our constitution is undoubtedly of a dictatorial nature. On that basis my statements were not directed at His Majesty's individual capacity but it was His Majesty's status under the constitution and the exercise of that authority that I am concerned with".

I come now to the passage of ***Kele'a*** in which the accused directly implied "The King is a Dictator". This is in his "response to the petition by Papiloa and Keiti Fusimalohi and four hundred and twenty six others", the passage is as follows:

> The petition imputes 'Akilisi Pohiva saying "'Akilisi told the Wall Street Journal newspaper that the King is a dictator."
>
> RESPONSE: Yes, what the king wants, that shall be done, whether the Hon. Ministers or public like it or not."

There follows a series of examples and two brief comments, all of which are set out above, and must be read together with this quoted passage.

After considering the submissions and the evidence about these eight examples I must say that the ones I have been addressed on by counsel seem to be in general legally and/or factually accurate. I know nothing however of an alleged breach by the Minister of Police of section 29 of the constitution, example (iii), and I think it may be inaccurate to describe Princess Pilolevu as "the agent for the government of Tonga (for) the satellites", example (vi). I have no details of example (vii). The first two sentences of example (viii) seem from the evidence to be one way to describe briefly what I was told occurred in the matter of the passports. The third sentence of that example however makes a statement directly about His Majesty the King: "The concept to deposit the proceeds from the sales of the passports in America came from the King also". This is an allegation directly against the King in person and it was a statement of fact which the accused was unable at this trial to substantiate and did not wish to substantiate. However, the words "The King" are ambiguous in that paragraph, in that they could just as well be shorthand for "The King and the Privy Council", which words he also used, and in that meaning the statement seems true.

In reading the whole of the ***Kele'a*** articles I cannot hold that the accused either said or implied that the king is a bad king, a despot or a dictator like Idi Amin.

I come now to the second statement alleged against the accused. It was said in the Minister's letter, in allegation (a), that he had accused the King and his nobles of financial legerdemain. The words written by the accused in ***Kele'a*** in response to that allegation do not contain any claim by the accused that the King and his nobles were guilty of financial legerdemain or sleight-of-hand. What the accused said about the allegation is set out fully above in his "response to the first accusation (a)" and I need not repeat it here. That allegation is not even imputed so far as I am able to understand what the accused wrote.

I come now to the third statement alleged against the accused. In ***Kele'a*** he responded to the allegation in (d) in the Minister's letter, that the words published in the Wall Street Journal clearly inferred that His Majesty had or may have misappropriated funds. His two paragraphs on that topic speak for themselves. One looks in vain for anything in those paragraphs that contains or generates that claimed inference. The relevance of the Press Release escapes me. It was not published in ***Kele'a***. Two paragraphs headed "Press Release" were included in the agreed English translation but they convey little to me. They were not referred to in the evidence and I omitted them in what I set out above from ***Kele'a***.

I come now to the fourth statement alleged against the accused. In ***Kele'a*** he responds to allegation (e) of the Minister's letter that the words published in the Wall Street Journal inferred misappropriation by His Majesty in respect of Tongasat funds.

Here again the answer is in two paragraphs. They are set out fully above. They speak for themselves. One looks in vain for that inference.

The charge arising from what the accused wrote in ***Kele'a*** is that in writing it he made four specific statements and in doing so he "Defamed the character of the King" (section 2 of the Defamation Act). From other words of section 2 it is clear that the criminal offence of defamation consists in statements "damaging the reputation" of another, or "exposing that other to hatred contempt or ridicule, or causing him to be shunned".

It is not in doubt that one's personal character and one's personal reputation are inseparable from one's role in society, be it butcher or baker, beggar or king. To say of a good baker that he bakes badly defames him even though it is only his conduct in performing his occupation that he is being attacked. It is so for a king. To say of a good king that he rules badly defames his character and damages his reputation. The questions raised in this trial are, did the accused say what is alleged and if so has he published "matter damaging the reputation of [The King] or exposed him to hatred, contempt or ridicule or caused him to be shunned"?

Apart from the Minister, three witnesses, ordinary citizens of the kingdom, gave evidence about that. Two of them gave evidence that they recognized the statements as insults to His Majesty but rejected them. One (Mrs Foliaki) gave evidence that her faith in His Majesty was shaken for, perhaps, she said, the accused may be right, he knows more about these things than I do. However she stated also that she believes the King is not a dictator. None of their evidence amounts to strong evidence that what was published was matter damaging the reputation of the king or matter which exposed him to hatred, contempt or ridicule, or caused him to be shunned. Those are the words which define defamation for present purposes.

What is said to have occurred in this case is characterised by the Crown (closing submissions paragraph 9.8) as "an imputation of corruption, dishonourable conduct (or motives) …". What is central throughout this case however is the Constitution. It creates an authoritarian form of government, governed by the Constitution.

Nowhere did the accused claim that His Majesty rules in breach of the constitution. He acknowledged that the actions and inactions which he outlined had occurred within the constitution. He sought more accountability to the people in His Majesty the King, His Ministers, and His nobles than the constitution presently allows. He described his own actions, taken in a vain attempt to achieve what is no less than amendment to the constitution. He described the actions of others, and inactions, including those of His Majesty, in ignoring and/or rejecting his claim for constitutional change. In all that he wrote I have looked in vain for words which, as a matter of fact, impute corruption, dishonourable conduct, or dishonourable motives to the King, and for words which damage the reputation of the King or expose him to hatred, contempt or ridicule, or cause him to be shunned. On count 2 the accused must be acquitted.

The Law: some Final Comments

Before closing, I am bound to refer to certain aspects of the case presented to me. The decisions which I have made are in the end decisions of facts. I have not had to consider the nature of the two charges, but in my view there was a danger of unfairness in way these charges were framed. Neither was cast as simple alternatives, both were cumulative and while the Crown sought to rely on any one of the alleged

statements, had rebuttal been necessary the accused was required to rebut all four statements. As well, the statements alleged, except for the first phrase in count 1 and particularly those in count 2 about the ***Kele'a*** articles were not particular words of the accused at all but subjective derivations which were said to have the same meanings as the (unspecified) words of the accused. For criminal charges this uncertainty made both proof and defence difficult.

I have considered the law advanced by both parties but there was little specific argument about the law of criminal defamation and I say nothing about that except to suggest that the offence, once proved, may be one of strict liability and subject to no defences other than those provided in the Defamation Act which creates the offence.

I found useful the passages presented to me from **Halsbury,** 4th edition, volume 28 on *Libel and Slander*, particularly paragraphs 42-287. I had to bear in mind however that the case before me is a criminal trial, not a civil claim; not merely a criminal trial but a trial under the Tongan statute which not only provides for the offence of criminal defamation but defines it and provides the available defences. The single most helpful paragraph in **Halsbury** was paragraph 283 about indictments for the defamatory libel.

About the cases presented to me, they were all civil suits for defamation. As Gatley [above] commented at chapter 22, the nature and rationales of civil and criminal proceedings for defamation are distinct. That by itself detracted not from their interest and relevance, as far as they went. It needs to be noted however that they were all in the context of democratic government. I was engaged by them all but, in the present context they are of little help. The more recent cases particularly, ie, *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; 124 ALR 1, *Stephens v West Australian Newspaper Ltd* (1994) 182 CLR 211, and *Lange v Atkinson* [1997] 2 NZLR 22 are in the context of the performance of public officials in an elected democracy and public accountability to an electorate. Their strong foundation is the nourishment of democracy. The principles in those cases are of limited application in the present case.

Finally, I must refer briefly to the submission made that in writing what he did in ***Kele'a*** assuming it to be defamatory, the accused was in breach of his oath as a member of the Legislative Assembly, taken pursuant to section 83 of the constitution. In my view the accused in writing his views in a newspaper outside the term and context of any sitting Legislative Assembly was not necessarily acting within the scope of the activities contemplated by his oath to serve as a member of the Legislative Assembly. There is no substance in this submission.

Verdicts

For the reasons stated above in respect of Count 1, the accused is acquitted of Count 1. For the reasons stated above in respect of Count 2, the accused is acquitted of Count 2.

Vaka'uta v Napa'a

Supreme Court, Nuku'alofa
Lewis CJ
C/App 150/97

October and November 1997, and March 1998; 23 March 1998

Negligence — duty of care — vicarious liability
Negligence — forseeability of injury — pyschological harm

On 20 December 1995 the first defendant was operating a front-end loader and struck and killed the plaintiff's nine-year-old son. The plaintiff witnessed this. The plaintiff claimed that she suffered psychological harm as a consequence of observing first, the collision and second, the vivid and fatal head and body injuries to her nine-year-old son. The plaintiff claimed damages and costs against the second defendant, the Kingdom of Tonga, and the first defendant, Napa'a the driver, and alleged that Napa'a negligently caused her to suffer a psychological injury.

Held:

1. If it was reasonably foreseeable, in all the circumstances, that the plaintiff may have suffered psychiatric injury because she had seen the fatal incident involving her son, then a duty of care was owed by the defendant to the plaintiff.
2. The doctor's evidence showed a condition which evidenced a psychological harm which went beyond mere grief at the loss of her son. This psychological disorder was "post traumatic stress disorder".
3. The argument by the defendants for the estoppel of the plaintiff failed because while her going back on her word may be said to be socially unacceptable in Tongan traditional society, it was not legally unacceptable.
4. The Kingdom of Tonga was vicariously liable for the breach of the duty of care owed to the plaintiff. The very best example of the breach of obligation to the plaintiff was the manifest failure or refusal of the Kingdom to rectify the faulty braking system of the loader which most certainly was a factor contributing to the fatal injury.
5. Judgment was entered for the plaintiff against both the first and second defendants.
6. Plaintiff awarded general damages for past pain, suffering, and loss of the amenity of the enjoyment of her life TOP $20,000.00; damages for future pain and suffering assessed at $30,000.00; interest on those said sums at

the rate of 5% per annum from 11 February 1997 (date of issue of Writ) until paid.

NOTE: The defendants subsequently successfully appealed against the amount of the award -- the Court of Appeal judgment is reported at page 159.

Cases considered:

Alcock v Chief Constable of South Yorkshire [1992] 1 AC 310; [1991] 4 All ER 907

Cropper v Smith (1884) 26 ChD 700

Jaensch v Coffey (1984) 54 ALR 417

McLoughlin v O'Brian [1983] 1 AC 410; [1982] 2 All ER 298

Statutes considered:

Mental Health Act 1992

Rules considered:

Supreme Court Rules 1991

Counsel for plaintiff	:	Mr Niu
Counsel for first defendant	:	Ms Tonga
Counsel for second defendant	:	Mr Cauchi

Judgment

The plaintiff is 32 years old, a housewife and mother. She claims damages and costs against the second defendant the Kingdom of Tonga, and against the first defendant Napa'a alleging that Napa'a negligently caused her to suffer a psychological injury. The third defendant the Minister of Works is alleged to be vicariously liable for her injury as the employer of Napa'a, the driver of a front-end loader owned and operated by the Ministry of Works which struck and killed her 9-year-old son, Tamiano, in her presence.

The issue in this case is not whether the defendant acted negligently or in a reckless manner in the driving management or control of the front-end loader thereby causing the deceased child's fatal injury, the issue is whether the defendants were negligent or reckless toward the plaintiff personally and whether they breached a duty of care which they owed to her to ensure that she did not suffer psychological harm by seeing her child fatally injured.

In such an action the onus of proof rests on the plaintiff to prove that the defendants owed her a duty of care, that they breached the duty and that as a consequence of that breach the plaintiff sustained a psychological injury, known in earlier times as "nervous shock", but more recently characterized as "psychiatric harm". Psychiatric harm was considered in *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310; [1991] 4 All ER 907.

Having read *Alcock* together with *McLoughlin v O'Brian* [1983] 1 AC 410; [1982] 2 All ER 298 and *Jaensch v Coffey* (1984) 54 ALR 417, I take the law to be as presently advised that the determinant of liability in cases of this kind is the forseeability of injury being caused to a plaintiff in the form of psychiatric harm by virtue of the relationship between the plaintiff and the primary victim consisting of

close ties of love and affection. The relationship may be found beyond the obvious one of "parent and child", "husband and wife".

The plaintiff must prove that she perceived through sight or sound and unaided, the incident itself or the immediate aftermath thereof. Putting it in another way in the context of the present claim, if it was reasonably foreseeable that Mrs Vaka'uta may suffer psychiatric injury because she saw the fatal incident involving her son, in the circumstances in which the incident occurred, then the duty of care was owed by the defendant to the plaintiff.

The husband, children, family, friends and associates of the plaintiff had been at the 'Api adjacent to the site of the fatal collision for more than 14 days discussing plans to establish a Church. Prayers and discussions had gone on for a great part of that time. While the meeting progressed, the children of those participating played on the vicinity of the road way along which Napa'a drove the Front-end loader. I find that at all material time, but in particular during the mid-morning of December 20, 1995, the second defendant was the owner and operator of a Front-end loader which bore a Government Registration No P2. The defendant Napa'a was driving the loader in an approximately westerly direction along the perimeter road approaching the vicinity of the 'Api of Kamehameha Faka'osi at the village of Fata'ulua, 'Eua, heading in the general direction of his place of employment at the Government quarry. One 'Isileli Maamatui was riding as passenger on the loader. Tamiano Vaka'uta was in company with two other children, one of them was his brother Tevita, near the Southern edge of the perimeter road and about opposite the 'Api of Faka'osi.

I find that the loader was equipped with a braking system which was faulty, rendering the operation of the braking system inefficient. The first defendant was aware and had been fully aware of the faulty braking system on the loader, and had on a number of previous occasions reported the faulty system to the Ministry's mechanic, but the fault had not been rectified.

At a point on the perimeter road the defendant saw Tevita Vaka'uta (whom he knew well as the brother of Tamiano) standing away from the road. The first defendant slowed the loader and passed Tevita and was about to pass a tree to his left when he felt the wheel of the loader pass over something. The loader struck the child, I find, probably with the edge or part of the bucket which contacted with the child's head and the impact caused the child to fall or to be propelled under the wheel or wheels of the vehicle. The first defendant dropped the bucket of the loader in order to stop the loader after striking Tamiano. He was approaching the corner, which he had to turn to the right.

The plaintiff had seen the approach of the loader and called to Tamiano to stand still. She saw the child struck by the loader from a position some approximately 30 metres away. From which position she ran to his body lying on the roadway and saw the head-wound, which he had suffered. As a direct result of the plaintiff having seen the collision and the consequences of it to her son Tamiano, I am satisfied that Lineti Vaka'uta suffered the psychological injury probably, in the nature of a postal-traumatic stress disorder.

I make it plain, that in arriving in the findings in this action, I put from my mind, the fact and consequences of criminal proceedings arising from this incident which were determined sometime before the civil trial in which we have participated to the point of this Judgment.

Napa'a, during cross-examination acknowledged, that on the very day of the collision he had seen women weaving coconut fibres at the 'Api by the side of the track he was using to travel to the quarry to carry out his duties. He acknowledged that he had seen children running about the vicinity. He did not say that he was certain of seeing people in the area at the time immediately before the collision. I considered Napa'a to be witness of truth. I'm sure that he regretted very much the consequences of his driving of the front-end loader and that his expressions of sorrow and remorse are genuine. Equally, I have no doubt, that the plaintiff is a truthful witness. Her grief was real at the loss of her son in these tragic circumstances. I add, that I'm satisfied that she in no way exaggerated the circumstances of the collision.

First proof of the claim such as the present entails proof by the injured plaintiff of a breach of the duty of care owed by the defendant to the victim. Here I'm satisfied there was breach of that duty which I find was owed to the plaintiff by the defendant.

In claims such as the present, it is never easy to judge the degree of knowledge of recklessness in the alleged tortfeasor. The court must apply objective standards for the existence of negligence or recklessness in arriving at its conclusions. Applying those considerations here, Napa'a admitted awareness of the presence of adults and children in the vicinity of the road where the incident occurred. Indeed, as I found, he knew the child Tevita and recognized him. I'm satisfied that in the circumstances of this claim, any reasonable front-end loader driver would think that those adults in the vicinity would be relatives or close loved ones of the children in the vicinity, and that, to injure or cause fatal injuries to one of the playing children would be likely to cause consequent and consequently related psychiatric harm to loved one or relatives of the injured child.

The front-end loader in this case had a defective braking system. The vehicle examining officer who examined the vehicle found as much, he found that the foot brakes and emergency brakes were inefficient. Napa'a knew the brakes were faulty, I accept that he reported the fault to his employer four or five times.

Napa'a described the method he used to stop the vehicle involving the dropping of the bucket and applying of a reverse gear while the vehicle was moving forward. The defendant submitted that to have used a speed of 10-20 km per hour was not dangerous. I reject the submission. I find that it was reckless speed. Indeed it was reckless to put the machine in motion at all given the condition of the braking system. The speed of 10-15 km per hour which the vehicle was travelling as I found, as it approach the point of the collision on the track, which was viewed by the Court, was in itself a dangerous speed. The track is unpaved and narrow, about 6.5 paces at the point of impact. I have no doubt that in context of this claim the defendant was negligent.

I find that the risk of psychiatric harm to a friend or loved one of Tamiano ought to have been foreseen by Napa'a on an objective basis. And that given the admitted condition of the malfunctioning braking system of the front-end loader, he ought to have been at pains to take care to avoid the very situation which arose by slowing or stopping before moving into the area of adults and children presenting itself in the vicinity of the track ahead of him. He failed to do so, therefore, in my Judgement, is guilty of a breach of the duty of care which he owed to this plaintiff.

I turn now to consider the plaintiff's case that she suffered a psychological harm as a consequence of observing first, the collision and secondly, the vivid and fatal head and bodily injuries to her 9-year-old son. It must be said, her evidence was the

subject of considerable criticism, particularly at the instance of the second defendant. I have weighed those criteria in arriving at findings. I conclude that overall, I can place reliance upon the evidence of the plaintiff. She was examined by Dr Mapa Puloka at the request of counsel for the plaintiff. The interview by Dr Puloka took place in the second half of October 1997. After the commencement of the trial, the management of the plaintiff's claim by solicitors ideally would require a psychiatric examination to have occurred almost as soon as instructions to litigate were received by the lawyers. It was not arranged. While regrettable, it has not been damaging to the plaintiff's claim. Although the potential for damage has been there.

What has been properly made the source of complaint is the fact that Dr Puloka spoke with (putting that in its most neutral), a number of lay, witnesses. From them, he frankly recites in Exhibit B4 - his report of 11 November 1997 — he obtained information. Some of the informants were not called as witnesses by the plaintiff or at all. Others of them were called by the plaintiff as part of their case, but long before Dr Puloka had produced his report and before he gave evidence, so that the defendants were not able to cross-examine the informants on the accuracy of material which Dr Puloka obtained from them and may have used as the basis of his opinion. That situation is one, which although not rendering his Report inadmissible, tends to detract from the right that the others had to know the source of his information.

I conclude that notwithstanding the infirmity to that extent and only to that extent, I am able to accept and to act on his opinion without doing any injustice to the defendants. Dr Puloka refers extensively to the subjective account of the plaintiff. Page 5 of the Report — Exhibit B4, in particular page 6 of Exhibit B4. He reports, "she has experienced physiological responses manifested by left-side headaches, palpitations, chest discomfort, weakness, backache, upset stomach, generalised body ache, peripheral numbness and tingling of body parts, sleep disturbances and hot or cold spells".

He says, "she has intense psychological distress its exposure to internal and external cues that symbolize and resemble the aspect of traumatic event. She had moved from 'Eua to Tongatapu as the sight of all things that related to her son's death exacerbated her symptoms especially of recurrent and intrusive distressing recollection of the events. The sight of a loader and the sound of it's engines, the hearing of news about any motor vehicle accident are external cues that stimulate or trigger recurrent and intrusive distressing recollection of the event."

Significantly he concludes: "Lineti has been and still suffering from post traumatic stress disorder. It has been precipitated by the fact she witnessed the nature of the death of her son. She has undergone the normal stage of bereavement after the death of her son but incapacitating symptoms of pre-post traumatic stress disorder has significantly affected her since October 1996. The treatment plan for Lineti is a long-term one, since the prognosis of her psychotic illness is somewhat poor."

Lineti's evidence is following the collision she regularly experienced headaches, backaches, weeping and debilitating weaknesses. Her sexual desires are significantly weakened.

I find from his evidence a condition which evidences a psychological harm which goes beyond mere grief at the loss of her son. I am satisfied that she suffered from the psychological disorder known as "post traumatic stress disorder." While grief is not compensible at the instance of the defendant, post traumatic stress disorder clearly is compensible and is characterized by Dr Puloka as a mental

disorder within the meaning of the Mental Health Act 1992. The plaintiff, was gently but firmly cross-examined concerning her symptoms. I paid careful attention to the cross-examination of the plaintiff by counsel and to counsel's submission concerning this aspect of the evidence. In the end, the overall conclusion I have reached from the evidence of Dr Puloka, is the shock of what she saw brought about the features of post traumatic stress disorder.

I'm satisfied that Dr Puloka is an expert witness in the sense that he can be relied upon to give an opinion from which I'm entitled to draw conclusion of fact, as to the existence or otherwise of psychological harm in the plaintiff. I accept his evidence when he says: "Lineti gives a clear history of Post traumatic stress disorder. Post traumatic stress disorder is an incapacitating disorder that is characterized by the experiencing of an extremely traumatic event accompanied by symptoms of increased arousal and by avoidance of stimuli associated with the trauma. Post traumatic stress disorder is a form of Anxiety Disorder that is also associated with depression. Lineti has been and still is suffering from Post traumatic stress disorder."

I'm satisfied and I find that post traumatic stress disorder is a form of psychological harm. I find, that with some intensity the plaintiff has continued to experience symptoms of the disorder and at the time of Judgement still suffers from them. There is no expert evidence countering Dr Puloka's diagnosis. I do not impose any onus of proof on the defendants, but I observed that where there are two hypotheses, it is easier to determine which is the more probable given the circumstances.

Finally, the defendants submitted that the plaintiff should be estopped from receiving any damages from the first defendant since in accordance with customary obligation as a fellow Tongan he offered an apology and gifts to discharge his obligation to the plaintiff and that she should accept his apology and traditional gifts. I have no doubt that the defendant did carry out traditional acts of apology which were accepted. Indeed, on all sides, the evidence of apology appears to be accepted. However, there is no recognition of customary law in this Kingdom which limits or brings to an end the rights of statute law and the Common Law of England possessed by plaintiff in cases such as the present.

While her going back on her word may be said to be socially unacceptable in Tongan traditional society, it is not and cannot be said to be legally unacceptable. The argument by the defendants for the estoppel of the plaintiff must fail.

In assessing the plaintiff's damages, I have taken into account the sequel of reliving the moment and terrible emotional disarray which post traumatic stress disorder must have repeatedly caused to the plaintiff. Next there is the related episodic symptoms referred to by Dr Puloka which I find are continuing.

Lastly, I hold the Kingdom of Tonga vicariously liable for the breach of the duty of care to the plaintiff. The very best example of the breach of obligation to the plaintiff is the manifest failure or refusal of the Kingdom to rectify the faulty braking system of the loader which most certainly was a factor contributing to the fatal injury suffered by Tamiano. I enter Judgement for the plaintiff against both the first and second defendants in this action for reasons that I have given. I assess damages to the plaintiff for past pain and suffering. I will fix the commencement date for the onset of post traumatic stress disorder as being in or about October 1996. I make some allowance for the months between December 1995 and October 1996 relating to the immediate shock suffered by the plaintiff upon her seeing the collision and its

consequences. I make an allowance for the loss by the plaintiff of amenity of enjoyment of life to the present day.

Given the continuing nature of the disorder suffered by plaintiff, doing the best I can, and using a broad brush to do so, I award her damages for future pain and suffering. I reduce the award for plaintiff's suffering in the future by 30% for contingencies. The plaintiff has claimed $10,000 general damages in the statement of claim. During addresses which were in writing the counsel for the plaintiff submitted the award should be in the sum of $50,000. Earlier today I ruled on the application by the plaintiff on amendment of the statement of claim, increasing the quantum of claim by the plaintiff from $10,000 to $50,000.

Crown counsel and counsel for defendants are most emphatically opposed to any application to amend the recitation of claim of the plaintiff from $10,000 to any higher figure on the basis they had prepared their case on the $10,000 claimed qualification which the statement of claim had notified them to expect was the maximum award available.

I had counsel argue the point fully. In the end Mr Cauchi conceded there was a general discretion in the Court to make such an amendment. The English practice is that the plaintiff simply claims an unliquidated sum of damages to be assessed, Rules of this court provide [Rules of Supreme Court Order 8 Rule 1]: Every statement of claim shall state the material facts on which the plaintiff relies and the relief sought. However, the defendants were not disadvantaged by this application in my opinion. The obligation they carry and the rights they have to defend themselves is to the best of their ability against any claim. And I follow the dictum of Bowen J as in *Cropper v Smith* (1884) 26 ChD 700.

I set out the award as follows:

- General damages for past pain suffering and loss of the amenity of the enjoyment of her life TOP $20,000.00.
- Damages for future pain and suffering which I assess at $30,000.00.
- Interest on those said sums at the rate of 5% per annum from 11 February 1997 (date of issue of Writ) until paid.
- Costs to be those of the plaintiff against the first and second defendants.

Re Fakafanua

Supreme Court, Nuku'alofa
Lewis CJ
555/1998

21, 23, 24 March 1998; 31 March 1998

Habeas corpus — Police powers of arrest and questioning
Practice and procedure — habeas corpus

The Hon Fakafanua applied for the issue of a writ of habeas corpus against Fifita and the Minister of Police, the Hon Clive Edwards. Investigating officers from the Police wanted to interview the applicant concerning alleged forgery offences. Investigations proceeded some little way. The Police had in their possession allegedly forged documents. They sought to ask the defendant questions about his knowledge of the documents. At the Central Police Station the applicant was accompanied and advised by counsel who advised his client not to answer any questions. There were some heated exchanges between counsel for the applicant and the investigating Police. In the result the applicant Fakafanua was arrested without warrant by Police on the ground that they suspected that the Hon Fakafanua had committed the offence of forgery. He was arrested so that he could be questioned with a view to the Police establishing whether or not he had committed the offence of forgery (or indeed whether or not he had committed no offence). The Hon Fakafanua was cautioned and he was then taken into the Nuku'alofa Police station. In the Police Station he was asked for formal particulars — his name and the like.

Held:

1. The issue was whether section 22 of the Police Act (Cap 35) could be construed as conferring on the police power to question a person arrested and charged without warrant before taking that person before a magistrate to be charged in court and, if so, the degree to which the police had such power?
2. Section 22 did not give police officers who decide that there are grounds to arrest without warrant the right to question the suspect arrested concerning the crime for which he has been arrested.
3. The section is a procedural section. Police must in all things act without any unnecessary delay. The section requires the police to take or send the suspect before a magistrate without any necessary delay. "Unnecessary delay" is to be judged from the circumstances of each case by the Court not by the police.

4. The section does not authorise the police to arrest without warrant for the purpose of questioning the suspect about the crime for which he or she was arrested.
5. The arrest and the obtaining by police of the personal particulars of the suspect once completed required police to take or send the suspect before a magistrate or designated police officer as soon as practicable to be charged. If it was not practicable to take or send the suspect before a magistrate or designated police officer within 24 hours then the police were obliged to inquire into bail and the requirements of the Bail Act.
6. The volunteering by a suspect of information connected with the crime being investigated during "routine moves" — that is during the time in which the police were attaining the suspect's particulars — did not give rise to a right to question him further about his volunteered information before he was taken or sent by police before a magistrate or police officers designated by section 22.

NOTE: the respondents subsequently successfully appealed this decision to the Court of Appeal. The Court of Appeal judgment is reported at page 127.

Cases considered:

Finau v Kingdom of Tonga (unreported, C110/98, Ward C.J, 12 May 1992)
Holgate-Mohammed v Duke [1984] AC 437; [1984] 1 All ER 1054
Soakai v Taulau, Minister of Police and the Government of Tonga [1981-1988] Tonga LR 46 (PC)
Wiltshire v Barrett [1965] 2 All ER 271; [1965] 2 WLR 1195 (CA)

Statutes considered:

Bail Act 1990
Evidence Act Cap 15
Police Act Cap 35

Rules considered:

Supreme Court Rules 1991

Counsel for applicant : Mr Niu
Counsel for respondent : Solicitor General

Judgment

Preliminary

A writ of Habeas Corpus was issued and served on the respondent Fifita. The Minister of Police the Hon Clive Edwards by what appears to be an oversight was not served. Both respondents however submit to the jurisdiction of this Court and waive proof of formal service.

Provision for the application for the writ of Habeas Corpus is made by R.S.C. Order 28. The applicant is a Noble of the realm and a former Minister of the Crown presently under investigation by Police for suspected breaches of the criminal law.

The Facts

The compass of facts is narrow. For the purposes of this decision the Court is asked to assume (without finding) the following facts;

- that at all material times investigating officers from the Tonga Police were desirous of interviewing the Applicant Fakafanua concerning alleged forgery offences.
- investigations proceeded some little way. The Police had in their possession allegedly forged documents. They sought to ask the defendant questions about his knowledge of the documents.
- at the Central Police Station the applicant was accompanied and advised by counsel who advised his client not to answer any questions. There were some heated exchanges between counsel for the applicant and the investigating Police.
- in the result the applicant Fakafanua was arrested without warrant by Police on the ground that they suspected that the Hon Fakafanua had committed the offence of forgery. He was arrested so that he could be questioned with a view to the Police establishing whether or not he had committed the offence of forgery (or indeed whether or not he had committed no offence).
- the Hon Fakafanua was cautioned and he was then taken into the Nuku'alofa Police station.
- in the Police Station he was asked for formal particulars — his name and the like.

The Law

The issue therefore seems to me to be whether the police acted without any lawful authority by detaining the applicant in the circumstances outlined above given the provisions of the Police Act Cap 35 section 22. Putting it more precisely the question is:

> Can the Police Act section 22 be construed as conferring on the Police, power to question a person arrested and charged without warrant before taking that person before a Magistrate to be charged in Court — and if so to what degree do the Police have that Power?

It must be said immediately that the precise question has been already considered and answered in the Privy Council decision of *Soakai v Taulau, Minister of Police and the Government of Tonga* [1981-1988] Tonga LR 46. The question is not novel. It has been considered many times in many jurisdictions.

In the Judgment the Privy Council made it clear that s 22 of the Police Act Cap 35 "*is a provision aimed at safeguarding the rights of a citizen to freedom from arrest and detention without formal warrant first being obtained for that purpose*" (p 6).

The English Common Law is expressed in a passage from "Clerk and Lindsell On Torts" 15th Edition page 687. The Police Act would appear to be based on this statement of that law. The learned authors conclude:

> "whenever a power of arrest without warrant on a criminal charge is given it is for the purpose of investigation before a magistrate, and no arrest can be justified which is not for this purpose. Arrest is the first step in criminal proceedings against a suspected person on a charge which is intended to be judicially investigated … There is no power in the Police save under special statutory authority to detain for inquiries or questioning independent of their powers of arrest". (my emphasis)

I have come to the conclusion that it was not the intention of the Legislature in enacting Cap 35 section 22 subsections (1) and (2) as amended, to allow arresting Police Officers to question persons arrested without warrant as to the substance of the offence for which they have arrested the person.

In the context of special statutory authority, the respondents rely upon *Holgate-Mohammed v Duke* [1984] AC 437; [1984] 1 All ER 1054 in justification of their position as to their right to interrogate the arrested person when arrested without warrant. In my opinion that is an example of the special statutory authority referred to by *Clerk and Lindsell*.

Once arrested the Police have every right to ask questions of the person to establish his or her identity and address. This right derives from the reference to "routine moves" by the Privy Council in *Soakai*.

The respondents here argued that by "routine moves" the Privy Council meant to suggest that Police may then move to questions designed to obtain evidence which may lead to conviction or release on the substantive enquiry in which they are engaged.

In my opinion that is an erroneous view of the law. Once the routine moves are completed that is that the name, address etc of the person arrested have (without unnecessary delay) been established it is the unqualified duty of the Police to take or send the person arrested before a Magistrate there to be charged.

Parliament in enacting s 22 of the Police Act recognised that there are times when it is not practicable for Police to find a Magistrate — crime is not always committed with an eye to convenient timing — arrests are not always effected during conventional work hours and so provision is made for Police to resort to alternative measures but only after all reasonable measures have been practically attempted to bring the accused before a Magistrate. But that does not factually arise for determination here.

It was argued by the respondents that to take a person before the Magistrate without first questioning the suspect would run the risk of civil action at the instance of the person arrested if he were able to demonstrate his innocence and had been deprived of that opportunity by not being questioned before being taken before the Magistrate. The respondents rely upon *Wiltshire v Barrett* [1965] 2 All ER 271; [1965] 2 WLR 1195 (CA). The arrest is in my view the determinant of that issue. The evidence sufficient to justify the arrest must exist before the arrest. The taking or sending before the Magistrate is the consequential safeguard which Parliament requires where no warrant exists.

In *Finau v Kingdom of Tonga* (unreported, C110/98, Ward C.J, 12 May 1992) the arrested person was kept in custody for a little over 12 hours. He sued the Police for wrongful arrest and false imprisonment. The Court held that since at the time of arrest it in fact seemed practicable that a Magistrate would be available within 24 hours (as he in fact was) therefore the appellant's detention was lawful within the meaning of the Act.

Wherever a person is arrested pursuant to the provisions of s 21 of the Act the Police must decide whether as a matter of practical possibility he can be brought before a Magistrate within 24 hours. If Police conclude that he may be so brought then he may be held for this period of hours but without being questioned about the substantive offence until the Magistrate is available. As soon as the Magistrate becomes available Police must take or send the suspect before the Magistrate. If Police conclude the Magistrate will not become available within 24 hours then the suspect must be taken before the Police Officer designated in s 22(2) of the Act to be granted or refused bail.

However there may be no questioning by Police of the suspect beyond that necessary to verify his identity before he is taken or sent before the designate Police officer under s 22(2) of the Act.

The following principles emerge from the present Application:

1. The Police Act Cap 35 s 22 does not give Police Officers who decide that there are grounds to arrest without warrant the right to question the suspect arrested concerning the crime for which he has been arrested.
2. The section is a procedural section. Police must in all things act without any unnecessary delay. The section requires Police to take or send the suspect before a Magistrate without any necessary delay.
3. "unnecessary delay" will be judged from the circumstances of each case by the Court not by the Police.
4. The section does not authorise Police to arrest without warrant for the purpose of questioning the suspect nor does the section authorise Police to question the suspect about the crime for which he or she is arrested at any time.
5. The arrest and the obtaining by Police of the personal particulars of the suspect once completed requires Police to take or send the suspect before a Magistrate or designated Police Officer as soon as practicable to be charged.
6. If it is not practicable to take or send the suspect before a Magistrate or designated Police Officer within 24 hours, then Police are obliged to inquire into bail and the requirements of the Bail Act.
7. The volunteering by a suspect of information connected with the crime being investigated during the "routine moves" — that is during the time in which Police are obtaining the suspect's particulars — does not give rise to a right in Police to question him further about his

volunteered information before he is taken or sent by Police before a Magistrate or Police officers designated by s 22.

8. Investigating Police must at all times bear in mind the proviso to s 22 of the Evidence Act Cap 15 which provides:

"22. It shall be no objection to the admissibility in evidence of a confession that it was made —

(a) under a promise of secrecy; or

(b) in consequence of a deception practiced on the accused person for the purposes of obtaining such a confession; or

(c) when the person making it was drunk; or

(d) in answer to questions which the person making the confession need not have answered; or

(e) without any warning having been given to the person making it that that he was not bound to much such a confession and that evidence of it might be given against him.

Provided always that where a confession is alleged to have been made to a Police Officer by the accused person while in custody and in answer to questions put by such Police officer, the Court may in its discretion refuse to admit the evidence of the confession."

The Applicant is now at liberty. Consequential Orders and declarations are now immaterial to the Writ issued.

Police must now judge what they next must do with the investigation. As to the Writ before this Court it is now discharged as is the bail order which brought the Applicant into the custody of this Court.

Subject to the observations made in the foregoing judgment the Applicant is now released.

After hearing Counsel I Order that each party bear its own costs.

R v Vea

Supreme Court, Nuku'alofa
Lewis CJ
Cr 330/98

14, 15, 16, 17, 20 April 1998; 20 April 1998

Criminal law — grievous bodily harm — self-defence

The defendant and the complainant were involved in a motor vehicle collision on 24 March 1997. Instead of exchanging particulars, the complainant, with two other men attacked the defendant Vea. Vea was injured. The complainant and one of the attackers, 'Eteaki, were prosecuted and convicted of offences arising out of the incident. On 28 May 1997 the defendant and the complainant met again on a busy road. The defendant claimed that it was his intention to turn left and escape from the complainant. At the junction while waiting for the traffic to clear with his vehicle ahead of that of the complainant, the defendant said that he saw the complainant coming towards his car carrying an "iron" (translated as a wheel brace). The complainant said that he did not encounter the defendant on the road rather that the defendant saw him in his motor vehicle and challenged him to duel and generally was behaving in a very threatening way to the complainant who eventually signalled him to stop so that he could speak to the defendant about his behaviour. In each case each man claimed to have been wronged at the instance of the other. The complainant used a shop-girl as a shield from the advances of the defendant. She escaped. The defendant then seriously injured the complainant with a bush knife. The defendant was charged with grievous bodily harm.

Held:

1. All the ingredients of grievous bodily harm had been proved.
2. The court took into account the whole of the evidence in arriving at its conclusion that the Crown had proved beyond any reasonable doubt that the defendant had not been acting in self defence
3. The accused was guilty of the offence of grievous bodily harm.

Statutes considered:
Criminal Offences Act Cap 18

Counsel for prosecution : Ms Simiki
Counsel for defendant : Mr Veikoso

Judgment

The defendant stands charged with grievous bodily harm in that he on the 28th May, 1998 assaulted Siosifa Latu thereby occasioning him grievous bodily harm.

The prosecution carry the obligation of proof of each the elements of the charge beyond "any reasonable doubt". The prosecutor must also prove the defendant was not acting in self defence.

The following narrative represents the facts I find them to be beyond any reasonable doubt from the whole of the evidence.

The two principal actors in this case the defendant and the complainant are brutal men ready to use violence rather than reason to settle differences. So much can be said immediately.

This charge has it beginnings in an incident which took place at an area near what is locally known as the flea market, on 24th March, 1997. On that day and that place their vehicles came into collision. Instead of exchanging particulars, the complainant in this case assisted by one 'Eteaki and another mystery man, attacked the defendant Vea. Vea was injured. Since then Latu and 'Eteaki have been prosecuted and convicted of offences arising out in this incident.

There it should have rested. However, neither man appears to have been capable of restraint at that time, and they encountered each other again by (coincidence I am prepared to find) on Wednesday 28th May, 1997 on a busy road intersection and the incident, the subject of the present charge began.

I have no doubt that menacing words were exchanged between the two, and from there with the defendant in the lead and the complainant following they travelled some little distance to a road junction at Vaha'akolo Road, Longolongo on which is situated a Falekoloa.

The defendant claims that it was his intention to turn left and escape from the complainant. At the junction while waiting for the traffic to clear with his vehicle ahead of that of the complainant, the defendant says that he heard the door of the complainant's vehicle slam, and saw the complainant coming towards his car. Vea says that he decided to stand and defend himself fearing damage to himself or damage to property.

The defendant parked his vehicle and alighted. He saw the complainant approaching him carrying an "iron" (translated as a wheel brace). The complainant says that he did not encounter the defendant on the road rather that the defendant saw him in his motor vehicle and challenged him to duel and generally was behaving in a very threatening way to the complainant who eventually signalled him to stop so that he could speak to the defendant about his behaviour.

It is plain that the truth lies somewhere between their versions of events. I formed the opinion that both of them were telling me what-ever suited them whatever was favourable to their own position. In each case each man claimed to have been wronged at the instance of the other.

Since neither man can be relied upon to tell the truth about this matter, it has been necessary to look at other pieces of evidence which confirm in some material way (the claims) of the complainant, since the prosecution carry the burden of proof.

At the Falekoloa the complainant claims that the defendant attacked him with a bush knife. The defendant claims that he was indeed the victim since the complainant attacked him with a wheel brace, narrowly missing the defendant twice and then dropping the brace and being thrown off balance by the defendant's manoeuvring.

The defendant says that in the light of the attack upon him by the complainant with the wheel brace he became convinced of the need to defend himself against the complainant who had already threatened to shoot him and was acting in a way consistent with that threat. The defendant then went to his vehicle and got the bush knife (Exhibit 6). The defendant says that the complainant then retreated inside the Falekoloa. As he entered the defendant says that the complainant took hold of a shop girl and held her in front of him as protection against the attack of the defendant with the knife.

The unfortunate shop girl was thereby forced in between the two while they played out their struggle for supremacy with each other. Her evidence confirms that the complainant used her as a shield.

I'm satisfied that there had been verbal exchanges and silly driving on both sides during the approach to the Falekoloa and I'm satisfied this was a consequence of the chance encounter.

The complainant and the complainant's wife both gave evidence that the defendant had slowly driven past the complainants' 'api earlier that morning and that the defendant had threatened to return with people from Ha'ateiho and beat him and shoot the complainant. I doubt whether that incident ever occurred. The defendant admitted he knew the location of the 'api of the complainant, but gave an account of his movements which clearly puts him elsewhere at 0800 — the time the complainant and his wife gave as the time of him threatening them at the complainant's 'api.

If the defendant did drive past the complainants 'api and threaten him, that piece of evidence would simply add weight to the crown submission that the defendant was angry and aggressive and was not acting in self defence when he later produced the bush knife.

I cannot be satisfied from the whole of the evidence that the defendant did so drive to the 'api and threaten the complainant. If the defendant did so drive there why did the complainant take no action? Why did his wife made no complaint? If the threat was believed by the complainant and his wife to be serious and was a death threat calling for immediate and strong action, then why did they do nothing? Why did they not report the matter to the Police?

I consider the complainant has dressed up what really happened to add weight to his version of events and for some extraordinary reason, his wife has joined him in giving the same evidence perhaps from misplaced loyalty?

I revert to the narrative. I am satisfied that the complainant produced no wheel brace. The shop-girl saw no such thing either before or after the event, what the shop-girl did see, was a man the complainant, very much afraid of what was about to happen to him. A man who was prepared to use her as a shield against the advance of the defendant. I find that the evidence of the shop-girl demonstrates that the defendant was an aggressor.

Somehow the girl was left alone for long enough to make her escape and she did so. The complainant, still retreating, is said to have seized a cardboard box and held it toward the defendant. The defendant would have the court accept that this was an act of aggression on the part of the complainant which justified his use of the bush knife. I do not think so.

What followed was that the defendant wielded the knife deliberately at the complainant and seriously injured him. It is significant that in the main the complainant's injuries caused by the knife are in the region of his back. The position

of the injuries is surely consistent with the crown case that this was not a desperate man forced by circumstances, to defend himself but rather the intentional and unlawful act of the defendant who was acting out of a sense of revenge for the behaviour of the complainant towards him on the 24th May. I so find.

The wounds are depicted in the photographs. I find those wounds were inflicted by the defendant on the complainant at the Falekoloa. The wounds are gross and are consistent with an unjustified assault by the defendant on the complainant. The wounds amount to serious bodily harm. Dr Latu says that they caused serious blood loss. In that sense I find that the wounds are life threatening, the sort of wounds that the Criminal Offences Act characterizes as "grievous".

The Law

The Criminal Offences Act Cap 18 provides "S.106. Every person who wilfully and without justification causes grievous harm to any person in any manner or by any means whatsoever shall be liable to imprisonment etc."

'Grievous Harm' means:

a) any harm endangering life
b) the destruction or permanent disabling on any external or internal organ member or sense
c) any severe wound
d) any grave permanent disfigurement

The wounds in this case I find to be wounds which fall within the provisions of Subsection (2) (a), (c) and (d). The elements of the offence for the prosecution to prove beyond any reasonable doubt are.

- that the accused, on a day and date certain
- the accused
- on a day and date certain
- intentionally and without any lawful excuse
- acted in a way which was the direct and proximate cause of grievous harm (as defined in s 106 (2) of the Act)
- was not acting in self defence that is that he had no lawful justification or excuse for inflicting the harm.

The prosecution must eliminate any reasonable possibility that the defendant did what he did while acting in his own defence. When considering that requirement in this case, the court must look to see whether the prosecution has proved beyond any reasonable doubt all the specific ingredients required of them to prove the offence. I have no doubt that all that the ingredients of the offence of grievous bodily harm have been proved in this case.

Since the defence raised the justification self defence, I turn now to the considerations surrounding the issue of whether from the whole of the evidence it is reasonably possible that the defendant was acting in self defence in using a weapon against Siosifa.

It is both good sense and good law that an accused who injures another with intention of injuring or doing serious bodily harm to that other person is entitled to do

so if the accused believed at the time of his action on reasonable grounds that it was necessary in self defence to do what he did.

However it must be said that an accused who does serious bodily harm to another person can hardly believe on reasonable grounds that it is necessary to do so in order to defend himself unless he genuinely believes that there is an imminent threat which calls for that response.

In assessing whether the belief of the accused is based on reasonable grounds, what the court needs to consider is whether the degree of force use by the accused was proportional to the threat offered.

A threat is unlikely in many instances to call for strong response unless it causes a reasonable fear on the part of the accused of serious bodily harm to himself.

For example a terrified woman defending herself against a rapist in a dark and lonely place at night, might reasonably believe that it is necessary for her to take strong action to defend herself.

These principles have been derived from the general principle of reasonable self defence as simple and practical guidelines to be borne in mind in relation to situations that over years have become fairly common. It's those guidelines which derive from general principle to which I now turn.

First, self defence means defence. It does not mean attacking another person. A person who is truely defending himself does not want to fight. He defends himself to avoid attack and to avoid fighting. If two persons voluntarily decide to fight one against another by common design each being and continuing to be an aggressor towards the other each are guilty of an unlawful assault.

Self defence can never be made a cover for aggression. A person who provokes another to attack him and then uses that attack really as an excuse for aggression towards the other party cannot cry self defence. That is a matter of law and common sense.

Thirdly self defence can never been called in aid to justify retaliation. If the threat of the danger has passed then the occasion for self defence is at an end. If the party originally threatened then sets out to get his own back he is not acting in self defence and his acts are unlawful.

Fourthly self defence (in the sense which I set it out), justifies a threatened person in using such measures as he or she genuinely believes on reasonable grounds to be necessary to make the situation safe. If that warrants or that requires the use of force resulting in serious bodily injury to the aggressor in order to prevent aggression from the other, he or she does not act unlawfully. Common sense suggests however, that to justify such an action the aggression must be immediately and patently about to happen.

Fifthly the possibility of retreating or evading the attack or of seeking aid close at hand must be given consideration by the person attacked. There is no fixed rule about that. It simply a question of whether the accused genuinely believed on reasonable grounds that what he did was necessary in self defence at the time or indeed whether the accused genuinely believe that he was in immediate danger.

Finally (and this is only another aspect to the notion of belief based on reasonable grounds) I must say again that the force used in the face of the threat must not be out of proportion to the necessity of the occasion. If the response of an accused person goes beyond what he believes to be reasonably necessary to defend himself or there are no reasonable grounds for that belief on his part that a response is necessary,

then the occasion will not have been one which calls for self defence. If a person is frightened by a kick in the behind or a single punch to the face it might normally be difficult to envisage how he could genuinely come to believe on reasonable grounds that it's necessary to wound with a knife.

Moreover it must be said that if it is the case that an aggressor has already effectively been subdued or is no longer on the attack there would be no right in law to hand out additional punishment or exhibit further aggression towards that person. If the threat of attack has passed or not immediately in evidence and no threat can reasonably be thought to exist, to use force perhaps by way of punishment to pay off an old score or to prevent possible future but not imminent action by another will be simple aggression. In such a case there won't be a link with necessity of self defence.

Additionally and finally I should point out that if there has been an attack or threat of attack so that self defence is genuinely believed to be necessary common sense recognises that a person can not be expected to weigh with accuracy the exact measure of his necessary defensive action.

If the court is satisfied that the accused was acting in lawful self defence of himself then of course he must be found not guilty of the crime of wounding. The prosecution must prove beyond any reasonable doubt that he was not acting in self defence.

In this case I do not propose to labour the facts. The evidence here shows that on a number of occasions the defendant had an opportunity to leave, to go away, to call aid.

I make it clear that I do not accept that the complainant carried a wheel brace in his hand or at all. I find that the defendant followed the complainant into the Falekoloa with revenge in mind.

There is no legal principle which protects people in Tonga by enabling anyone to shoot first and talk later. I find that the defendant chose to mete out punishment. I have no doubt that the punishment he had in mind for the defendant was connected with a beating the defendant took from the complainant some four or five days before, on 24th May near the flea market, although I am prepared to accept that he thought there was a risk that the complainant may shoot at some time in the future.

I have considered carefully the evidence given by the accused in that context. I have taken into account the whole of the evidence in arriving at the conclusion that Crown has satisfied the Court beyond any reasonable doubt that the defendant was not acting in self defence by doing what he did (the wounds from which are depicted in the photographic exhibit in this Court). I find the accused guilty of the offence of grievous bodily harm.

Bank of Tonga v Fotofili

Supreme Court, Nuku'alofa
Lewis CJ
C274/96 & 336/97

8, 12, and 13 May 1998; 13 May 1998

Practice and procedure — garnishee proceedings against Kingdom
Crown immunity — garnishee proceedings

The judgment debtor was paid a salary by the Kingdom of Tonga as a noble and Parliamentary basic salary. The judgment creditor made an ex parte application which sought to garnishee sums owed, or to be owed, by the Kingdom of Tonga to the judgment debtor. The Kingdom sought to assert its immunity from garnishee proceedings under the Crown Proceedings Act (Cap 13).

Held:

1. Garnishee proceedings cannot be brought in respect of any money due or accruing due, or alleged to be due or accruing due, from the Crown. Garnishee proceedings cannot succeed where the subject property was that of the Crown.
2. The application is refused.

Cases considered:

Hollinshead v Hazleton [1916] 1 AC 428

Statutes considered:

Bankruptcy (Ireland) Amendment Act 1872 (UK)
Civil Law Act Cap 25
Crown Proceedings Act Cap 13

Regulations considered:

Supreme Court Rules 1991

Counsel for judgment creditor : Ms Tapueluelu
Counsel for judgment debtor : No appearance

Judgment

These proceedings arise out of an action brought by the plaintiff Bank against the Hon Kalaniuvalu Fotofili, to recover a substantial sum of money owed by him

under a loan agreement. The Bank obtained judgment in default of defence (case number 336/97) on December 17th, 1997, and an order was issued that the Hon Fotofili deliver up his dwelling house at Fongoloa in satisfaction of the sums owed.

The Judgment Creditor makes exparte application seeking to garnishee sums owed, or to be owed, by the Kingdom of Tonga to the Judgment Debtor. These sums are firstly his salary as a noble, amounting to $6,000.00 per annum, to be given over at the rate of $495.00 per annum per fortnight, and secondly his "Parliamentary basic salary" of $12,375.00 per annum.

The Kingdom seeks to assert its immunity from garnishee proceedings under the Crown Proceedings Act (Cap 13). This decision therefore centres on the interpretation to be given to the section 8 of the Act in dispute. That section provides:

> "S8 No execution or attachment or process in the nature thereof, shall be issued against the property or revenues of the Kingdom of Tonga in any suit, but when Judgment is given against the Kingdom of Tonga, the Registrar of the Supreme Court shall give to the party in whose favour a judgment is given a certificate in the form in the Schedule to this Act" (my emphasis).

The Bank accepts, as I understand its submissions, that garnishee proceedings are caught in this section by virtue of the section's first clause, which I have highlighted above. However, counsel for the Bank argues that the "property" sought in this case is not that of the "Kingdom of Tonga" as envisaged by the statute. Citing a House of Lords decision, namely *Hollinshead v Hazleton* [1916] 1 AC 428, as authority for this proposition.

Having read this decision, I have formed the opinion that it cannot avail the plaintiff in this case. It was a decision under the English Bankruptcy (Ireland) Amendment Act 1872, and as such is not directly applicable here. It is indeed true that in that case, an order was made appropriating part of a Member of Parliament's salary in order to satisfy his creditors. However, the order appears to direct the Member to pay the sums required once he received the salary, and was not attached to his salary before it reached him. Moreover, given the existence in Tonga of the Crown Proceedings Act, I do not think that an aged English statute can be used in this way, via the Civil Law Act Cap 25 or at all.

The Solicitor-General in his submissions argues that s 8 is an unambiguous provision, and one which covers the situation in the instant case. His case is that garnishee proceedings, by definition, seek property from a party owing a debt to the Judgment Debtor. The property sought in this case, therefore, must be that of the Crown, up until the point where the money is transferred from the Kingdom to the Judgment Debtor. Since the Bank seeks to bring proceedings before this has taken place, it brings an action "… against the property or revenues of the Kingdom of Tonga …" which cannot, as a result of s 8 be preferred. Salaries paid by the Crown remain "property" of the Crown pursuant to s 8 until they are paid into the employee's bank account.

Given the existence of the Crown Proceedings Act, the references made in submissions to Halsbury's Laws of England, and from there to the English Rules of the Supreme Court cannot bind this court. I note, however, that the English position mirrors that taken by the Tongan Act, as I have interpreted it. Briefly, it seems clear that garnishee proceedings cannot be brought "… in respect of any money due or

accruing due, or alleged to be due or accruing due, from the Crown" - RSC Order 77,
80 r 16(1).

To conclude, it is clear that s 8 cannot properly be construed in the manner claimed by counsel for the Bank. Garnishee proceedings cannot succeed where the subject property is that of the Crown. Given the circumstances of this case, and for these reasons, the application is refused.

Costs of this application to be those of the Kingdom of Tonga to be fixed or agreed.

Koloamatangi v Mangisi

Land Court, Nuku'alofa
Lewis CJ
L 856/96

11 July 1997; 20 May 1998

Land — lease agreement — no consent of Cabinet — not binding
Land — widow of title holder — registered title holder

The plaintiff was a widow. Her husband, Semisi, was registered as the holder of an allotment and had entered into an agreement in 1986 relating to that allotment. The agreement provided for the defendant to construct a building on the allotment at her expense which would become the property of Semisi and which she would rent for a set amount and for a set period. In 1994 Semisi died and the estate passed to the plaintiff. After a lengthy dispute the plaintiff brought procedings to remove the defendant from the land. The plaintiff claimed that the agreement did not bind her. The defendant claimed that the agreement did bind the plaintiff in law or alternatively in equity.

Held:

1. The agreement could not be regarded as conferring a legal lease upon the defendant as the formality requirements of section 56 of the Land Act (Cap 32) had not been complied with.
2. The plaintiff was and, at all material times, had been the registered holder of the allotment.
3. The defendant had no equitable right to the allotment. Even had an equitable right existed, there were grave doubts that such a right could ever pass with the transfer of title as provided for by ss 58 and 80 of the Land Act.
4. The defendant was ordered to vacate the land and buildings.
5. The costs of proceedings are to be those of the plaintiff to be taxed or agreed.

Cases considered:

Makoni v Koloamatangi [1990] Tonga LR 50 (PC)

Statutes considered:

Evidence Act Cap 15
Land Act Cap 132

Counsel for plaintiff : Mr Tu'utafaiva
Counsel for defendant : Mr Niu

Judgment

This case arises out of an unfortunate series of dealings with a piece of land, in which some highly irregular transactions seem to have taken place. The difficulties in which the parties find themselves today can be traced back to these ill-advised dealings.

As a preliminary matter, it was raised in submissions and at trial that the second and third defendants to this action have vacated the land in question. As a result, the plaintiff elected not to pursue her claim against them, and the trial consequently proceeded on this basis.

Counsel for both the plaintiff and the defendant helpfully assembled a list of agreed facts; Accordingly, I find:

- The plaintiff is the widow of Semisi Koloamatangi (hereafter known as "Semisi"), whom she married on July 18th, 1964.
- On January 3rd, 1956, Semisi was registered as the holder of allotment "'Ulupoko", situated on Taufa'ahau Road, Nuku'alofa.
- The first (and now only) defendant, 'Olive Mangisi, also known as 'Olive Filipe, is a business woman trading as "Olive Investments" in Nuku'alofa.
- On about June 13th, 1986, Semisi and the first defendant entered into an agreement relating to 'Ulupoko. In essence, the agreement was that:
  - Semisi would permit the defendant to construct a building on 'Ulupoko.
  - The building was to be constructed at her sole expense.
  - The building would become the property of Semisi.
  - The defendant would rent the building from Semisi at the rate of T$200 per month.
  - The defendant would rent the building for a period of 20 years beginning June 13th, 1986.

On January 8th, 1994, Semisi Koloamatangi died. The estate passed to 'Ungatea as his widow. Difficulties began between the plaintiff and first defendant. After a lengthy dispute, Mrs Koloamatangi has brought this action, seeking to remove the first defendant from the land. She claims, inter alia, that the agreement between her husband and the defendant is not binding upon her, since the agreement was illegal and was also one to which she was not party. This is contested by the defendant, who claims that the agreement does bind the plaintiff, in law or alternatively in equity.

To begin with, counsel for the defendant makes reference to the case of *Makoni v Koloamatangi* [1990] Tonga LR 50, a decision of the Privy Council. This case concerned the same allotment, indeed the same agreement which is in dispute in this to rely on that part of the judgment which reads:

> "… if estoppel was available to anyone it was Linda Makoni as against Koloamatangi, but in our opinion she cannot call it in aid for as the trial judge found she was aware of 'Olive Filipe's prior agreement but pressed on regardless. It comes down to a matter of priorities and on that basis 'Olive Filipe's prior agreement must prevail."

"Prevail over what?" is the question that is raised by this passage. This case concerned an agreement entered into by the late Semisi Koloamatangi after that entered into with the first defendant in the present case — the Privy Council decided that the earlier decision in time must prevail. This has no bearing on the case to be decided in this Court — this cannot be taken as authority for the proposition that Mrs Mangisi/Filipe's agreement with the late Semisi can "prevail" over anything else.

Turning now to the issue of the alleged illegality of the agreement; the law governing the present matter is from s56 of the Land Act (Cap 132) which provides:

> "56 The Registered holder of a town or tax allotment may grant a lease over the whole or part of his town or tax allotment, provided that-
>
> i) the consent of Cabinet has been obtained in the manner provided by this Act
>
> ii) the holder is not a widow holding the town or tax allotment of her deceased husband …"

It was clear from the evidence given before the Court that this formality requirement was not complied with by the parties to this agreement — the Cabinet never knew of the arrangements made in respect of 'Ulupoko. This was not contested by the defendant in giving evidence. The agreement of June 13th, 1986 cannot therefore be regarded as conferring a legal lease upon the defendant.

As to the plaintiff's entitlement to the allotment in question — the parties are agreed that Mrs Koloamatangi became entitled to a life interest in the land held by her late husband through the mechanism of s 80 of the Land Act. Her title was duly registered. I find, as a result, that Mrs Koloamatangi is and has been at all material time the registered Holder of the allotment 'Ulupoko.

I now turn to the defence of estoppel raised by the defendant in her submissions. The defence is to be found in s 103 of the Evidence Act, but which-ever formulation is used, the essence of the defence is the same. Estoppel requires a representation to be made to the person seeking to raise the defence, which was relied upon by that person, who then acted on this representation to his or her detriment. The defendant claims two bases on which such a defence can be made out.

Firstly, it is said that the plaintiff was a party to the original negotiations between the defendant and the late Semisi, and therefore is estopped from denying the defendant's right to the land. The defendant has proved no such assertions, as she must, on the balance of probabilities. The plaintiff's signature appears on the document, solely as a witness to the agreement between her husband and the defendant, and not in any other capacity. The agreement makes no mention of the plaintiff being a party to it.

Secondly, the alleged acceptance by the plaintiff of rent money from the defendant is argued to be grounds for the defence. In the abstract, this might well be so, but once again, on the evidence before me, this cannot be sustained. The defendant claims that in 1994, 1995 and 1996, the plaintiff accepted rent money from her. I do not find this to be so. In 1994, the rent was paid while the late Semisi was alive, albeit gravely ill. In 1995, I find that the cheque was returned by the plaintiff's bank, acting on the plaintiff's instructions. In 1996, the rent money was accepted by the plaintiff, apparently acting on her lawyer's advice. Despite this, I do not believe that there could have been any reasonable belief on the defendant's part that at any time, the plaintiff was representing that she would agree to a continuance of the original agreement — in short, no representation was made.

A point of general importance is raised in submissions. It concerns the extent to which interests in land are passed when title to that land passes under s80 and s58 of the Land Act. In this case, it is argued by the plaintiff that under these sections, only legal rights subsisting in relation to the land survive the operation of the sections. Therefore, the plaintiff claims, since the agreement does not constitute a legal lease, she cannot be bound by it. On the other hand, the defendant submits that all rights concerned with the land pass with the title, and therefore that the plaintiff must respect her interest in the allotment.

Those sections provide:

> s80: "On the death of the lawful male holder of any tax or town allotment his widow shall be entitled to a life estate in such allotment which shall terminate on her re-marriage or upon proof in legal proceedings (as provided by s81 of her having committed fornication or adultery …"
>
> s58: "If the registered holder of a town allotment who has granted a lease in terms of this Part of the Act dies before the expiry of the period of the lease, then -
>
> i) Where there is a widow entitled to a life estate, she shall for such remaining period of the lease as she is entitled to the life estate
>
> a) be bound by the terms of the lease
>
> b) receive the rental due as provided by this Part of the Act;
>
> c) not material" (my emphasis)

Taken together, the only reasonable inference open is that these sections demonstrated a much narrower approach taken to the question of the transfer of interests in land than the defendant contends. Both sections are clear and unambiguous, and neither envisages the life estate taken by a widow to include any third party interests other than those of a legal lessee. However, since I have already found that the defendant enjoys neither a legal or equitable interest in the land in question, this last submission has no direct bearing on the outcome of this case.

I find that the plaintiff succeeds in her action. The first defendant has no legal right to the land in question. The defendant entered into an agreement with the plaintiff's husband which had no legal effect by reason of their failure to comply with s 56 of the Land Act. It follows that the first defendant has no legal right to the land now that it is held by the plaintiff. It is for the first defendant to show that the defence

of estoppel, as provided for by s 103 of the Evidence Act, applies here, and this she has failed to do. Consequently, I find the first defendant is possessed of no equitable right to the allotment. I might add that even were there an equitable right to be found, I have grave doubts that such a right could ever pass with the transfer of title as provided for by s58 and s80 of the Land Act.

IT IS ORDERED THAT:

There be judgment for the plaintiff as follows:

1. It is declared the purported agreement between the plaintiff and the defendant is void by reason of illegality.
2. The purported agreement between the defendant and the plaintiff's now deceased husband does not bind the plaintiff.
3. The structure erected on the land in question is the property of the plaintiff.
4. The 1st defendants yield possession to the plaintiff of the subject land and building.
5. That the first defendant forthwith vacate the land and buildings the subject of these proceedings.
6. The costs of these proceedings be those of the plaintiff to be taxed or agreed.

Egan v Morris Hedstrom Tonga Ltd

Supreme Court, Nuku'alofa
Lewis CJ
C 504/97

18, 19 May 1998; 22 May 1998

Negligence — statutory duty of care — supermarket — no evidence of failure

The plaintiff went to shop at the defendant company's supermarket. As she went to leave she fell over and hurt her ankle. She sued in negligence for damages for personal injury. The plaintiff claimed that the defendant negligently permitted a greasy surface to be present in the public area of the supermarket and that caused her to fall and be injured. There was no evidence of any substance which could cause a greasy surface. At various times there were spills suffered in the supermarket. The store employed a person to mop up spillages as a precaution.

Held:

1. It was a vast leap in the process of reasoning to suggest that because there were spillages in the store on a regular basis the plaintiff's fall could be said to probably be a consequence of her encountering a slippery spot caused by a spillage.
2. It was the duty of the defendant company to ensure that the floors were kept clean and free from spillages so that accidents did not occur. The evidence was that the defendant employed a person to clean up spillages.
3. The doctrine of *res ipsa loquitur* may be resorted to by the Court though it had neither been pleaded nor made the subject of submissions. The claim was not based upon the doctrine of *res ipsa loquitur* but in negligence and must therefore be determined that way. That approach excluded the doctrine of *res ipsa loquitur*.
4. There could be no probable inference drawn in the circumstances of the paucity of evidence surrounding the cause of the fall that the defendant failed in its statutory duty of care to the plaintiff.
5. The plaintiff's claim was dismissed.

NOTE: The plaintiff's appeal to the Court of Appeal was dismissed. The Court of Appeal judgment appears at page 99.

Cases considered:

Bennett v Chemical Construction (GB) Ltd [1971] 1 WLR 1571; [1971] 3 All ER 822

Reaney v Thomas Lyddon and Sons Limited [1957] Ir Rep 1,3
Roles v Nathan [1963] 1 WLR 1117; [1963] 2 All ER 908 (CA)
Simons v Winslade [1938] 3 All ER 774 (CA)
Turner v Arding and Hobbs Ltd [1949] 2 All ER 911
Ward v Tesco Stores [1976] 1 All ER 219; [1976] 1 WLR 810 (CA)

Statutes considered:
Civil Law Act Cap 25
Occupiers Liability Act 1957 (UK)
Occupiers Liability Act 1984 (UK)

Counsel for plaintiff : Mr Appleby
Counsel for defendant : Ms Foliaki

Judgment

The plaintiff is a self employed business woman and artist of Nuku'alofa. The defendant company is a grocery retailer and owner of the Morris Hedstrom Supermarket in Nuku'alofa Tonga. The plaintiff sues in negligence for damages for personal injury which she sustained in a fall at the defendant's Nuku'alofa supermarket.

The plaintiff carries the onus of proof of all material facts on the balance of probabilities. The following narrative represents the facts as I find them to be having heard the witnesses and having considered the documentary evidence tendered.

On the 28th May, 1996 the plaintiff went to shop at the defendant's supermarket. She completed her shopping and made her way to the front of the store to pay for her purchases at a 'check-out' counter — one of a number of counters and situated at the front of the store. The plaintiff says that her payment was made at the 1st check-out counter. The Plan P1 sets out the layout of the store at the material time.

The witness 'Elitisi Fanguna remembers the occasion. I accept 'Elitisi when she says that she was stationed at the counter no. 2 and that the first counter was not open at the material time. That being the case the reference by the plaintiff to 'going to the first counter' is consistent with the evidence of 'Elitisi. 'Elitisi was the first checkout operator. I so find.

Thereafter the plaintiff went to telephone a taxi company. The call was made at her request in the office of the witness Lili Maleini Moala, a shop supervisor. Following the call the plaintiff made her way back to the front of the shop. It is during the plaintiff's passage to the front of the store the evidence of the plaintiff and the evidence of 'Elitisi parts company.

The Plaintiff marks her route from the office of Lili Maleini to the front of the shop on the plan D1. The route curves around an ice chest marked on the plan "ice". The plaintiff marks with an 'x' the point at which she fell. 'Elitisi marks the point as 'x1' by an entrance turnstile and alongside a depot of shopping trolleys. Although the plaintiff says that the point of her fall indicated by 'Elitisi is 'not that far away from where I said - it was', 'x1' is indeed some way away. The two women are not speaking of the same place at all.

The plaintiff's account of the fall I noted with care. She said "I slipped on something greasy and fell forward … I put my arm out straight in front and hit my foot on one of the shelves I bruised my left foot and my ankle."

'Elitisi says "after she left Maleini's room I saw her as she returned. She was exiting the supermarket she was trying to push the turnstile out. So she turned to go back in where the trolleys are. She (then) was slowly falling down to the floor. As I saw her falling she tried with one hand to hold the trolley that's when I ran to her. I asked her what happened she did not speak to me … I saw no water there. The eggs were there and cracked but did not flow. I noticed no liquid which may have caused her to slip."

Dr Helga Schaeffer Macdonald is the Doctor called to the scene. As to where she found the plaintiff she says in her affidavit evidence (admitted by consent), "I found the plaintiff on the left of the store premises, sitting on the floor to the left of the check out counters near where the shopping trolleys are stored, and near one of the freezers, I believe the ice cream freezer."

It was not suggested to the plaintiff in cross examination that she had 'slowly fallen down to the floor'. The witness Dr Taniela Palu gave evidence that the "plaintiff's fall may be cause by a faint cannot be the case" since the plaintiff's injuries are "inconsistent with a faint … the injuries described and observed by Dr Helga Schaeffer Macdonald are consistent with a forceful fall and I believe that the injuries were caused by the impact of the plaintiff hitting the floor quite hard."

I conclude that the plaintiff fell as she described it by slipping on something greasy. The nature and degree of the injuries sustained by Mrs Egan persuade me that she indeed slipped and that the fall was sudden and the impact forceful. But where was it that she slipped?

I accept that it was in the vicinity of the trolleys and on the balance of probabilities I am satisfied that it was in the vicinity of point 'x' marked by the plaintiff on D1 rather than at point "x1" described by 'Elitisi. I find 'Elitisi is mistaken in her recollection of the events when she says that the fall was near the turnstile and the trolleys as she marked the place. Nor do I accept 'Elitisi's account of the plaintiff slowly falling.

I am satisfied that no witness was able to give an account of any substance which probably caused the fall. Perhaps it was the slippery floor itself. I cannot say. There is no evidence about it.

In applying the law appropriate to the facts of the present case I refer to the Civil Law Act Cap 25 sections 3 & 4 and I refer to the common law and the statutes of general application of England for the law appropriate to this case.

A shop owner owes customers a duty to take reasonable care to ensure they are reasonably safe when on his premises. This applies not only to dangers of which he has knowledge but also of those of which he ought to know. This may include dangers created by the actions of third parties. A shopper's knowledge of a particular danger does not of itself mean that the shop owner's liability is at an end. A shopper is entitled to assume that a shop is safe for him or her to enter. If injured a shopper may recover for personal injuries, damage to his property and/or for future financial losses.

English Law in the area of issue in this case is controlled by the provisions of the Occupiers Liability Act 1957 and 1984. The duty owed to a lawful visitor is "… to take reasonable care to ensure visitors are reasonably safe when on the premises".

Common law principles are to be used to determine what is reasonable in the circumstance: s 2(2) and (3) Occupier's Liability Act.

- It is the visitor who must be safe and not necessarily the premises *Roles v Nathan* [1963] 1 WLR 1117; [1963] 2 All ER 908 (CA).
- An invitee is entitled to assume that the premises are fit for him to enter *Reaney v Thomas Lyddon and Sons Limited* [1957] Ir Rep 1,3.
- At common law the occupier as the person best able to control and supervise activities upon the land may be held liable for the actions of third parties. This will be limited to situations where risk created by third parties is of a type which could reasonably be foreseen. *Simons v Winslade* [1938] 3 All ER 774 (CA).

The plaintiff does not plead the doctrine of res ipsa loquitur as being the basis of her claim against the defendant company. She is not compelled by law to do so. The doctrine may be resorted to by the Court though it has neither been pleaded nor made the subject of submissions — *Bennett v Chemical Construction (GB) Ltd* [1971] 1 WLR 1571; [1971] 3 All ER 822.

As Davies LJ said at page 825 of the Judgment,

> "… in my view it is not necessary for that doctrine … to be pleaded. If the accident is proved to have happened in such a way that prima facie it could not have happened without negligence on the part of the Defendants, then it is for the Defendants to explain and show how the accident could have happened without negligence."

The requirements of the doctrine are that:

- There is reasonable evidence of the negligence of the defendant
- The plaintiff must prove the 'thing' to be under the control of the defendant
- The accident be of a kind in which in the ordinary course of events does not happen without negligence.

It is for the Court from the whole of the evidence to determine whether the plaintiff has proved the allegation of negligence she makes. Here, the claim is not based upon the doctrine of res ipsa loquitur but in negligence and must therefore be determined that way. That approach excludes the doctrine of res ipsa loquitur.

What is the plaintiff's allegation? It is that she slipped on 'something greasy.' She must demonstrate that the 'something greasy' was something which the defendant company ought to have reasonably foreseen to have been likely to cause an invitee to be injured. To prove the negligence of the defendant she must also demonstrate that it was not her own misadventure which caused her fall — a twisted ankle — an awkward placement of her foot for example.

The plaintiff's case is that the defendant negligently permitted a greasy surface to be present in the public area of the supermarket thereby causing her to fall and be injured.

The evidence about the substance which caused the greasy surface can be fairly summarised as being: that it was the cause of the fall of the plaintiff, that what it was has never been identified, that where it was has never been identified.

The witnesses called by the defendant, Lili Maleini Moala and 'Elitisi Fanguna both say they looked for the presence of the substance and found nothing. In cross examination the plaintiff herself said [tscpt 3.5] that she did not know what caused her to fall save that it was a 'slippery spot' and that she saw neither water nor oil spilled on the floor.

Steven Aldridge the Operations Manager of the defendant company (whom I accept as an honest witness), gave evidence that he had no knowledge of any spillage which caused Mrs Egan to fall, that there is regularly a spillage of some kind in the store and that as a precaution the store employs a person to mop up spillages.

The plaintiff in her submission through counsel acknowledges that there is no evidence of the 'actual condition of the floor at the time the plaintiff fell' … but all the employees of the supermarket admitted that at various times there were spills suffered in the supermarket from produce falling off shelves and that 'on occasions the freezers leaked water.'

It is a vast leap in the process of reasoning to suggest that because there are spillages in the store on a regular basis the fall of the plaintiff can be said to probably be a consequence of her encountering a slippery spot caused by a spillage.

It was the duty of the defendant company to ensure that the floors were kept clean and free from spillages so that accidents did not occur. The evidence is that the defendant employed a person to clean up spillages. The present case is factually distinguishable from *Ward v Tesco Stores* [1976] 1 All ER 219; [1976] 1 WLR 810 (CA) and from the decision in *Turner v Arding and Hobbs Ltd* [1949] 2 All ER 911 the yoghurt in *Ward* or the vegetable matter in *Turner*. While the principles in those cases bind this Court they are factually distinguishable.

The evidence of the cause of the incident of the fall of the plaintiff is so weak as to render any finding that the defendant is probably responsible for the plaintiff's injuries impossible. There can be no probable inference drawn in the circumstances of the paucity of evidence surrounding the cause of the fall that the defendant failed in its statutory duty of care to the plaintiff.

The plaintiff's claim is dismissed. I refrain from making any assessment of damages.

Manuofetoa v Fonua

Supreme Court, Nuku'alofa
Finnigan J
C 1208/96

1, 2 June 1998; 5 June 1998

Contract — sale of goods — unpaid purchase price
Sale of goods — bona fide purchaser for value without knowledge

On 11 July 1996, the plaintiffs sold goods to the first defendant for TOP23,620.90. The first defendant paid TOP10,000 and was to pay the balance within a short time. On that same day the first defendant sold the goods to the second defendants for TOP14,268.40. When the balance was not paid, the male plaintiff pressed the first defendant. At the end of July or beginning of August the first defendant took the male plaintiff to the second defendants to ask them to pay the balance. The plaintiff then lodged a complaint against the first defendant with the police. Thereafter he tried, with a degree of success, to have the unsold balance of the goods retained by the second defendants until the matter could be determined in court. There was said to be an agreement by the plaintiffs together with the police and one of the second defendants that the second defendants will keep under safe custody the goods as per an inventory and agreement. The plaintiffs seek the return of the goods or payment of TOP12,620.90 from the second defendants. The claim against the first defendant was not pursued at this hearing. The second defendants claim in the position of bona fide purchaser for value without knowledge of the relationship between the first defendant and the plaintiff. Issues to resolve were: was there any contractual basis on which the second defendants may be found liable to the plaintiffs, and if so, what was that contract, and what was their liability?

Held:

1. The plaintiffs passed title in the goods to the first defendant and thereafter had no security in the goods with which to enforce payment of the balance. They no longer owned the goods, they had only their contract to be paid the balance of their price.
2. The evidence was that there was a valid contract for sale, a price was paid, the goods were delivered and the second defendants had good title. There was no legal principle by which title could be claimed from the second defendants by the plaintiffs, so that the goods (or what remained of them) might be returned to the plaintiffs.

3. There was no legal principle whereby the second defendants, who had good title under a contract with the first defendant, could be required by the court to pay the first defendant's debts.
4. Judgment was entered for the second defendant.

Cases considered:
Phillips v Brooks Ltd [1919] 2 KB 243; [1918-19] All ER Rep 246
Lewis v Averay [1972] 1 QB 198; [1971] 3 All ER 907 (CA)

Rules considered:
Supreme Court Rules 1991

Counsel for plaintiff : Mr Fakahua
Counsel for second defendant : Mr 'Etika

Judgment

Introduction

This is a hearing of the plaintiffs' claim against the second defendants. They seek judgment for the return of goods which the plaintiffs claim are (i) their property and (ii) worth $12,620.90 in value, and (iii) wrongfully in the possession of the second defendants. Alternatively they seek judgment for payment of $12,620.90. They also seek damages, which are not specified.

Their claim against the first defendant was not pursued at this hearing. At first I thought this was because judgment had been obtained against the first defendant by default on 21 January 1997, but that was an error. On that day judgment was originally entered against one of the second defendants. That judgment was later set aside, on 20 February 1997. The situation of the first defendant is that he has till now taken no part in this action. The plaintiffs have not proceeded against him. He has not participated in any of the interlocutory matters, nor in the setting down of the case for hearing. There is no record of any steps taken by him, or against him. He has not been served with the proceedings. The statement of claim, dated 8 November 1996, at paragraph 9, pleads as a fact that the first defendant was at that date serving a sentence in prison. On 11 November 1996 the plaintiff personally delivered the writ of summons and statement of claim to a warder at Hu'atolitoli prison. Service by the plaintiff himself, and service upon some person other than the party being sued, are both contrary to the provisions of O11, RR 1 and 2 of the Supreme Court Rules.

The first defendant was present for the hearing, and after both parties had closed their cases as to evidence, counsel for the plaintiff sought leave to call him in order to cross-examine him. I declined that application, on the ground that he had no status in which to give evidence-in-chief and, as a witness, was no longer available to the parties because they had closed their cases. At the close of the hearing, I advised the parties accordingly, the first defendant being by then not present. The plaintiffs are free to pursue the claim against the first defendant or not, as they choose, the first step being service of the proceedings upon him.

The Cause of Action against the Second Defendants

It is not easy to find in the statement of claim a clear statement of what the plaintiffs allege is their cause of action against the second defendants. There is a pleading that there was a contract with the first defendant and delivery to him on credit of certain goods, for which part payment was subsequently made. After that there was an agreement with the first defendant for payment of the balance, on which the first defendant is said to have defaulted. There follows (at paragraph 8) a pleading without explanation that the first defendant took one of the plaintiffs to the second defendants, and that that plaintiff told the second defendants to return his goods until they were fully paid for, and that the second defendants agreed to attend to it. At paragraph 9 the second defendants are alleged to have custody of all the goods and to have started selling them. There is said (at paragraph 12) to be an agreement by the plaintiffs together with the police and one of the second defendants that the second defendants will keep under safe custody the goods as per an inventory and agreement. Those are the plaintiffs' pleadings.

The second defendants filed a statement of defence. They have put the plaintiffs to proof of all their main allegations, and they have claimed (at paragraphs 11 & 14) that the male second defendant bought the goods from the first defendant as a bona fide purchaser for value, without knowledge of the relationship or the arrangements between the first defendant and the plaintiff.

In their pleadings, the parties identified the goods sold, and bought, respectively. There is no dispute that what the second defendants bought from the first defendant was more or less what the plaintiff had sold to the first defendant. The record of what the plaintiff sold is the copies of the dockets issued by the plaintiff at the time of delivery to the first defendant. The contents of the dockets were reproduced in the statement of claim, and copies of the dockets were produced in evidence. The record of what the second defendants bought was a carbon copy of a docket, the contents of which were set out in the statement of defence. The docket (said in evidence to be also a receipt for the money paid by the second defendants) was produced in evidence. There are some minor discrepancies in the itemised list of goods, which may safely be ignored. There is a major discrepancy in the values of the items and thus in their total stated value. The plaintiffs claim a credit sale to the first defendant for TOP23,620.90 on 11 July 1996, and the second defendants claim to have purchased the goods the same day from the first defendant for TOP14,268.40.

The Issues and the Facts

Most of the essential facts of this case occurred on 11 July 1996. On that day contracts were concluded between the first defendant and each of the other parties. There was a certain amount of evidence about events after the contracts were concluded, evidence of attempts by the plaintiff to recover possession from the second defendants of some of the goods in question, including the intervention of the police at the urging of the male plaintiff and interlocutory orders made on his application in this court. There was a conflict of evidence about whether the female second defendant acknowledged in November 1996 that the goods in her possession were the property of the plaintiffs, and about how well the second defendants speak and/or understand English. There was a lot of hearsay evidence, particularly from the

police officers called by the plaintiffs, which was not challenged by counsel for the second defendants. These other matters seem to me to contribute little to the issues that the court is required to decide, so, with one exception, I put them aside. The exception is the evidence of the police officer Lolu Ma'u, whose evidence of a formal statement made to him by the male plaintiff while lodging a complaint helps supply some detail to the plaintiffs' evidence.

From the evidence of the male plaintiff and the male second defendant, what occurred is clear. Neither knew anything about the dealings of the first defendant with the other. Neither learned from the first defendant, until later, about the existence of the other. Neither knew of the agreement that the first defendant had with the other. Neither had direct knowledge of the facts stated in evidence by the other. They are strangers to each other. The plaintiffs imported the goods and, on 11 July 1996, sold them to the first defendant for an agreed price of TOP23,620.90. The first defendant paid TOP10,000 that day and took delivery of the goods. He was to pay the balance, ie TOP13,620.90, within a short time. The male plaintiff's understanding when he gave the goods to the first defendant was that he was selling them to the first defendant: that the first defendant would quickly sell out the goods because he was working together with some Chinese people, and that he would therefore by selling the goods quickly obtain and pay the due balance. When that balance was not paid, the male plaintiff pressed the first defendant. On 14 July the first defendant paid a further TOP1,000. Then, in the last week of July or the first week of August, the first defendant took the male plaintiff to the second defendants to ask them to pay the balance. They asked how much was owed to the male plaintiff, and he told them. He asked to be shown the goods they had, and he was shown some of them, in a shipping container. On that day, as the first defendant had failed to pay any more, the male plaintiff lodged a complaint against the first defendant with the police. He did this, he said, because his dealings were with the first defendant, the money was owed to him by the first defendant, and he knew nothing of the relations between the first defendant and the second defendants. Thereafter he tried, with a degree of success, to have the unsold balance of the goods retained by the second defendants until the matter could be determined in court.

The male plaintiff said that the first defendant had showed him the carbon copy docket which was held by the second defendants and is said to have been signed by the first defendant. This docket stated the value of the goods, upon sale to the second defendants, to be TOP14,268.40. He said that the first defendant gave him an explanation for that, which I shall set out here, because the explanation was put to the male second defendant for comment. He said that the first defendant told him that the docket was a delivery docket, not a receipt, and that the value stated was actually half the price that the second defendants had paid him. According to the first defendant's explanation, the actual total which he had agreed with the second defendants was made up of the TOP23,620.90 that he owed the plaintiffs plus his profit on the sale, which he called his commission. The male plaintiff said that he had no arrangement to pay the first defendant a commission, he had sold the goods to him. He said that the first defendant stated to him the reason why the docket stated only half the true payment due; this was so that the first defendant would be charged less tax.

The male second defendant said in evidence that he was approached on 11 July by the first defendant as a businessman, and the first defendant showed him the goods which he wished to sell. They discussed a sale and purchase, and he asked the first

defendant for a good price. After discussion they settled on a price. The agreed price was TOP14,268.40 for the whole container, and after the goods had been delivered he paid that whole price to the first defendant in one sum. The first defendant then prepared and signed the docket, which was a receipt. It is dated 11 July 1996. The male second defendant said that this was a deal between himself and the first defendant, he had nothing to do with the plaintiff. He said he was told by the first defendant that the goods were from Australia, that he was the person in charge of them, and that they were his to sell. He said that he paid no commission, only the agreed price in a proper business deal, and the goods belonged to him. He said the money he paid was the full price, there was no balance owing.

Decision of the Claim

Counsel for the plaintiff Mr Fakahua and counsel for the second defendants Mr 'Etika, made good submissions. The plaintiffs seem to rely on purported agreement by one or both second defendants that the goods in their possession belong to the plaintiff. However, if they did agree to that proposition, which I strongly doubt, they could not by agreeing alter the true legal position. It is clear that there is no claim of contract arising from the pleaded agreements said to have been made by the second defendants about returning and/or keeping safe the goods in their possession. The evidence for such a claim does not exist. No point was taken about a cause of action in the statement of claim, and the claim was argued on the merits. From the evidence I heard and from the submissions and from the statements of claim and defence, I find that the parties do join issue on the plaintiffs' claim, and that the issues I have to resolve are the following:

(a) Is there any contractual basis on which the second defendants may be found liable to the plaintiffs?
(b) If so, what is that contract, and what is their liability?

For the plaintiffs, Mr Fakahua relied on the evidence of the male plaintiff, which, if accepted, shows a balance due, in the sale to the first defendant, of TOP 12,620.90. He relied then upon a document that I have heretofore not mentioned, a statement in Tongan, prepared by a police officer, and signed by the officer, the male plaintiff and the female second defendant. This document states as a fact that the goods at that date (7 November 1996) in the possession of the second defendants are the property of the plaintiffs. However, that is a question of law, depending on the facts of their earlier dealings. They had no earlier dealings, except for the July visit by the male plaintiff and no contract regarding ownership of the goods was formed between them on that occasion. Whether the goods are the property of the plaintiffs must depend on whether the plaintiffs passed title in them to the first defendant on 11 July 1996. If they did pass title, then they can no longer have title, unless somehow title has come back to them from the first defendant.

Did they pass title to the first defendant? Clearly that was their intention when they dealt with the first defendant. The agreed object of delivering them to the first defendant was that he would pay a price for them, ie that they would become his. In particular, it was agreed that immediately, before delivery, he would pay about half the agreed price and that then he would move to sell them quickly, so that from the proceeds of sale he would quickly pay the balance due. That was the deal which the plaintiffs chose and agreed. They passed title in the goods to the first defendant and

thereafter had no security in the goods with which to enforce payment of the balance. They no longer owned the goods, they had only their contract to be paid the balance of their price.

Was there some principle of law, or something in their contract which allowed them to take back title from the first defendant if he should not pay the balance of the price? No such principle was suggested to me, nor do I know of one. They made no agreement that the goods would become the plaintiffs' property again if the first defendant failed to pay the balance of the price.

For the second defendants, Mr 'Etika relied upon *Phillips v Brooks Ltd* [1919] 2 KB 243; [1918-19] All ER Rep 246, and upon *Lewis v Averay* [1972] 1 QB 198; [1971] 3 All ER 907 (CA). These cases illustrate the principle of law that a fraudulent purchaser may misrepresent his identity to a seller and may obtain title by that deceit under a voidable contract and may, while that contract remains on foot, pass good title to a bona fide purchaser for value. That is not the situation in the present case, but they are of persuasive value because the second defendants plead that they are such purchasers. However, they do not illustrate the principle governing the case. This is because the first defendant did not misrepresent himself to the plaintiffs in order to induce them to sell the goods to him. There was no fraud at all. There is no claim in the pleadings or in the evidence that at the time of his agreement to purchase, the first defendant intended to defraud the plaintiffs in any way. The plaintiffs claim in their pleadings, only that upon taking title to the goods he failed to complete the agreed payment. No legal basis was advanced at the hearing for a judgment that requires the first defendant to return the goods to the plaintiffs.

What of the second defendants? Can they be required to return the goods to the plaintiffs? It is clear that the first defendant had good title. The evidence of the male second defendant is that he made a contract with the first defendant to pass that title to him, upon payment of an agreed price. His evidence is that the agreed price was paid, and that he took possession, and that he began to sell the goods to other people. I do not accept that the first defendant and the male second defendant agreed on a total price of TOP14,268.40, clearly a sale at that price would have been a crushing loss to the first defendant. Perhaps there is more to be paid yet, perhaps more has been paid. There are matters to be cleared up here, but not in the present proceedings. For the present case the evidence is there was a valid contract for sale, a price was paid, the goods were delivered and the second defendants have good title. I know of no legal principle, and none was suggested to me, by which title may now be claimed from the second defendants by the plaintiffs, so that the goods (or what remains of them) may be returned to the plaintiffs.

I turn now to the plaintiffs' claim against the second defendants for TOP12,620.90. This sum is the balance claimed as due from the first defendant, under the contract which he made with the plaintiffs to take the goods and pay for them TOP23,620.90. I know of no legal principle, and none has been suggested to me, whereby the second defendants, who have good title under a contract with the first defendant, can be required by the court to pay the first defendant's debt.

Anything that I have said about the relations between the plaintiffs and the first defendant is not a finding of the court for the purposes of any court action between them. All of that must be subject to what is proved by the evidence brought by those parties if the claim between them should come to court. In the present case, for the reasons which I have stated, I must find against the plaintiffs, and enter judgment for

the second defendants. Costs in their favour are to be agreed between counsel, otherwise taxed.

R v Lavakei'aho

Supreme Court, Nuku'alofa
Finnigan J
Cr 823/97 and 879/97

16 June 1998; 17 June 1998

Practice and procedure — one charge replaced with another — same evidence

The two accused were charged initially upon summons in the magistrates' court and faced three charges. The third charge in each case was a charge alleging an offence against s 105 of the Customs and Excise Act (Cap 67). Each accused elected the procedure of committal to the Supreme Court without witnesses under s 42 of the Magistrates' Courts Act. Each was duly served with the statements of evidence and was committed to the Supreme Court for trial. Upon arraignment, each faced an indictment containing three counts as before, but the third count in the indictment was no longer a charge of an offence against s 105 of the Customs and Excise Act, but rather a charge of an offence against s 210. The Crown undertook to prove the charge with the same evidence. The accused brought a pre-trial motion that the third count in the indictment of each should be struck out.

Held:

1. In laying the third count against each accused, the Crown had acted as it is empowered to do, and had not caused a breach of any statutory or constitutional right of either accused.
2. As for miscarriage of justice, there may have been cause to consider that if the Crown had intended to introduce new evidence, but to proceed as the Crown had done, using the same evidence, was not a miscarriage of justice.
3. The third count was directed to remain in the indictments and the motion to strike out was declined.

Statutes considered:

Constitution of Tonga Cap 2
Customs and Excise Act Cap 67
Interpretation Act Cap 1
Magistrates' Courts Act Cap 11
Supreme Court Act Cap 10

Judgment

The question here is whether the Crown may upon arraignment after a preliminary inquiry lay a charge different from that upon which the accused was committed for trial.

By consent, the two accused are being tried together. The indictments in respect of each were presented on 14 November 1997, and on that date each accused pleaded Not Guilty. There is a pre-trial motion that the third count in the indictment of each should be struck out.

Each accused was charged initially upon summons in the Magistrates' Court, and faced three charges. The third charge in each case was a charge alleging an offence against s 105 of the Customs and Excise Act, Cap 67. Each accused elected the procedure of committal to the Supreme Court without witnesses under s 42 of the Magistrates' Courts Act, Cap 11. Each was duly served with the statements of evidence and was committed to the Supreme Court for trial. Upon arraignment, each faced an indictment containing three counts as before, but the third count in the indictment was no longer a charge of an offence against s 105 of Cap 67, but rather a charge of an offence against s 210.

Counsel for each defendant have both submitted that the third count should be struck out, as something new. They argue that the new charge has not been through the statutory process of preliminary inquiry. They suggest that the Crown must, on the new charge, adduce new evidence, of which they do not have notice. They submit that the accused are entitled to be tried upon the charges for which they were summoned, and upon which they exercised their statutory election to be committed for trial without testing the evidence. They submit that the accused have been deprived of their statutory entitlement to a prescribed procedure, which they say is unfair and prejudicial, and deprived of a constitutional right to be tried only on the charges which were initially presented. For the statutory entitlement, they rely upon the detailed provisions in Part II and Part III of Cap 11, and for the constitutional right they rely upon Clauses 11 and 13 of the Constitution, Cap 2. All of their submissions have been of high quality, thought provoking and detailed. In response, I have heard submissions of equal measure on behalf of the Crown.

It is simpler to deal first with the claim of breach of a constitutional right. Tied in with this is a claim that the Tongan versions of the relevant statutory provisions should prevail over the English versions, pursuant to s 21 of The Interpretation Act Cap 1. This argument is directed to the effect that, there being a single Tongan expression for both "indictment" and "summons" in the English, the procedure for indictable offences should be held to commence upon the issue of a summons. At the hearing I called this an argument of last resort, and expressed doubt that s 21 applies in the present circumstances. Upon reading the Tongan version of cl 13 of the constitution in any event, I have found the two concepts are expressed differently in Tongan, just as they are in English, so I reject that argument.

As for the constitutional right, I read cl 11 of the constitution to provide that where a person is to be tried, that person must first have a written indictment, except for summary offences where a summons is to be issued, and the indictment must clearly state the offence. Whoever may be indicted has a right to elect trial by jury. For the two present accused, the trial has not yet commenced but the indictment has been prepared. Before the indictment was prepared, there was a preliminary inquiry

upon summonses issued by a Magistrate, as Cap 11 provides. Now, as it happens, the third charge for which the third summons in each case was issued was not an indictable offence; s 105 of Cap 67 prescribes an offence which was not subject to preliminary inquiry, because it is not one on which the accused could be tried only in the Supreme Court. It was not an offence which, pursuant to s 25 of Cap 11, the Magistrate should have committed the accused for trial. The accused at that time, in my opinion, could have taken the point and required a hearing of the third charge in the lower court. They did not, and the Magistrate wrongly offered them under s 12 of Cap 11 an election of trial by jury, and committed them for trial by jury. That charge was replaced by the present third count, and this count, by reason of the alleged value of the goods, carries a potential penalty outside the jurisdiction of the magistrate, and is thus triable by indictment. In my opinion, this is not contrary to the constitutional rights of the accused, because those rights under cl 11 and cl 13 entitle them first, to a clear statement of the offence and the grounds before trial, which they have, and second, to a fair trial on that offence and those grounds, which is not yet in question. In my opinion, the constitutional rights of the accused are not in the present situation under threat.

The question at issue then is whether what has occurred is a breach of statutory rights. The accused now face a charge which was not a charge considered by the Magistrate in his decision to commit them for trial. After they were committed for trial, they were not aware that they would be tried on this charge. They were committed for trial on another charge. They were aware of the evidence to be relied on for that charge, and chose not to test it in the preliminary inquiry. Rather they chose their right to remain silent. Now, in their submission, they are at risk of facing new evidence that they have not seen or heard, and which they could have chosen to test had there been a preliminary inquiry into the new charge. In their submission, they have been deprived of the statutory procedure which in their submission must precede the presentation of their indictments, and that is a miscarriage of justice.

The Crown, through senior crown counsel, advises the court and the accused that no new evidence is contemplated. Rather, the situation is said to have arisen from consideration of the evidence that was presented in the lower court, and which will be presented at the trial. In the opinion of crown counsel preparing the indictment, an indictment for an offence under s 105 is not possible, and the evidence supports a charge of an offence under s 210. Therefore he has laid that charge. It is not the Crown's intention to preserve the earlier charge for later hearing in the Magistrates' Court. That charge has been replaced with an indictable charge that contains some of the elements of the earlier charge and more besides, all of which the Crown undertakes to prove on the same evidence of which the accused are already aware.

I found attractive the arguments presented by counsel for the accused, but on consideration of the constitution Cap 2, Parts II and III of Cap 11 and the Supreme Court Act Cap 10, I am unable to accept their invitation to hold that the legislation provides one mandatory path, commenced by summons in the Magistrates' Court, for all indictable charges without exception. Section 8 of Cap 11 is a jurisdiction section, and what s 8(c) provides is only a jurisdiction to conduct preliminary inquiries. How that jurisdiction is to be exercised is then provided (mostly) at Part III, ss 32 to 50. Section 32 does not provide that every charge for an indictable offence must be commenced by summons in the Magistrates' Court as counsel submitted, but rather it empowers a Magistrate by saying that he may issue a summons for the purpose of a

preliminary inquiry into an indictable charge. Once that has occurred, the succeeding sections provide many things which must thereupon happen. These mandatory steps are the prescribed way of carrying out a preliminary inquiry, but a preliminary inquiry into indictable offences is not itself mandatory. Neither is it mandatory that the Crown, in presenting an indictment, must reproduce the charges that were laid by summons in the Magistrates' Court. What is mandatory for the Crown is laid down by cl 11 and cl 13 of the constitution; the Crown may not place any person on trial for an indictable offence until it has given the person a written indictment which clearly states the offence and the grounds, and the charges stated in the indictments which it presents must be the charges upon which the accused is tried.

The words "*may* issue a summons" in s 32 (Part III of Cap 11) are a sharp contrast to the words "*shall* make out a summons" in s 14 and the word "*shall*" used twice in s 16. The summary procedure to be followed under those sections in Part II of Cap 11 is clearly mandatory. The summary procedure for a preliminary inquiry is not.

The only provision I have found which might tend to support a mandatory procedure of preliminary inquiry is s 12 of the Supreme Court Act Cap 10, which makes jury trial in the Supreme Court subject to s 12 of the Magistrates' Court Act Cap 11. That latter section is a mandatory requirement requiring a Magistrate to give an accused the jury election before committing him for trial. I am unable to accept this solitary provision as establishing that all indictable charges must pass before a Magistrate, particularly since s 5 of Cap 10 gives the Supreme Court the power to issue warrants, writs and summonses, and the power to exercise all the powers of the Magistrates' Court.

None of this is to say that there is a free choice to decide whether or not there will be a preliminary inquiry into charges of indictable offences. There is no free choice. Clearly the provisions in Cap 11 are enacted to provide the normal way of processing charges for indictable offences. The normal way must normally be followed. There must be good reason to depart from it.

The other submissions placed before me by all three parties are worthy submissions, but they do not add to or alter the conclusions I have set out. For that reason only I stop here without further reference to them. After considering them all, I am satisfied that in laying the third count against each accused, the Crown has acted as it is empowered to do, and has not caused a breach of any statutory or constitutional right of either accused. As for miscarriage of justice, there may have been cause to consider that if the Crown had intended to introduce new evidence, but to proceed as the Crown has done, using the same evidence, is not a miscarriage of justice. I direct accordingly that the third count remain in the indictments, and I decline counsels' motion to strike out.

Vaka'uta v Wong

Supreme Court, Nuku'alofa
Finnigan J
C 208/96

9 June 1998; 6 July 1998

Practice and procedure — interim order — no grounds for lapse
Creditors' remedies — warrant of distress — assignment of chose in action

The claimant was registered owner and vendor of a vehicle under an agreement for sale and for payment by instalments — the full price was $8,600 + insurance of $387. At the date of hearing the purchaser (judgment debtor) still owed $3,837. The car was seized pursuant to a warrant of distress. The issue was between the claimant, who claimed to be the owner of the car, and the defendants, who were the judgment creditors and sought sale of the car in order to recover the $1,784 due to them in costs and court costs. The claim had already been denied once, in an order issued on 19 November 1997, for non-appearance of the claimant and for the absence of affidavit evidence with original documents. Costs for the judgment creditors and for the bailiff were added to the judgment sum and the balance was to be paid to the plaintiff/judgment debtor. The claimant had not been served notice of the 19 November hearing. Therefore, as an interim measure, the order had been set aside pending the hearing.

Held:

1. There was a common intention that both parties would have an interest in the vehicle and it would be inequitable to permit the legal owner to retain the entire benefit of the property for himself. The vehicle had both a legal owner and an equitable owner.
2. The judgment debtor was vested with a chose in action, a right to sue the claimant for continued possession of the vehicle so long as the instalments continued. A chose in action is a right which can be assigned to another. It is a remedy available to judgment creditors in satisfaction of the debt due to them. For this reason, the bailiff is entitled to seize the vehicle to satisfy the judgment debtor's debt, and there were no grounds to set aside permanently the order made on 19 November 1997.
3. The claimant's claim was declined.

Cases considered:
'Alatini v LDS Church & Muti [1990] Tonga LR 1
Torkington v Magee [1902] 2 KB 427; [1900-3] All ER Rep 991

Statutes considered:
Contracts Act (Rep)
Traffic Act Cap 156

Rules considered:
Supreme Court Rules (UK)

Counsel for claimant	:	Mrs Taufaeteau
Counsel for respondent	:	Mr 'Etika
Counsel for bailiff	:	Mr Malolo

Judgment

A claim has been made upon the bailiff by Tevita Misa Fifita, for return to him of a motor car which he has claimed is his property. The car has been seized pursuant to a Warrant of Distress. The Court had issued that warrant in September 1997 for enforcement of a judgment obtained by the defendants herein on 20 May 1997, which was for costs only. Those costs had been on 24 July 1997 taxed at $1768, to which was added $16 as costs on the writ, a total of $1784. The bailiff accordingly on 19 September 1997 had seized the car in question, a Toyota Carina C5204, which had till then been in the possession of the plaintiff.

The plaintiff, now judgment debtor, takes no part in these proceedings. The issue is between the claimant, who claims to be the owner of the car, and the defendants, who are now the judgment creditors and seek sale of the car in order to recover the $1784 due to them in costs and court costs. The claim has already been denied once, in an order issued on 19 November 1997, for non-appearance of the claimant and for the absence of affidavit evidence with original documents. Costs for the judgment creditors and for the bailiff were added to the judgment sum and any balance was to be paid to the plaintiff/judgment debtor.

The claimant has sought, not by application but by letter, to have that order set aside. He claimed that he had not been served with notice of the 19 November hearing. The court file shows this claim to be correct. The order of 19 November 1997 was subsequently set aside, on 24 April 1998, as an interim measure until a rehearing could take place and all counsel given the opportunity to be heard. After several attempts by the Court to arrange a hearing, counsel for all parties finally have had the opportunity to be heard in the present hearing.

The hearing took place on 9 June 1998. A witness for the claimant gave evidence, and counsel for both parties made submissions. Counsel for the bailiff abides the outcome, but seeks to preserve the bailiff's right to costs on seizing and detaining the vehicle. All parties treated the rehearing as a hearing of the merits of the claimant's claim, but the judgment creditors rely primarily on the point that the application is not properly before the Court because of the absence of an affidavit. However, counsel on his behalf at the present hearing has adduced the evidence in

support of the claim from a witness on oath, who produced documents relating to title and was cross-examined by counsel for the judgment creditors.

The factual essence of the claim, as now revealed in evidence, is that the claimant is owner and vendor of the vehicle under an agreement for sale and for payment by instalments. On the registration certificate he is the registered owner. Both the agreement and the certificate are dated 12 February 1997. Both documents were put before me in evidence. The agreement is written in Tongan and was not explained to me except that the witness read clause 10 in Tongan, as the basis for a submission that the claimant had under the contract a right to repossession; but about the conditions for that right I did not hear any evidence. The agreement is signed by the purchaser alone, and by no other person, either as vendor or as witness. It states that the claimant sold the vehicle to the plaintiff/judgment debtor in February 1997, for a full price of $8600 plus insurance of $387. A deposit of $3500 was paid, leaving a balance due upon delivery of $5487. On the date of seizure, 19 September 1997, there was outstanding the sum of $4237. The claimant's witness stated that by that time the payments were in arrears and the claimant contacted the plaintiff/judgment debtor for repossession under the contract, but the bailiff had already taken possession. The plaintiff/judgment debtor subsequently on 22 October 1997 made a further payment, being a pig, for which a deduction of $400 was made from the amount due.

For the judgment creditor, Mr 'Etika submits that the claim should fail for non-compliance with the procedure at O 17 r 3, [English Supreme Court Rules], in particular that no affidavit was filed and served. He refers me to *Halsbury Laws of England*, 4th ed, Vol 25, para 1026, which in his submission was the basis of the dismissal of the claim on 19 November 1997. The passages in *Halsbury* make it clear that when there is a summons for interpleader relief an affidavit is required, and that a statutory form for the affidavit has been created, and that the courts regard interpleader summons as urgent matters. The purpose is obvious, to hasten the processing of an interpleader claim so that disposal of the goods, and thus execution of the judgment, is not unnecessarily delayed by the claim. I pause to note that photocopies of the registration certificate of the vehicle C5204 seem to have found their way to the file, but not until the present hearing has the claimant given evidence to make good his initial claim to the bailiff that he is the owner of the vehicle. It has not been until now that the judgment creditors, who are otherwise entitled to sale of the vehicle and payment of what they are owed by the judgment debtor, have been given the facts of the claim. They dispute that claim on its merits. They have suffered a delay of nine months, without knowing whether the claim holding them out of their money has merit or not.

Second, Mr 'Etika submits that in law the judgment debtor is the owner of the vehicle, having purchased it from the claimant and being now merely his debtor. In his submission the agreement has no legal effect and is invalid because it was signed by the purchaser alone, not by the vendor nor by any witnesses. The Tongan Contracts Act having been repealed at all material times, he relies upon English law. He submits that with the payments made being more than half the purchase price, the purchaser has more than a half share in the vehicle, and that the two parties are joint owners. He submits that the judgment debtor has an interest valued at the total of his payments, against which the judgment creditor is claiming, and so is the claimant; but the claimant is entitled only to the value of the unpaid instalments, which represent

his interest in the vehicle, namely the $3837 which the claimant's records show as the outstanding balance still due after the credit for the pig.

Mr 'Etika relies upon *'Alatini v LDS Church & Muti* [1990] Tonga LR 1 as authority for the proposition that the certificate of registration is not conclusive evidence of single ownership by the judgment debtor, and may be displaced by contrary evidence, as in the present case, of joint ownership. He submits that the public auction ordered by the Court should go ahead, with the proceeds being available to the judgment debtor and to the claimant pro rata their interests in the vehicle. The judgment debtor's share is available in his submission to his clients the judgment creditors and any balance available from that belongs to the original purchaser, the judgment debtor. The pro rata share of the claimant one assumes on this submission goes to the claimant to reduce or satisfy the claimant's claim as unpaid vendor for the balance owed by the judgment debtor.

On behalf of the bailiff, Mr Malolo submits that the claimant's case is weakened, if not actually groundless, without the required affidavit. He points out that there is no allegation against the bailiff and seeks costs, first as ordered on 19 November 1997 and second from that date till this judgment.

On behalf of the claimant, Mrs Taufaeteau submits that the absence of an affidavit by the claimant is overcome by the *viva voce* evidence adduced at this hearing. She relies upon the registration certificate which the witness produced, and upon the Traffic Act Cap 156, particularly ss 5, 6(4) and 10. She submits that registration is prima facie evidence of ownership, pursuant to s 5, and that since the certificate shows registration of the claimant as owner on the day of the sale, 12 February 1997, there is clear evidence that the parties intended the claimant to be owner and intended ownership to remain with the claimant until the price was paid. Section 10 requires the owner, upon disposal of the vehicle, to notify change of ownership within 7 days, and this has not occurred.

Decision

It is necessary to remember that the primary purpose of the hearing has been to determine whether the interim order made on 24 April 1998, setting aside the 19 November order pending a rehearing, should lapse.

There is no dispute between the parties that for interpleader relief English practice applies. So far as the file reveals, the claim now in dispute was made by the claimant in writing by letter to the bailiff dated 22 September 1997. The claim was that the vehicle seized under the warrant belongs to the claimant. Upon that letter the Solicitor-General issued a Notice of Claim to the goods, and required any disputing party to advise within 7 days, failing which the bailiff might issue an interpleader summons. The judgment creditors gave notice that they disputed the claimant's claim and that they required further particulars of it. The dispute thereafter was set down for hearing and no interpleader summons was issued. In the absence of the claimant, his claim was determined on 19 November, and dismissed. However, he had not been advised of the hearing because of an error in the Court, and he had not given farther particulars or any affidavit of the grounds for his claim. It is clear that the claimant's grounds for a rehearing are that he did not have notice of the hearing. For that reason it could be said that he had not had the chance to remedy his failure to supply an affidavit and/or explain his failure. He has now had that opportunity and taken full advantage of it. He has revealed fully the details of his claim to be the owner of the

car, and the merits of that claim have been challenged, and he has given an explanation for his failure to supply those details before the hearing of 19 November 1997. In my view he is entitled to a rehearing, and I make that order accordingly.

For the same reasons, in conducting the rehearing, I hold that the absence of an affidavit by him is not fatal to his claim. I turn now to decide the merits. The contractual relationship of contracting parties is determined by the terms of their agreement. There is an agreement in the present case, and I have been referred to no provision or principle of law that in Tonga the agreement for sale and purchase of a motor car must be in writing. As it happens there is a document, and although it is not executed as a contract, it nonetheless sets out clearly in writing some at least of the terms for sale and purchase upon which the vendor (the claimant) and the purchaser (the judgment debtor) agreed. I cannot say for certain whether it contains all the terms, but the registration certificate is evidence of a term about ownership, whether or not that term is contained within the agreement. There is no reason to suppose that the agreement contains a contrary term. The registration certificate, being of the same date as the agreement document, shows a common intention that along with the sale to the judgment debtor there would be registration of the claimant as owner, even though the judgment debtor paid simultaneously over one third of the value of the vehicle.

It seems that on that day, 12 February 1997, the judgment debtor took actual delivery of the vehicle. As in *'Alatini* (above), at p 3, (i) there was a common intention that both parties would have an interest in the vehicle and (ii) it would be inequitable to permit the legal owner to retain the entire benefit of the property for himself. Indeed, although the registered ownership vested that day in the claimant, the vehicle and the right to use it were taken by the judgment debtor. He had a benefit too, the right to use the car and the right to become the legal owner in due course. The judgment debtor had already paid a substantial amount of money for that. He had an equitable interest as part owner. So far as I am advised, there is nothing in the agreement about when legal ownership vests in the purchaser. The presumption must be that it will vest when the car is fully paid for. In the meantime, the vehicle has a legal owner and an equitable owner. So the evidence does displace the presumption that the registration certificate tells the full story. The claimant is not the only owner.

Where does that leave the judgment debtor? This situation appears not to have been considered before by the Court. No authorities have been cited to me other than *'Alatini* (above), and I do not think this is a joint ownership situation like that of the husband and wife in that case, who had each acquired ownership rights when each paid part of the purchase price. They both had bought the vehicle. In my opinion, the judgment debtor's position in the present case is that he has what the law calls a "chose in action". A chose in action is a personal property right which can be enforced only by legal action, and not by taking possession: *Torkington v Magee* [1902] 2 KB 427 at 430; [1900-3] All ER Rep 991 at 994 per Channell J. The term includes rights to sue that arise from contracts, and rights to sue that arise from breaches of contract and rights to sue that are given in other ways, such as by cheques and shares and deeds. A chose in action must be carefully distinguished from a future chose in action, ie, a right that has not yet come into being but is only expected. A chose in action may be assigned to another so that the other may sue on it, but a future chose in action may not be assigned, one can do no more than agree to assign it if it should come into being.

Now, what is the judgment debtor's position? He has a contract with the claimant, under which he paid part of the purchase price and on the same day took possession of the car. At that moment he had enforceable rights against the claimant, which could be enforced only by action, and no longer by taking possession. For example, had the claimant then proceeded to purport to sell the car to another, the judgment debtor was entitled to come to court and have that stopped. In that sense, it was already his car. Since that time, he paid more and reduced the balance which the claimant is entitled to receive, and in return, his claim to ownership of the car strengthened. So long as he kept his side of the agreement and paid the instalments on time and in full, he would have become entitled to the legal ownership, or to damages, for which he could sue. It happens (I am told, but expressly do not find) that he has not kept up his payments, and that the claimant wished to exercise a right of repossession claimed under clause 10 of the written terms, only to find that the judgment creditors and the bailiff had got in first. Since that time the judgment debtor reduced the balance due by another $400. The Court does not know the effect of the subsequent payment. It cannot be said that the claimant has actually exercised a repossession right, nor is it established in the present proceedings that he has that right. There is no evidence about why the judgment debtor made no further payments after the $400 in October 1997, but it is reasonable to suppose that this is linked to the seizure of the car and its subsequent detention while the claimant tried to make good his claim. The vehicle has now been detained and unused for nine months. I am bound to treat the agreement as if it was being complied with and was in full effect at the time of seizure by the bailiff.

This means that the judgment debtor at that time was, and at the present time still is, vested with a chose in action, a right to sue the claimant for continued possession of the vehicle so long as the instalments continued. This chose in action is a right which he is entitled at law to assign to another, ie, his interest in the vehicle is something he can sell. This interest is available to the judgment creditors in satisfaction of the debt due to them. For this reason, which rests on the merits of the claimant's claim, I hold that the bailiff is entitled to seize the vehicle to satisfy the judgment debtor's debt, and I see no grounds to set aside permanently the order made on 19 November 1997.

The claimant of course is free to bid for the vehicle at the public auction, and thus buy out the judgment debtor. In the present proceedings I decline his claim, for the reason set out above.

The interim setting-aside order of 24 April 1998 now lapses. The order of the Court dated 19 November 1997 is now reinstated, and to it is added an order for costs in this hearing in favour of the judgment creditors, and a similar order in favour of the bailiff, these to be taxed and deducted from the sale proceeds.

Egan v Morris Hedstrom Tonga Ltd

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 18/98

27 July 1998; 8 August 1998

Res ipsa loquitur — requirements not met — respondent not responsible

The appellant, the plaintiff in the Supreme Court, brought proceedings against the respondent for damages for personal injuries claimed to have been suffered on 28 May 1996, when she was grocery shopping at the respondent's supermarket in Nuku'alofa. She claimed special damages of $7,962.30 and general damages of $20,000.00. In a judgment delivered on 22 May 1998 the Chief Justice dismissed the appellant's claim. On 27 May 1998 a formal judgment was entered dismissing the appellant's claim and awarding costs in favour of the respondent. From that judgment the appellant appealed.

Held:

1. The true principle of *res ipsa loquitur* is not that the plaintiff must show any positive control in the defendant, but rather that outside interference was unlikely. The appellant was not able to show that outside interference in the events leading to the accident was unlikely.
2. The second requirement of res ipsa loquitur was that the accident must be such as could not in the ordinary course of things have happened without negligence. It was well within common experience and knowledge for a person to slip on the floor of the supermarket without negligence on the part of the occupier.
3. The Chief Justice was correct (however different reasoning) in finding that the doctrine of *res ipsa loquitur* did not apply.
4. The Court of Appeal agreed with the conclusion of the Chief Justice that, in the absence of any evidence of what, if anything, caused the appellant to slip, it was not possible to make a finding that the respondent was responsible for the appellant's injuries.
5. The appeal was dismissed with costs.

Cases considered:

Scott v London & St Katherine Docks Co (1865) 3 H & C 596
Turner v Arding and Hobbs Ltd [1949] 2 All ER 911

Walsh v Holst & Co Ltd [1958] 1 WLR 800; [1958] 3 All ER 33 (CA)
Ward v Tesco Stores [1976] 1 All ER 219; [1976] 1 WLR 810 (CA)

Statutes considered:
Occupiers Liability Act 1957 (UK)

Counsel for appellant : Mr Appleby
Counsel for respondent : Mr Foliaki

Judgment

The appellant, the plaintiff in the Supreme Court, brought proceedings against the respondent for damages for personal injuries claimed to have been suffered on 28 May 1996, when she was grocery shopping at the respondent's supermarket in Nuku'alofa. She claimed special damages of $7,962.30 and general damages of $20,000.00. In a judgment delivered on 22 May 1998 the Chief Justice dismissed the appellant's claim. On 27 May 1998 a formal judgment was entered dismissing the appellant's claim and awarding costs in favour of the respondent. From that judgment the appellant has appealed.

The factual background

The Chief Justice found that on 28 May 1996 the appellant, having completed her shopping at the respondent's supermarket, made her way to the front of the supermarket to pay for her purchases at a checkout counter. A shop supervisor, at the request of the appellant, called a taxi. Following the call, the appellant made her way to the front of the shop. It was while she was doing so that she fell. The Chief Justice did not accept the evidence of 'Elitisi Fanguna, the operator at the checkout counter through which the appellant had passed. Her evidence was to the effect that the appellant had fainted, the witness saying that she saw the appellant slowly falling down to the floor. The Chief Justice said the appellant fell as she described by slipping on something greasy. The nature and degree of the injuries sustained by the appellant persuaded the Chief Justice that she slipped, and that the fall was sudden, and the impact forceful. He found that the fall occurred in the vicinity of some trolleys at a point marked by the appellant on a plan produced in evidence.

As a result of the fall, the appellant suffered a broken right arm, bruising of the right arm, a grazed right knee, and a sprain of the left fore foot and ankle.

The reasons for judgment

The Chief Justice accepted that the shop owner owes customers a duty to take reasonable care to ensure that they are reasonably safe when on his premises. It applies not only to dangers of which he has knowledge but also to those of which he ought to know. He also referred to the statutory duty owed to a lawful visitor under the Occupiers Liability Act 1957 (UK) (check this reference) to take reasonable care to ensure that visitors are reasonably safe when on the premises.

The Chief Justice considered whether the doctrine res ipsa loquitur applied in the circumstances of this case. He accepted that the plaintiff was entitled to rely on the doctrine despite it not having been pleaded. But he concluded that the plaintiff

had based her claim in negligence, and that the approach adopted excluded the doctrine.

He then considered the allegations of negligence relied on by the plaintiff. He held that the substance that caused the greasy surface had never been identified, and that where it was had also never been identified. He referred to the evidence of the respondent's operations manager that he had no knowledge of any spillage which caused the appellant to fall, that there was regularly a spillage of some kind in the store, and that as a precaution the store employed a person to mop up spillages. The appellant's counsel had acknowledged in her submissions that there was no evidence of the actual condition of the floor at the time the appellant fell.

The Chief Justice expressed his conclusion in this way:

> "The evidence of the cause of the incident of the fall of the plaintiff is so weak as to render any finding that the defendant is probably responsible for the plaintiff's injuries impossible. There can be no probable inference drawn in the circumstances of the paucity of evidence surrounding the cause of the fall that the defendant failed in its statutory duty of care to the plaintiff".

The application of the doctrine of *res ipsa loquitur*

The principal submission advanced by Mr Appleby in support of the appeal was that the Chief Justice erred in not applying the doctrine in the circumstances of this case, and that the reason the Chief Justice gave for not applying the doctrine was an erroneous view of the law.

The classic statement of the doctrine is that of Sir William Erle CJ, delivering the judgment of the Court of Exchequer Chamber in the leading case of *Scott v London & St Katherine Docks Co* (1865) 3 H & C 596 at 601:

> "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

The first requirement is that the "thing" causing the accident must be under the control of the defendant. If the events leading up to the accident were, or might well have been, under the control of others besides the defendant, then the mere happening of the accident is insufficient evidence against the defendant. The true principle appears to be not that the plaintiff must show any positive control in the defendant, but rather that outside interference is unlikely: *Walsh v Holst & Co Ltd* [1958] 1 WLR 800; [1958] 3 All ER 33 (CA), Winfield & Jolowicz on Tort 12th Edition 110.

We do not consider that the appellant has fulfilled this requirement. The "thing" causing the accident is unknown. It may have been, as the appellant said in her evidence, something greasy, although later in cross examination she accepted that she did not know what caused her to fall, and that after the accident she did not see anything on the floor. The Chief Justice was unable to make any positive finding. He said that he was satisfied "… that no witness was able to give an account of any

substance which probably caused the fall. Perhaps it was the slippery floor itself. I cannot say. There is no evidence about it." When the accident happened in a part of the supermarket to which the public had unrestricted access, it is not possible to say that whatever caused the appellant to slip, assuming it was something that caused her to slip, not simply a slip on a normal floor, was under the control of the respondent. It could just as well have been dropped on to the floor moments before by another customer. In these circumstances the appellant is not able to show that outside interference in the events leading to the accident is unlikely.

This lack of any evidence about what, if anything, caused the appellant to slip distinguishes the case from the two supermarket cases relied on by the appellant. In *Turner v Arding and Hobbs Ltd* [1949] 2 All ER 911 the plaintiff slipped on a piece of vegetable matter. The court held that the piece of vegetable matter was an unusual danger which would not be expected and ought not to be present, and the burden was on the defendants either to explain how it came to be on the floor or to adduce evidence to show that reasonable steps had been taken to avoid the accident. In *Ward v Tesco Stores* [1976] 1 All ER 219; [1976] 1 WLR 810 (CA) it was some yoghurt on the floor that caused the plaintiff to slip. The Court of Appeal held, by a majority, that since the probabilities were that, by the time of the accident, the spillage had been on the floor long enough for it to have been cleared up, the judge was entitled to conclude that the accident had occurred because the defendant had failed to take reasonable care. No such conclusion can be reached in the present case. There is no evidence of an unusual danger. There is no evidence of something being on the floor that should have been cleared up. There is simply no evidence.

The second requirement is that the accident must be such as could not in the ordinary course of things have happened without negligence. Mr Appleby submitted that a person slipping comes within this requirement. We do not accept that submission. It is well within common experience and knowledge for a person to slip on the floor of a supermarket without negligence on the part of the occupier. A person can slip for a number of reasons, such as the loss of balance, or something dropped on the floor by another customer a short time before, which can occur without any negligence on the part of the occupier. The mere fact that a person slips, for no reason that can be identified, is not in itself evidence that the occupier of the premises where the slip has occurred has been negligent.

For these reasons, which differ somewhat from the reasons of the Chief Justice, we conclude that he was correct to find that the doctrine of *res ipsa loquitur* does not apply in the circumstances of this case.

Evidence of negligence

Mr Appleby submitted that, quite apart from the doctrine, the Chief Justice was wrong not to find negligence on the part of the respondent. He invited the court to infer that there was negligence from the circumstances of the accident. He relied on the finding that the appellant slipped on something greasy, submitting that it was negligent for the respondent to allow something greasy to be on the floor where the public had access. But, even if this were so, we do not consider that the Chief Justice made such a finding. The comment that she slipped on something greasy appears to be a statement of her explanation of falling that she had given in her evidence, not a finding of fact. This is clear from the observation he makes shortly afterwards, to which we have already referred, that he cannot say what it was that caused her to fall.

We agree with the conclusion of the Chief Justice set out above that, in the absence of any evidence of what, if anything, caused the appellant to slip, it is not possible to
170 make a finding that the respondent was responsible for the appellant's injuries.

Conclusion

For the reasons we have expressed, the appeal is dismissed with costs.

Manu v R

Court of Appeal, Nuku'alofa
Lewis CJ, Burchett, Tomplins JJ
CA 438/97 & 1355/97

27 July 1998; 7 August 1998

Practice and procedure — appeal after guilty plea — dismissed
Criminal procedure — appeal after guilty plea — dismissed

The two appellants were charged with two offences under the Customs and Excise Act. Part way through a defended hearing, both appellants changed their pleas to guilty to both charges. They were each fined $11,088.00 on one charge and $50,760.00 on the other. Orders for forfeiture were made. The appellants appealed against conviction and sentence.

Held:

1. An appeal against conviction following a plea of guilty can only succeed in very exceptional circumstances.
2. Section 310 leaves the court with no discretion concerning the penalty to be imposed where a person has been found guilty of an offence under that section: the court had no option but to impose a penalty of triple the value of the goods or $200.00 whichever is greater, and to forfeit the goods.
3. The appeals against conviction by both appellants in respect of both charges were dismissed. The appeals against the sentences imposed were also dismissed.

Cases considered:

R v Forde [1923] 2 KB 400; [1923] All ER Rep 477
R v Ripia [1985] 1 NZLR 122 (CA)
R v Stretch [1982] 1 NZLR 225 (CA)
R v Turner [1970] 2 QB 321; [1970] 2 All ER 281
R v Turrall [1968] NZLR 312

Statutes considered:

Customs and Excise Act Cap 67
Magistrates' Courts Act Cap 11
Supreme Court Act Cap 10

Counsel for first and second appellants : Mr Veikoso
Counsel for respondent : Mr Cauchi

Judgment

Both appellants were charged with two offences under the Customs and Excise Act (Cap 67) ("the Act"). Part way through a defended hearing, both appellants changed their pleas to guilty to both charges. They were each fined $11,088.00 on one charge and $50,760.00 on the other. Orders for forfeiture were made. Both appellants have appealed against conviction and sentence.

The offences charged

Both appellants were charged with "Evading customs law contrary to section 210(1)(e) of the Customs and Excise Act (Cap 67)".

In respect of this indictment, the particulars of the offence were that each appellant:

> "… on or about 9 April 1996 at Ma'ufanga was knowingly concerned in a fraudulent evasion relating to removal of uncustomed goods namely, 12 cartons of Winfield cigarettes and 2 cartons of Port Royal tobacco."

Both appellants were also charged with "Knowingly acquiring possession of goods with intent to defraud the revenue of duties thereon, contrary to section 210(d) of the Customs and Excise Act (Cap 67)".

Particulars of the offence in this indictment against the appellant Manu were that:

> "… on or about March 1996 you knowingly were concerned with dealing with 14 boxes of spirit bottles with intent to defraud the revenue of duties from those boxes when you sold those boxes to Branco Sugar of Ma'ufanga"

Particulars of the offence in this indictment against the appellant Fainga'a were that:

> "you did on or about March 1996 knowingly acquire into your possession 14 boxes of spirit bottles from the Leiola Duty Free Shop in Ma'ufanga with intent to defraud the revenue of duties thereon".

The application to reverse the pleas of guilty

These and other charges against both appellants and a co-accused came before Finnigan J in the Supreme Court on 3 March 1998. Part way through the hearing Mr Veikoso, counsel for these appellants, and counsel for the co-accused, indicated to the Judge that, on the basis that the Crown would elect to call no evidence in respect of the other charges, the appellants and the co-accused would plead guilty to the charges under the Act. This course was adopted. The other charges were dismissed. In respect of these two charges pleas of guilty by both appellants were entered. Both appellants were remanded to 24 March 1998 for sentence.

On that day Mr Veikoso, appearing for the appellants, submitted to the Judge that, in respect of both charges, there were defences available to the appellants. He submitted that because, as he put it, he had "entered the wrong plea" he asked that the pleas of guilty be reconsidered. The Judge in his reasons for sentence held that that was not the time for him to consider any application for change of plea, and that he was bound to sentence the appellants on the pleas of guilty. Nevertheless, he went on to decide the merits of the submissions Mr Veikoso had advanced, concluding that the pleas of guilty were correctly entered.

In this court, Mr Veikoso submitted the reasons for sentence do not accord with his understanding of the events that occurred concerning the change of pleas. He thought that the Judge had granted the application to change the pleas. We are satisfied that Mr Veikoso's recollection of the reaction of the court to his application to change the pleas is not correct. It is clear from the transcript of the reasons for sentence that the Judge did not grant that application. On the contrary, as we have said, he declined to entertain the application at that stage. However it is possible that Mr Veikoso may have misunderstood the Judge's response, because he did deal with the grounds Mr Veikoso had advanced.

An appeal against conviction following a plea of guilty can only succeed in very exceptional circumstances: *R v Stretch* [1982] 1 NZLR 225 (CA) at 229, Cooke J, delivering the judgment of the Court. In that case an accused, who had pleaded guilty to a charge of murder and who had been sentenced thereon, applied for leave to appeal against his conviction on the ground that he had made a mistake in pleading guilty. Cooke J cited what he described as the dictum often quoted of Avory J in *R v Forde* [1923] 2 KB 400 at 403; [1923] All ER Rep 477:

> "A plea of guilty having been recorded, this Court can only entertain an appeal against conviction if it appears (1) that the appellant did not appreciate the nature of the charge, or did not intend to admit he was guilty of it, or (2) that upon the admitted facts he could not in law have been convicted of the offence charged."

Cooke J went on to say that that statement, which was unaccompanied by reasons or citation of other authority, is not necessarily exhaustive, referring for example to *R v Turner* [1970] 2 QB 321; [1970] 2 All ER 281, where a plea of guilty was treated as a nullity after a defendant changed his plea to guilty during the trial under a misunderstanding.

In *R v Ripia* [1985] 1 NZLR 122 (CA) Mc Mullin J, after referring to Cooke J's observations in *Stretch*, also cited the comments of Hardie Boys J in *R v Turrall* [1968] NZLR 312 at 313, where he allowed an application to withdraw a guilty plea on the broad principle that the interests of justice demanded that the accused should be allowed to change his plea:

> "This Court should be the fountain of justice and ensure that no man is wrongfully convicted even if it is his own foolish act that has brought the situation about".

We are prepared to consider the issues raised by Mr Veikoso in his submissions before us, to determine whether the appellants should have been allowed to withdraw their guilty pleas either on the second ground referred to by Avory J in *Forde*,

namely, whether on the admitted facts, they could not in law have been convicted of the offences charged, or on the ground that it is in the interests of justice that the appellants should be allowed to change their pleas.

The spirit bottles indictment

The statement of offence against both appellants relating to the fourteen boxes of spirit bottles alleges an offence "contrary to section 210(d)" of the Act. At the hearing on 24 March 1998, Mr Veikoso submitted that there is no such section in the Act. For that reason he submitted that that charge should be dismissed against both appellants. Mr Cauchi for the Crown applied to amend the statement of offence by substituting for the words "contrary to section 210(d)", the words "contrary to section 210(1)(d)". The Judge granted that application for amendment, holding that there had been no misunderstanding about the nature of the charges under section 210(1)(d).

In this court, Mr Veikoso submitted that the judge had no jurisdiction to amend the charge in the manner that he did, referring to s 90 of the Magistrates' Courts Act (Cap 11), relating to amendments in criminal cases, and to s 5 of the Supreme Court Act (Cap 10), providing that the Supreme Court shall have power to exercise all the powers of the Magistrates' Court. Since the amendment made by the Judge was not within s 90 of the Magistrates' Courts Act, he submitted that the court had no jurisdiction to make the amendment.

We do not accept that submission. It will have been obvious to any person considering the charge that the intention was to charge the appellants with offences against s 210(1)(d). It would have been equally obvious that the omission of the reference to subs (1) was a simple typographical error. The Supreme Court has an implied jurisdiction to make appropriate amendments in such a case, providing of course that the accused person is not unfairly prejudiced by the amendment. There was no suggestion of prejudice in the present case. Indeed on the contrary, that both appellants were prepared, after competent legal advice, to plead guilty to the offences, confirms the absence of prejudice. The amendments were properly made. This ground for seeking to withdraw the guilty pleas on these charges has not been made out.

The cigarette indictment

The relevant parts of s 210 of the Act under which each appellant was charged in this indictment read:

> "210. (1) Every person who –
>
> …
>
> (d) is in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any import or export duties of customs, or of the laws, and restrictions, of the customs relating to the importation, warehousing, delivery, removal, loading and exportation of goods;
>
> shall be guilty of an offence and for each such offence incur a penalty of triple the value of the goods or $200 which ever is greater; and all goods in respect of which any such offences shall be committed shall be forfeited."

Mr Veikoso submitted that these charges were wrongly laid because the section refers to taking goods from a warehouse. He submitted that the Leiola Duty Free shop was not a government warehouse nor a private warehouse. He submitted the appellants should have been charged under s 214, which relates to offering goods for sale under pretence that they are smuggled.

This submission misunderstands the nature of the charge. It is not a charge relating in any way to the warehousing of goods. In respect of the appellant Manu the charge was that she "… was knowingly concerned in a fraudulent evasion relating to the removal of uncustomed goods …" In the case of the appellant Fainga'a, it was that he did "knowingly acquire into your possession 14 boxes of spirit bottles from the Leiola Duty Free shop … with intent to defraud the revenue of duties thereon". Both these charges are clearly within the subsection. In neither of the charges was any issue of warehousing or selling from a warehouse an ingredient that the Crown was required to prove. This ground upon which Mr Veikoso sought to justify the withdrawal of the guilty pleas has also not been made out.

The appeal against sentence.

Section 310 leaves the court with no discretion concerning the penalty to be imposed where a person has been found guilty of an offence under that section. The court has no option but to impose a penalty of triple the value of the goods or $200.00 whichever is greater, and to forfeit the goods. Mr Veikoso did not submit that the penalty in the present case had been in any way incorrectly calculated.

The result

We do not find any reasons why, in the interests of justice, the appellants should be allowed to change their pleas of guilty. The appeals against conviction by both appellants in respect of both charges are dismissed. The appeals against the sentences imposed are also dismissed.

Fumera v Pozzati

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 17/97

28 July 1998; 7 August 1998

Partnership — contemplated partnership — refund of contributions
Contract — contribution to contemplated partnership — refund

The appellants appealed against orders awarding damages and granting other relief in a civil action in the Supreme Court in a commercial dispute between several Italian citizens who planned to develop a beach resort in Tonga. The primary claim made at the trial by the plaintiff, Claudio Pozzati, the respondent on the appeal, was that he was entitled to a refund of contributions he made towards the project. The trial Judge upheld his claim and ordered that the sum of $90,746, plus interest, be refunded to the respondent. It was also ordered that the respondent be paid the sum $10,000, plus interest, by way of special damages. Other consequential orders were made. Two of the defendants, Luigi Fumera and Simonetta Maccio, appealed from these orders on the grounds that none of the orders made at first instance, that is, for refund of contributions, for special damages or the consequential orders (which purported to secure payment of the judgment debt) should have been made.

Held:

1. The trial Judge was correct to order the refund to the respondent of his contributions, however, a question arose as to the form of his Honour's orders in this connection.
2. The Court varied the orders by setting the consequential procedural orders aside and reducing the claim for the airfare.
3. The respondent was substantially successful on the appeal but the court reduced the claim for air fares and discharged some of the procedural orders obtained by the respondent by way of security for the judgment debt. The respondent was awarded three-quarters of his costs on the appeal.

Cases considered:

Brown v Heffer (1967) 116 CLR 344; [1968] ALR 89
Curtain v Rudge [1949] NZLR 752
Egan v Ross (1928) 29 SR (NSW) 382
Jackson v Sterling Industries Ltd (1987) 162 CLR 612; 71 ALR 457

Keith Spicer Ltd v Mansell [1970] 1 WLR 333; [1970] 1 All ER 462 (CA)
Kennedy v Vercoe (1960) 105 CLR 521; 34 ALJR 310
McWilliam v McWilliams Wines Pty Ltd (1964) 114 CLR 656; 37 ALJR 435
York Air Conditioning and Refrigeration (Australasia) Pty Ltd v Commonwealth (1949) 80 CLR 11

Statutes considered:
Land Act Cap 132

Counsel for appellants : Mr Tu'utafaiva
Counsel for respondent : Mr Niu

Judgment

Introduction

This is an appeal from orders awarding damages and granting other relief in a civil action in the Supreme Court in a commercial dispute between several Italian citizens who planned to develop a beach resort in Tonga. The primary claim made at the trial by the plaintiff, Claudio Pozzati, the respondent on the appeal, was that he was entitled to a refund of contributions he made towards the project. The trial Judge upheld his claim and ordered that the sum of $90,746.00, plus interest, be refunded to the respondent. It was also ordered that the respondent be paid the sum $10,000.00, plus interest, by way of special damages. Other consequential orders were made. Two of the defendants at first instance, Luigi Fumera and Simonetta Maccio, now appeal from these orders.

In order to understand the issues dealt with in the learned primary Judge's reasons for judgment, reference should first be made to the nature of the case pleaded by the respondent at first instance.

The Case Pleaded by the Respondent

The essential allegations in the respondent's statement of claim may be summarised as follows:

- A beach resort business, known as Kahana Lagoon Resort, was owned and carried on by Joe Tu'ilatai Mataele.
- By written agreement dated 19 May 1993, Mr Mataele agreed to let the premises on which the business was conducted to Eduardo Frascati [the first defendant at the trial] and Mr Luigi Fumera for a term of 10 years, with an option to renew for a further 10 years, upon terms that Messrs Frascati and Fumera would manage the business and keep the profits.
- Messrs Frascati and Fumera then conducted the business in partnership.
- In January 1994, Messrs Frascati and Fumera invited Ms Maccio to become, and she did become, a partner.

- In February 1994, Messrs Frascati and Fumera represented to the respondent that they were willing to let him share 20% of the business if he contributed 80,000,000 lira ["ITL"].
- On 1 March 1994, the respondent met with Mr Frascati and agreed to the offer. The respondent paid Mr Frascati ITL 60,000,000 in order that Mr Frascati could purchase goods for the business.
- On 22 April 1994, the respondent paid ITL 7,242,000 into the bank account of the business, and ITL 7,250,000 on 3 May 1994. He contributed a further ITL 28,000,000 during June 1994. It was agreed that the respondent's share in the partnership would be increased accordingly.
- In June 1994, inconclusive negotiations were conducted with Mr Mataele with a view to amending the tenancy agreement so as to permit Ms Maccio and the respondent to participate.
- On 4 July 1994, the respondent and Messrs Frascati and Fumera agreed: (1) that Messrs Frascati and Fumera would continue to negotiate with Mr Mataele ; (2) that Messrs Frascati and Fumera would form a company, to be called "Blue Dream", the members of which were to be the four "partners", to conduct the resort business; (3) that, based on the contributions made, the "partners' " shares were -

Mr Frascati	33%
The respondent	31%
Mr Fumera	14%
Ms Maccio	14%
	92%

- It was further agreed that the remaining 8% would be allocated in accordance with such further contributions of the "partners" as might be made as at the date of incorporation of the company.
- On 10 August 1994 and 21 September 1994, the respondent remitted the amounts of ITL 8,500,000 and 5,000,000 respectively to the business's bank account, making a total contribution to the business of ITL 115,992,000 or T$90,746.
- In December 1994, Mr Fumera informed the respondent that he had lost his money, and that he should claim it from Mr Frascati. Mr Fumera and Ms Maccio disputed the respondent's contributions to the business.
- The respondent met with Mr Frascati, who acknowledged the respondent's contributions. They further agreed that Mr Frascati sell his share and entitlement to the respondent.

- No company was incorporated. Mr Fumera and Ms Maccio refused to allow the respondent to participate in the business, notwithstanding his 39% contribution and his entitlement to Mr Frascati's 33% share; nor was any amendment made to the tenancy agreement.
- Since the defendants had not been able to fulfill their promise to give the respondent a share in the business proportional to his cash contribution, the defendants were liable to refund that contribution.

The Findings and Reasons of the Trial Judge

The learned primary Judge found that the background facts, in particular the making by the respondent of his contributions, occurred essentially as was alleged by the respondent in his statement of claim. Although there was a conflict in the evidence in some areas, his Honour preferred the version of the events given by the respondent and that given by Mr Frascati to Mr Fumera's version. His Honour also rejected some special defences, to which reference will be made below.

His Honour said:

> "3.1 The Partnership Agreement
>
> The partnership agreement is a composite of oral and express agreements made between the parties. It is comprised of, in part Exhibit P100 executed 4 July 1994 at Nuku'alofa recording the share structure as being:-
>
> | | |
> |---|---|
> | Frascati | 33 % |
> | Pozatti | 31% |
> | Fumera | 14% |
> | Maccio | 14% |
>
> It records that the intent of the parties is to resolve the balance of 8% of the shares on the day of constitution of a company which the parties intended should be incorporated but in fact never was. *Pozzati says and I accept that he acquired those shares ultimately*. [Emphasis added]
>
> The partnership is further comprised of Exhibit P23-25 because it purports to record that all former agreements were avoided and that it would remain the definitive document until a Company could be incorporated in Tonga. Though Pozzati did not sign the document it is clear that he advanced the funds in two sums of ITL 60,000 [sic] and ITL 20,000 [sic] and the document specifies the sum of ITL 80,000 [sic] would be paid by him. Fumera says that the money should have come to him directly but concedes the payments were made. That is contrary to the terms of the document P23-25.
>
> Further the partnership terms include those recited in Exhibit P20-22. It describes the partnership responsibilities of the four

> partners and Exhibit P156 is the purported transfer of Frascati's shares."

In expressing his conclusion on the primary claim, his Honour said:

> "I have intimated that I have found that Frascati is to be treated as a continuing partner and that this court must resolve the difficulties as between the parties. I do not accept the submission of the repudiation of Frascati bringing the partnership which I find existed, to an end. *In my opinion the state of the evidence at the end of the day shows that just as counsel for the plaintiff put it - 'the defendants promised they would give the plaintiff shares in the business if the plaintiff paid his contributions. The plaintiff paid his contributions. The first and second defendants refused to give the shares to the defendant."*" [Emphasis added]

With respect to the claim for special damages, his Honour said:

> "As to sums spent by the Plaintiff on air fares Italy — Tonga return. The claim is not a contractual one. I consider it to be appropriately expressed as special damages flowing from breach of agreement. I am satisfied that the head of claim arises only by virtue of the behaviour of the second and third defendants towards the plaintiff whose visits to Tonga were necessitated by the refusal of the defendants to meet their obligations. I would award damages on a proper proof of the travel expenses."

The Grounds of Appeal

The appellants now appeal on the grounds that none of the orders made at first instance, that is, for refund of contributions, for special damages or the consequential orders (which purported to secure payment of the judgment debt) should have been made.

Conclusions on the Appeal

It will be convenient to deal separately with the several aspects of the appeal that arise.

(a) The Respondent's Primary Claim for Refund of his Contributions

On behalf of the appellants it is submitted that, insofar as this claim depended upon a finding by the trial Judge that the defendants were in breach of a promise to give the respondent his proportionate share of the business, no such finding was made. On the contrary, the argument runs, in the passage cited above dealing with "Partnership Agreement", his Honour actually found that the respondent did "acquire" his interest. It will be recalled that, after stating that the company had not been incorporated, his Honour had said -

> "*Pozzati says and I accept that he acquired those shares ultimately*". ["Those shares" were the balance of 8%, in addition to his existing 31% entitlement.]

We have difficulty accepting the appellants' argument.

In the first place, his Honour clearly did not, and could not, find that any shares in a company proposed to be incorporated were allotted to the respondent: it is common ground that a company was never incorporated. Rather, when read in context, his Honour's acceptance of the respondent's statement should be understood as no more than an acceptance of the respondent's belief that, by virtue of his additional contributions, he was then entitled to a 39% interest. There is nothing at all inconsistent with accepting this, on the one hand, and finding, as his Honour did, that the appellants then denied that the respondent had contributed funds to the business, thus denying that the respondent had any entitlement to participate in the business, on the other.

Moreover, as we read his Honour's reasons, they proceed upon the footing, which was clearly open, that the whole arrangement between the parties was, in truth, executory rather than executed. That is to say, this was a case of no more than a contemplated, rather than an actual, partnership.

As *Lindley on the Law of Partnership* [15th Ed] says [at 19]:

> "Persons who are only contemplating a future partnership, or who have only entered into an agreement that they will at some future time become partners, cannot be considered as partners before the arrival of the time agreed upon."

Lindley goes on to say [at 23]:

> "Subscribers to inchoate companies not partners
>
> It is a necessary result of the principles established above that persons merely associated for the purpose of forming a company are not partners.

Keith Spicer Ltd v Mansell [1970] 1 WLR 333; [1970] 1 All ER 462 (CA) is cited as authority for this proposition and, in relevant respects, its facts are similar to the present case. It was there held that no partnership existed, but one was merely contemplated.

In our opinion, when his Honour's reasons are read as a whole, his conclusion that the appellants were in breach of their promise to the respondent to promote a company to take over and conduct the business, and to issue to the respondent his due proportion of shares in the company, was plainly open. The documentation in evidence, to which his Honour referred, supported his finding. Moreover, as has been noted, his Honour had rejected the testimony of Mr Fumera when in conflict with the version given by the respondent. There is no challenge to his Honour's assessment of the credit of the witnesses.

Once that finding of breach is accepted, it must follow, in our view, that it was open to his Honour to make an award of damages for the breach which included, as a head of damages, the amount of the respondent's contributions. They were never repaid and the respondent received no other benefit, nor any advantage from his investment.

We would add, for completeness, that even if his Honour had not found a breach of contract, the respondent would, in any event, have been entitled to recover his contributions in quasi-contract, as money had and received, having been paid on a consideration that totally failed; or as paid provisionally and not finally, but not

ultimately applied to its mutually contemplated purpose, that is, within the structure of the proposed corporate joint venture; or, alternatively, under the modern law of restitution or unjust enrichment [see *York Air Conditioning and Refrigeration (Australasia) Pty Ltd v Commonwealth* (1949) 80 CLR 11; *Halsbury's Laws of England* 4th ed Vol 9 at 454].

It is next submitted for the appellants that the respondent's claim should have been rejected because the appellants did not misuse the respondent's contributions by personally misappropriating them; rather, it is said, the appellants applied the respondent's funds quite properly in the conduct of the business. But, in our view, this can be no proper answer to the respondent's claim, upheld at first instance, that the appellants had breached their promises to promote the proposed company and to ensure (a) that it took over the business and (b) that shares in the company were allotted to the respondent in proportion to his contributions.

Then it is submitted for the appellants that, given his status as a partner, the respondent could not seek to recover his contributions without an order for the dissolution of the partnership first being made and without accounts thereupon being taken. But, as has been said, the parties' arrangements were, in truth, no more than executory. No more happened than a contemplated partnership, in the form of the proposed corporate joint venture. Moreover, the appellants were guilty of anticipatory breach when the respondent was excluded by the appellants from participation in the existing business. Even the making of his contributions was disputed by the appellants. In those circumstances, where the existence of a partnership with the respondent is, as his Honour held, repudiated by the appellants in anticipation, it was not open to them to insist that the respondent first apply for the taking of partnership accounts. Instead, it was open to the respondent to accept that repudiation and sue for damages.

On behalf of the appellants, it is further submitted that his Honour should have upheld their defences of illegality by statute, upon the footing that the arrangements sued upon constituted either (a) an agreement relating to the use or occupation of a holding or (b) the occupation of land by an alien - in each case without the Minister's consent under s 13 or s 14 or s 15 of the Land Act, as the case may be, and thus prohibited by those provisions. But the subject arrangements were, as has been said, merely executory, and the respondent was not seeking specific performance in any event.

Even if the arrangements had been executed, there would ordinarily have been implied a condition that their performance was, subject to the grant of any necessary Ministerial consent, and only a limited, conditional order for specific performance could have been made. As Barwick CJ, McTiernan, Kitto and Owen JJ said in *Brown v Heffer* [1967] 116 CLR 344 at 350; [1968] ALR 89:

> "The specific performance which will be granted before the Minister's consent has been obtained is not specific performance of the obligation to convey or transfer, for that obligation has not yet arisen: *McWilliam v McWilliams Wines Pty Ltd* (1964) 114 CLR 656 at 661; 37 ALJR 435. As Harvey CJ in Eq made clear in *Egan v Ross* (1928) 29 SR (NSW) 382, at p 388, the decree that will be made will go no further than directing that the proper steps be taken for the purpose of obtaining the Minister's consent and,

> 'if that is obtained', to transfer the land to the purchaser: see also the more explicit form of order made by this Court in *Kennedy v Vercoe* (1960) 105 CLR 521 at pp 530, 531; 34 ALJR 310. Accordingly until the consent has been obtained the purchaser's interest, being 'commensurate only with what would be decreed to him', does not extend to ownership of the land and the interest of the vendor is not yet converted into a right to receive money in place of the land. Many authorities on the topic are discussed in the valuable judgment of Callan J in *Curtain v Rudge* [1949] NZLR 752."

We would reject these special defences of illegality.

In our opinion, the trial Judge was correct to order the refund to the respondent of his contributions.

However, a question arises as to the form of his Honour's orders in this connection, which were made in these terms:

> "1. The defendants do refund to the plaintiff the sum of $90,746.00 plus interest thereon at 10% per annum from l/10/94 to date of these orders, being the sum of $30,882.36, making a total of $121,628.36.
> 2. The defendants do pay to the plaintiff special damages for airfares as claimed by the plaintiff in the sum of $10,000 plus interest thereon at 10% per annum from the date of the statement of claim, 28/5/96, to the date of these orders, being the sum of $1,340.55, making a total of $11,340.55.
> 3. The defendants do pay to the plaintiff the costs of these proceedings to be taxed or agreed.
> 4. Interest at 10% per annum be charged and be paid by the defendants to the plaintiff upon the sums ordered in orders 1, 2 and 3 above from the date of these orders until payment of the same".

It will be recalled that the defendants included Mr Frascati, so that taken literally, Order 1 could be read so as to extend to Mr Frascati. But when his Honour's reasons are read as a whole, it appears that, given his findings, first that the appellants repudiated and breached their contract, and secondly, that the evidence of Mr Frascati should be preferred to Mr Fumera, it appears that his Honour's intention was that the appellants, but not Mr Frascati, should be held responsible. We would read down his Honour's orders accordingly. To put the matter beyond doubt, we propose to vary the orders made so that they will refer only to the appellants.

We should add that, although Mr Frascati was not made a party to the appeal, we were informed that his legal representatives were advised of the appeal, and were provided with a copy of the notice of the appeal by the appellants' legal representatives. Mr Frascati did not seek to be joined as a party to the appeal. In the circumstances, since he could not be adversely affected by the orders we propose to make, it is not necessary that he be joined.

(b) The Claim for the Airfares

Although the trial Judge awarded special damages on this account, the claim is we think, more appropriately viewed, in principle, as a claim for expenditure claimed by way of mitigation of loss, whether the primary claim is grounded in contract, quasi-contract or restitution. That being so, the question arises as to what should be allowed as a reasonable amount in this connection. In our view, it was reasonable for the respondent to visit Tonga twice for the purpose of mitigation of his losses. We will allow the cost of two airfares accordingly and reduce this award from T$10,000 to T$5,000.

(c) The Adjectival Orders Securing the Judgment Debt

Before referring to the terms of these orders, it should be mentioned by way of background that at the commencement of the trial, on the application of the respondent and Mr and Mr Frascati, his Honour granted a Mareva injunction that -

> "… the [appellants] … are hereby restrained from selling or purporting to sell or divesting themselves of any fixtures [fittings] plant and machinery situated at the Kahana Lagoon Resort or of any materials [bought] for the renovation of the said Resort until the further order of this Court."

The Mareva injunction is still in force. The appellants have not moved to discharge it.

At the final hearing, in addition to the orders for refund of contribution and for special damages, the trial Judge made the following final, albeit conditional, orders:-

> "5. Subject to the plaintiff complying with the terms and conditions of Exhibit P1 - P5 the Tenancy Agreement, the Plaintiff be at liberty forthwith to enter upon the premises of the resort business and take full control of the management of resort business unless he is paid in full, or otherwise as agreed, the sums ordered in orders 1, 2, 3 and 4 above.
>
> 6. If the plaintiff does exercise his right under order 5, he shall manage the business in a professional and business-like manner, and he shall keep proper books of account from the date he so commences management. He shall render an audited financial account of the business at the end of each 3 month period to the Registrar Supreme Court of Tonga and to the defendant.
>
> 7. If at the end of 6 months from the date of these orders the sums ordered have not been paid by the defendants to the plaintiff, the plaintiff may advertise and sell the management of the business for the best possible price. The purchaser shall (subject to his complying with the terms and conditions of the Tenancy Agreement Exhibit P1 - P5) thereupon have the entire right to management of the resort business for the remainder of the term of tenancy hitherto held by the defendants. The defendant

shall be entitled to any surplus of the proceeds of sale after deduction of their debts to the plaintiff and the necessary costs of the sale. Otherwise the defendants shall remain jointly and severally liable for the balance of their debts to the plaintiff.

8. The plaintiff shall be entitled to the net profit of the business at the end of each year (of his management) the sum of which shall be credited towards the debts of the defendants to him, unless for business reason and prudence the net profit or part thereof is again used in the business in the following year."

The effect of these orders is to elevate the status of the respondent from that of an unsecured judgment creditor to that of a secured one in respect of the assets of the business. This order is made in a context where, as his Honour had held, the respondent was not a partner in that business, even if a partnership had earlier been contemplated. We have difficulty with such elevation as a matter of principle. We note in this regard, by way of analogy, that it is usually inappropriate to invoke the remedy of a Mareva injunction for the purpose of conferring security upon a potential judgment creditor with an attendant preferential status vis-à-vis other unsecured creditors (see *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612; 71 ALR 457).

There are practical considerations to be taken into account as well. We were informed by counsel that, after his Honour's orders were made, Mr Mataele resumed occupation of the resort premises, and is now conducting the business jointly with Mr Frascati. In these circumstances, Orders 5 - 8 could not, in practice, operate as his Honour intended.

We also note that the Mareva injunction, which is in orthodox terms, is still in place. It should provide the respondent with adequate protection as an unsecured judgment creditor.

We propose therefore to vary the orders made at first instance by setting these consequential procedural orders aside.

Costs

The respondent has been substantially successful on the appeal, but allowance should be made for the fact that we have reduced the claim for the airfares and discharged some of the procedural orders obtained by the respondent by way of security for the judgment debt. In all the circumstances, the respondent should have three-quarters of his costs of the appeal.

We do not propose to disturb the order made for the costs of the trial.

Orders

We make the following orders:

1. Vary the orders made at first instance on 22 September 1997 as follows:
   (a) by inserting the words "second and third" before the words "Defendants" in Orders 1, 2, 3 and 4.

(b) by substituting in Order 2 the amounts of $5,000; $670.27; and $5,670.27 for the amounts of $10,000; $1,340.55; and $11,340.55 respectively.

(c) by setting aside Orders 5, 6, 7 and 8.

2. Appeal otherwise dismissed.

3. Order that the appellants pay three-quarters of the respondent's costs of the appeal, such costs to be taxed or agreed.

440 The orders made at first instance, as varied by our orders, will then read:

"1. The [second & third] defendants do refund to the plaintiff the sum of $90,746.00 plus interest thereon at 10% per annum from 1/10/94 to date of these orders, being the sum of $30,882.36, making a total of $121,628.36.

2. The [second & third] defendants do pay to the plaintiff special damages for airfares claimed by the plaintiff in the sum of $5,000 plus interest thereon at 10% per annum from the date of the Statement of Claim, [28/5/96] to the date of these orders [ie 22 September 1997] being the sum
450 of $670.27 making a total of $5,670.27.

3. The [second & third] defendants do pay to the plaintiff the costs of these proceedings to be taxed or agreed.

4. Interest at 10% per annum be charged and be paid by the [second & third] defendants to the plaintiff upon the sums ordered in orders 1, 2 and 3 above from the date of these orders [ie 22 September 1997] until payment of the same".

Nestle (Fiji) Limited v Tonga Cooperative Federation

Court of Appeal, Nuku'alofa
Lewis CJ, Burchett, Beaumont JJ
CA 12/97

29 July 1998; 7 August 1998

Trade marks — passing off — distinctive goods

Nestle (Fiji) Ltd ["Nestle"] the appellant, instituted proceedings in the Supreme Court claiming that the respondent, Tonga Co-operative Federation Limited ["The Co-operative"], had passed off one of its snack food products as that of Nestle's. The packaging and labelling of the two products — their "get up" — in virtually all respects was identical (ie, the type of packaging material, colours on packets, size of packets, printing and diagrams on packets, the placement and colour of printing). The names were also similar — "Bronco" and "Bongo". Nestle sought (a) a permanent injunction enjoining further passing off, (b) an account of profits and (c) damages. Pending the trial, Nestle moved for, and upon giving the usual undertaking as to damages, obtained an interim injunction enjoining the Co-operative from selling the product. However, at the final hearing, all of Nestle's claims were, by order of the primary Judge, dismissed. The Co-operative counterclaimed upon Nestle's undertaking as to damages. The Supreme Court ordered that Nestle pay the sum of $13,630.90 damages by way of compensation for loss suffered by the Co-operative by virtue of the restraint imposed upon it by the interim injunction. Nestle appealed against these orders and sought (1) an order to set aside the judgment at first instance and (2) in lieu thereof, a permanent injunction to restrain the Co-operative from selling its "Bronco" product in Tonga. The order for damages, or for an account of profits, was no longer sought by Nestle.

Held:

1. The necessary elements of the action for passing off: i. that the plaintiff's goods or services had acquired a goodwill or reputation in the market and were known by some distinguishing feature; ii. that there was a misrepresentation by the defendant (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by the defendant were goods or services of the plaintiff; and iii. that the plaintiff had suffered or was likely to suffer damage as a result of the erroneous belief engendered by the defendant's misrepresentation.
2. On the facts found by the trial judge, Nestle had demonstrated that all the elements were present.

3. It is not a necessary element of passing off that the misrepresentation be made by the manufacturer or the distributor of the product being passed off; a retailer may be liable to be enjoined even if not intending to pass off.
4. What Nestle had to show, and did show, was that its goods were distinctive in Tonga.
5. The action should have succeeded at first instance and the counterclaim ought to have been dismissed; accordingly, the appeal was allowed.

Cases considered:

Champagne Heidsieck et Cie v Scotto and Bishop (1926) 43 RPC 101 (ChD)
Childrens Television Workshop v Woolworths (NSW) Ltd [1981] NSWLR 273
Customglass Boats Ltd v Salthouse Brothers Ltd [1976] 1 NZLR 36
E Cusenier Fils Aine et Compagnie & George Idle Chapman & Co v Gaiety Bars & Restaurant Co Ltd (1920) 19 RPC 357 (ChD)
Leather Cloth Company v American Leather Cloth Company (Ltd) (1865) 11 HL Cas 523; 11 ER 1435
Magnolia Metal Co v Atlas Metal Co (1897) 14 RPC 389 (CA)
R Johnston & Company v Archibald Orr Ewing & Co (1882) 7 App Cas 219
Reckitt & Colman Products Ltd v Borden Inc [1990] 1 WLR 491; [1990] 1 All ER 873 (HL)

Counsel for appellant : Mr Appleby
Counsel for respondent : Mr Edwards

Judgment

Introduction

This appeal from orders dismissing an action for passing off arises in these circumstances. Nestle (Fiji) Ltd ["Nestle"] the appellant, instituted proceedings in the Supreme Court claiming that the respondent, Tonga Co-operative Federation Limited ["The Co-operative"], had passed off one of its snack food products as that of Nestle's. Nestle sought (a) a permanent injunction enjoining further passing off, (b) an account of profits and (c) damages.

Pending the trial, Nestle moved for, and upon giving the usual undertaking as to damages, obtained an interim injunction enjoining the Co-Operative from selling the product.

However, at the final hearing, all of Nestle's claims were, by order of the primary Judge, dismissed. The Co-Operative counterclaimed upon Nestle's undertaking as to damages. The Supreme Court ordered that Nestle pay the sum of $13,630.90 damages by way of compensation for loss suffered by the Co-Operative by virtue of the restraint imposed upon it by the interim injunction. Nestle now appeals from these orders.

The Judgment under Appeal

The following facts were found by the learned primary Judge. These findings are not challenged on the appeal.

- Nestle, in Fiji, manufactured (and sold to the Co-Operative in Tonga) a packaged and processed corn and rice based flavoured snack food called "Bongo".
- The Co-Operative sold "Bongo" in Tonga and had done so for at least 10 years.
- Goi Hiang (Singapore) Pte. Ltd manufactured (and through its own network of suppliers sold to the Co-Operative in Tonga) a similar packaged and processed corn based flavoured snack food called "Bronco".
- The Co-Operative bought 2 containers of "Bronco" in late 1995 (through one of its regular suppliers in Fiji) and sold or otherwise disposed of some 96,281 packets of "Bronco" in Tonga, leaving some 56,311 packets unsold at the time the interim injunction was ordered.
- The packaging and labelling of the two products - their "get up" - in virtually all respects was identical (ie, the type of packaging material, colours on packets, size of packets, printing and diagrams on packets, the placement and colour of printing).
- The survey evidence proved:
  - — that products "Bongo" and "Bronco" are in fact perceived "to be of high degrees of similarities (sic)";
  - — that there are features that "distort any perceptions" of differences between the two products;
  - — that the public of Nuku'alofa (where the surveying was done) "may be confused to believe that the two products are of the same manufacturing company (sic)".

After making these findings, his Honour said:

> "7. [Nestle] does not sell its 'Bongo' product in Singapore, or so it was stated in para 11 of the agreed statement of facts, although I note from the printing on the back of the 20g. packet of 'Bongo' produced in Court, that it is stated that the product is 'Imported by Nestle Singapore (Pte) Ltd, 200 Cantonment Road, #03-01 Southpoint, Singapore 0208'.
>
> 8. That leaves me somewhat hesitant about [Nestle's] position because [it] says, in the course of the submissions on its behalf, that no action has been taken by it against the manufacturer of "Bronco" (Goi Hiang (Singapore) Pte. Ltd) because of its assertion that it does not sell "Bongo" in Singapore and does not trade there.
>
> 9. And that is said to be, at least part of the explanation of and the justification for taking these passing off proceedings just against this defendant, who is described

> in the agreed statement of facts as (i) not trading with the manufacturer of "Bronco" (ie, the Goi Hiang company); and as (ii) not having made any intentional misrepresentation concerning either "Bongo" or "Bronco" products; and as (iii) not being aware that the sale of "Bronco" products, by it, might infringe the rights of the plaintiff."

Having said that his findings "would indicate a satisfaction, a fulfilling of [the] test [in passing off as to misleading the public]", his Honour said that he was "concerned with more fundamental matters here". He explained:

> "13. One of those concerns is as to why liability should be visited on a person in the position of this defendant who, as [Nestle] accepts, does not trade with the maker of "Bronco" and who has not made any intentional misrepresentation concerning either product and was unaware that the sale of "Bronco" might infringe the rights of the maker of "Bongo". The [Co-Operativel is sued in tort - what wrong has it committed? The various authorities referred to me by counsel, on my reading of them, do not seem to have extended liability to someone as remote from the manufacture and packaging of the goods as this defendant is. Let alone to someone in an even approximately equivalent position as that of this defendant, without suing as well the manufacturer and/or packager and/or labeller, and others in the line of distribution, marketing and so on (Refer *Leather Cloth Company v American Leather Cloth Company (Ltd)* (1865) 11 HL Cas 523 at 538; 11 ER 1435; *R Johnston & Company v Archibald Orr Ewing & Co* (1882) 7 App Cas 219 at 228-9; *Magnolia Metal Co v Atlas Metal Co* (1897) 14 RPC 389 (CA) at 394; and the four New Zealand cases I referred to in paragraph 6 above)."

His Honour went on to say that "something … fundamental … leads me, inevitably, to the view that this claim must fail … [that is] … that there is no evidence at all as to which of the two manufacturers — [Nestle] or Goi Hiang — first made the product, let alone adopted, the name, the design of and labelling on the packaging [and all its features … mentioned …]."

The primary Judge stated that Nestle, in its statement of claim, did not allege that it had made and "got up" this product, in its own packaging, first.

Accordingly, his Honour held, Nestle's claim should fail and the counterclaim should be upheld.

Nestle's Appeal

By its notice of appeal, Nestle seeks (1) an order setting aside the judgment at first instance and (2) in lieu thereof, a permanent injunction restraining the Co-Operative from selling its "Bronco" product in Tonga. The order for damages, or for an account of profits, is no longer sought by Nestle. Indeed, the Co-Operative having indicated that it does not now intend to sell the product, Nestle no longer asks for an injunction. Instead, it seeks a declaration that the Co-Operative did pass off its

product, coupled with a reservation of liberty to Nestle to apply for injunctive relief against the Co-Operative should this become necessary in the future.

In its grounds of appeal, Nestle challenges the conclusion of the trial Judge that an action for an injunction to restrain passing off cannot lie:

- against a vendor of a product who does not trade with the manufacturer and packager of the product.
- against a vendor of a product who does not trade with the manufacturer and packager of the product unless actions are also brought against the manufacturer and/or packager and/or labeller and others in the line of distribution, marketing and so on of the product.
- where the parties in the action are manufacturers of two different products which are the subject matter of the action, if the plaintiff does not sell its product in the place where the defendant's product is manufactured.
- where the defendant has made no intentional misrepresentation concerning the products which are the subject matter of the action.
- where the defendant is not aware that its actions might infringe the rights of the plaintiff in the action.

Nestle further challenges his Honour's conclusion that the question which of the "Bronco" or the "Bongo" food products was manufactured first in time, and which of the manufacturers — the appellant or the manufacturer of "Bronco" — first adopted the name, the design of and labelling on the packaging of, respectively, "Bongo" and "Bronco", was relevant to the issue of whether tortious passing off had occurred.

Nestle next argues that the primary Judge failed to consider the question of market recognition and goodwill in the Kingdom of Tonga in relation to "Bongo" and "Bronco".

Conclusions on the Appeal

With all respect to the learned trial Judge, there is, in our view, considerable force in Nestle's contentions.

It is now settled that the necessary elements of the action for passing off are three:

(1) that the plaintiff's goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;

(2) that there is a misrepresentation by the defendant (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by the defendant are goods or services of the plaintiff; and

(3) that the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant's misrepresentation.

[see Halsbury's Law of England, 4th Ed., Vol 48 at 97, citing *Reckitt & Colman Products Ltd v Borden Inc*

> [1990] 1 WLR 491 at 499; [1990] 1 All ER 873 (HL) per Lord Oliver].

In our opinion, on the facts found by the trial Judge, none of which findings are challenged, Nestle has demonstrated that the above elements were present here.

As to (1), the sales by the Co-Operative of Nestle's product for at least 10 years under the name "Bongo" and in the get-up described by his Honour, indicated that Nestle's goods have acquired a goodwill or reputation in the Tongan market and were known in Tonga by the distinctive features of their name and get-up.

As to (2), there was a misrepresentation by the Co-Operative [whether or not intentional] when it marketed a similar product under a similar name, "Bronco", with a get-up also similar to that of Nestle's goods, which was likely to mislead the public to believe that the goods offered by the Co-Operative were Nestle's goods. His Honour's unchallenged findings of the perceptions of "high degrees of similarities" and of confusion confirm this conclusion.

As to (3), this inference is clearly open, given the likelihood of Nestle's loss of sales of its product demonstrated by the survey evidence accepted by his Honour.

It is well established that it is not a necessary element of passing off that the misrepresentation be made by the manufacturer or the distributor of the product being passed off. A retailer may be liable to be enjoined even if not intending to pass off. As Ricketson [The Law of Intellectual Property at 573] says:

> "It does not matter that a retailer does not know that he is engaging in passing off, although obviously he himself will also be a potential defendant. See, for example, *Cusenier etc Co v Gaiety Bars & Restaurant Co Ltd* (1920) 19 RPC 357 (ChD); *Champagne Heidsieck et Cie v Scotto and Bishop* (1926) 43 RPC 101 (ChD); *Childrens Television Workshop v Woolworths (NSW) Ltd* [1981] 1 NSWLR 273."

And as Lahore (Patents, Trade Marks & Related Rights at [181,0701]) puts it:

> "The defendant … may be any person who has made the misrepresentation. There may be several possible defendants extending from the manufacturer to the retailer."

Moreover, "it does not matter what means the defendant uses to represent his goods or business to be another's. He may simply supply his own in response to an order to the plaintiff, without ever making a positively misleading statement" [see Cornish, Intellectual Property, 3rd Ed at 545].

With all respect to the primary Judge, the authorities he mentions do not support the gloss he sought to make upon the well established principles in this area. Most of those cases dealt with different questions, eg, the admissibility of survey evidence, and are accordingly distinguishable. In any event, all of them accept the settled principles we have mentioned. For instance, in *Customglass Boats Ltd v Salthouse Brothers Ltd* [1976] 1 NZLR 36, one of the New Zealand cases relied on by the trial Judge, Mahon J said (at 45):

> "a plaintiff must show that the use by the defendant of the name or mark indicates a common trade origin for his and the plaintiff's goods."

But Mahon J does not suggest that the use cannot be that of a retailer.

It is also now well established that an action for passing off may be brought by a person other than the manufacturer of the goods. As Fleming [Law of Torts, 4th Ed at 628] says:

> "it is no longer necessary that the goods in question should be asserted to be of the plaintiff's manufacture; it is sufficient if there is a representation that the plaintiff has been associated with their production or distribution."

In our view, Nestle had title to maintain this action.

Nor was it necessary for Nestle to prove that its get-up was designed before the get-up used for the "Bronco" product. Moreover, there was no burden upon Nestle to demonstrate the circumstances of the design of the get-up of the two products, including their timing, in Singapore. Rather, what Nestle had to show, and did show, was that its goods were distinctive in Tonga.

In our opinion, the action should have succeeded at first instance and the counterclaim ought to have been dismissed. Accordingly, we propose to allow the appeal.

Orders

We make the following orders:

1. Appeal allowed, with costs, to be taxed if not agreed.
2. Set aside the orders made at first instance, except order (ii) discharging the interim injunction granted on 14 June 1996. In lieu thereof, make the following orders:
   (a) Declare that by selling the "Bronco" product the respondent passed off those goods as the goods of the appellant.
   (b) Reserve liberty to the appellant to apply for any injunctive relief necessary to restrain future passing off by the respondent, if it should occur.
   (c) Order that the counterclaim be dismissed.
   (d) Order the respondent to pay the costs of the appellant of the proceedings at first instance, such costs to be taxed if not agreed.

Fifita v Fakafanua

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 6/98

30 July 1998; 7 August 1998

Criminal procedure — arrest without warrant — habeas corpus application

The first appellant, an Assistant Chief Inspector of Police, and the second appellant, the Minister of Police, were the respondents to an application for the issue of a writ of habeas corpus made on behalf of Noble Fakafanua following his having been arrested without warrant and detained at a police station. As a result of the habeas corpus proceeding, Noble Fakafanua, the respondent, was set at liberty, and the writ was discharged. The appellant did not seek to re-arrest the respondent, whose committal hearing was pending, but he challenged the correctness of certain rulings made by the trial judge in the course of dealing with the matter, and claimed the respondent should not have been released.

Held:

1. It was necessary under section 21 for a police officer justifying an arrest to show that he suspected the person arrested of having committed a crime and that he had in fact reasonable grounds for the suspicion.
2. The onus borne by the appellants was not discharged.
3. Performance that is without unnecessary delay is performance that is carried out as soon as practicable. The safeguard requiring that the arrested person be brought before a magistrate without unnecessary delay is primary, and must be fully observed.
4. The appeal should be dismissed with costs.

Cases considered:

Baxter Healthcare Pty Limited v Comptroller-General of Customs [1997] ACL Rep 10 FC 13; [1997] 72 FCR 467

Castorina v Chief Constable of Surrey (1988) Times, 15 June, [1988] CA Transcript 499

Holgate-Mohammed v Duke [1984] AC 437; [1984] 1 All ER 1054

Kingdom of Tonga v Finau (Court of Appeal, unreported, 23 June 1993)

Liversidge v Anderson [1942] AC 206; [1941] 3 All ER 338

Minister of Police v Moala [1997] Tonga LR 210 (CA)

Secretary of State for Trade and Industry v Rogers [1996] 1 WLR 1569; [1996] 4 All ER 854 (CA)
Soakai v Taulua, Minister of Police and the Government of Tonga [1981-1988] Tonga LR 46 (PC)
R v Iorlano (1983) 151 CLR 678; 50 ALR 291
Trobridge v Hardy (1955) 94 CLR 147
Williams v The Queen (1986) 161 CLR 278; 66 ALR 385

Statutes considered:
Bail Act 1990
Constitution of Tonga Cap 2
Customs Act 1901
Magistrates' Courts Act Cap 11
Police Act Cap 35
Police (Amendment) Act 1990
Tasmanian Justices Act (Aust)

Rules of Court considered:
Bill of Rights 1688 (UK)

Counsel for appellants : Mr Taumoepeau
Counsel for respondent : Mr Niu

Judgment

This is an appeal by the first appellant, an Assistant Chief Inspector of Police, and the second appellant, the Minister of Police, who were the respondents to an application for the issue of a writ of habeas corpus made on behalf of Noble Fakafanua following his having been arrested without warrant and detained at a police station. As a result of the habeas corpus proceeding, Noble Fakafanua, now the respondent to this appeal, was set at liberty, and the writ was discharged. The appellant does not seek to re-arrest the respondent, whose committal hearing is pending, but challenges the correctness of certain rulings made by the trial judge in the course of dealing with the matter, and says the respondent should not have been released.

In Tonga, the availability of the writ of habeas corpus is assured by constitutional guarantee: Constitution, clause 9. The nature and incidents of this right are to be ascertained from the great cases by which they were established in the common law: see *Minister of Police v Moala* [1997] Tonga LR 210 (CA) at 219 and 220. In *Liversidge v Anderson* [1942] AC 206; [1941] 3 All ER 338 at 362, Lord Atkin (whose dissenting judgment has since been generally recognized to be a masterly statement of the law) referred, as "one of the pillars of liberty", to the principle "that in English law every imprisonment is prima facie unlawful, and that it is for a person directing imprisonment to justify his act."

In the case of arrest by a police officer without warrant, what is required by the obligation to justify the act of interference with the individual's liberty? In the same judgment of Lord Atkin (at 351), the answer given by the common law is explained:

> "The power of arrest is confided by the common law both to constables and to private individuals. The constable has power within his district to arrest a person on reasonable suspicion of his having committed a felony. … In these cases, the grounds for suspicion must be brought before the court. The onus is on the person who arrested to prove the reasonable grounds, and the issue of whether or not the cause is reasonable is to be determined by the judge."

The legislature of Tonga has codified the police officer's power of arrest without warrant in sections 21 and 22 of the Police Act, but these sections have not affected the onus of proof stated by Lord Atkin. It remains necessary under section 21 for a police officer justifying such an arrest to show that he suspected the person arrested of having committed a crime and that he had in fact reasonable grounds for this suspicion. The relevant provision in section 21 reads:

> Any police officer … may arrest without warrant -
> (a) any person whom he suspects on reasonable grounds of having committed a crime.

In addition, section 22 provides:

> (1) A police officer making an arrest without warrant shall, *without unnecessary delay* [emphasis added] and subject to any provisions under any Act as to bail or recognizance, take or send the person arrested before a magistrate there to be charged or before a police officer of the rank of sergeant or above or before the police officer in charge of the police station.
> (2) If it is not practicable to bring the person arrested before a Magistrate having jurisdiction within 24 hours after he has been so taken into custody, the police officer of the rank of sergeant or above or the police officer in charge of the police station shall inquire into the case and shall grant or withhold bail in accordance with the Bail Act 1990.

Several questions were raised by the habeas corpus proceedings. Although the debate concentrated largely upon section 22, an important provision upon which it will be necessary for us to comment, logically the first question is whether the appellants justified the arrest under section 21. As to this, the respondent's counsel relied on his own affidavit to show that his client was not arrested on reasonable grounds of suspicion of having committed a crime, but simply because the police wished to interrogate him. The appellants relied on an affidavit of the arresting officer, Inspector Hia, which did not in terms allege he held any suspicion, and an affidavit of the appellant Fifita, who interviewed the respondent at the police station.

Neither affidavit brought the grounds of any suspicion before the court, to adopt the language of Lord Atkin. There was nothing to discharge the onus of proving reasonable grounds, or to show what grounds might have existed. But, at the hearing before Lewis CJ in the Supreme Court, the parties agreed to ask the court to "assume (without finding) the following facts":

- "That at all material times investigating officers from the Tonga Police were desirous of interviewing the Applicant Fakafanua concerning alleged Forgery offences.
- Investigations proceeded some little way. The Police had in their possession allegedly forged documents. They sought to ask the Defendant questions about his knowledge of the documents.
- At the Central Police Station the Applicant was accompanied and advised by counsel who advised his client not to answer any questions. There were some heated exchanges between Counsel for the applicant and the investigating Police.
- In the result the Applicant Fakafanua was arrested without warrant by Police on the ground that they suspected that the Hon. Fakafanua had committed the offence of Forgery. He was arrested so that he could be questioned with a view to the Police establishing whether or not he had committed the offence of Forgery (or indeed whether or not he had committed no offence).
- The Hon Fakafanua was cautioned and he was then taken into the Nuku'alofa Police Station.
- In the Police Station he was asked for formal particulars — his name and the like."

It will be apparent that the assumed facts assert, in very general terms, the existence of a suspicion, but bring before the Court no basis for that suspicion. Accordingly, the onus borne by the appellants was not discharged. That onus required evidence to be provided, failing appropriate admissions, to answer affirmatively the two questions which were stated by Woolf LJ (as he then was) in *Castorina v Chief Constable of Surrey* (1988) Times, 15 June, [1988] CA Transcript 499:

> "(1) Did the arresting officer suspect that the person who was arrested was guilty of the offence? The answer to this question depends entirely on the findings of fact as to the officer's state of mind.
> (2) Assuming the officer had the necessary suspicion, was there reasonable cause for that suspicion? This is a purely objective requirement to be determined by the judge if necessary on facts found by a jury".

Accordingly, the decision to release the respondent was correct.

But the learned Chief Justice did not simply set the respondent free on the ground that the police had failed to justify his arrest without warrant under s 21. Rather, his Honour considered the effect that s 22 might have had, once the arrest was made. Of this section, he said that it was not intended "to allow arresting Police Officers to question persons arrested without warrant as to the substance of the offence for which they have arrested the person." He stated a series of propositions centring upon his view that, although a person arrested under s 21 may be held (in the circumstances indicated in s 22) for a period of up to 24 hours, this should be

"without being questioned about the substantive offence until the Magistrate is available."

Section 22(1) requires that, "without unnecessary delay", a person arrested be taken before a magistrate or one of the police officers described. In *Soakai v Taulua, Minister of Police and the Government of Tonga* [1981-1988] Tonga LR 46 (PC), it was held:

> "Sub-section (2) [of section 22] is a conditional provision. It comes into operation "if it is not practicable to bring the person arrested before a magistrate having jurisdiction within 24 hours". If that condition is fulfilled a duty arises for the bringing of the arrested person before a designated police officer so a decision may be made which, of course, is of the same nature as that which a magistrate would perform. This does not mean a person can be held for 24 hours. As soon as it appears that no magistrate will be available as a practicable procedure sub-section (2) will apply.
>
> The scheme of Section 22 then is that, if a magistrate is available, the arrested person is to be taken before him without unnecessary delay, but, if that is not a practicable step which can be taken within a period of 24 hours, then the arrested person must be taken before a designated officer who must perform what might be called the functions of a magistrate."

The same view was taken in *Kingdom of Tonga v Finau* (Court of Appeal, unreported, 23 June 1993), where their Honours said:

> "[I]n our opinion this was not a case where the police officer had the jurisdiction to inquire into the case and release. The authority given an officer by S.22 (2) is circumscribed by the opening words of the sub-section … ."

As was pointed out in *Soakai v Taulua, Minister of Police and the Government of Tonga* [1981-1988] Tonga LR 46 (PC) the authority conferred on a designated police officer by s 22(2) cannot be augmented by reference to s 22(1), because that subsection says nothing about what he can do; in mentioning such an officer, it merely makes an anticipatory reference to the provision in subsection (2). Although s 22(2) was repealed and replaced by the Police (Amendment) Act 1990, the form of the new provision leaves this reasoning unimpaired.

The key question relates to the meaning of the expression "without unnecessary delay". When s 22 was first enacted, subsection (2) included the reiteration: "but where a person is kept in custody he shall be brought before a magistrate's court as soon as practicable". Although these words have since been repealed, they cast light on the meaning intended to be conveyed by the expression "without unnecessary delay", upon compliance with which they were plainly intended to insist. They also continue to be reflected in the opening words of subsection (2). Thus it is apparent that the two expressions refer to the same requirement. Performance that is without unnecessary delay is performance that is carried out as soon as practicable. This means that the provision in the Tongan Police Act may be regarded as equivalent to the provision that was considered by the English House of Lords in

Holgate-Mohammed v Duke [1984] AC 437; [1984] 1 All ER 1054, where, as appears from the speech of Lord Diplock at 1059, the relevant requirement was that the suspect arrested and detained in custody "must be brought before a magistrates' court as soon as practicable".

The statutory requirement to bring the arrested person before a magistrate "without *unnecessary* delay", or "as soon as *practicable*" may involve, perhaps, some softening of the common law, by which, as Lord Atkin said in *Liversidge v Anderson* at 360, the arrested person "must *at once* be brought before a judicial tribunal" (emphasis added). In England, the similar legislation mentioned has been said to represent a compromise the effect of which was stated as follows by Lord Diplock in *Holgate-Mohammed v Duke* at 1059:

> "My Lords, there is inevitably the potentiality of conflict between the public interest in preserving the liberty of the individual and the public interest in the detection of crime and the bringing to justice of those who commit it. The members of the organised police forces of the country have, since the mid-nineteenth century, been charged with the duty of taking the first steps to promote the latter public interest by inquiring into suspected offences with a view to identifying the perpetrators of them and of obtaining sufficient evidence admissible in a court of law against the persons they suspect of being the perpetrators as would justify charging them with the relevant offence before a magistrates' court with a view to their committal for trial for it.
>
> The compromise which English common and statutory law has evolved for the accommodation of the two rival public interests while these first steps are being taken by the police is twofold.
>
> (1) No person may be arrested without warrant (ie without the intervention of a judicial process) unless the constable arresting him has reasonable cause to suspect him to be guilty of an arrestable offence; and arrest, as is emphasised in the Judges' Rules themselves, is the only means by which a person can be compelled against his will to come to or remain in any police station.
>
> (2) A suspect so arrested and detained in custody must be brought before a magistrates' court as soon as practicable, generally within 24 hours, otherwise, save in a serious case, he must be released on bail (see ss 43(1) and (4) of the Magistrates' Courts Act 1980).
>
> That arrest for the purpose of using the period of detention to dispel or confirm the reasonable suspicion by questioning the suspect or seeking further evidence with his assistance was said by the Royal Commission on Criminal Procedure in England and Wales (Cmnd 8092) in 1981, at para 3.66 'to be well established as one of the primary purposes of detention upon arrest'."

Of course, since the legislature of Tonga has enacted legislation on the matter, the question is not what the law permits elsewhere, but what the Tongan statute means.

Decisions in England, Australia, New Zealand, and indeed other countries, may assist the court in the task of interpreting the Police Act. In Australia, the High Court, since the decision of the House of Lords in *Holgate-Mohammed v Duke*, has reviewed in detail the case law and legislation in this area. That was in *Williams v The Queen* (1986) 161 CLR 278; 66 ALR 385, which was concerned with the effect of two Tasmanian sections, one of which required a person arrested to "be brought before a justice as soon as is practicable after he has been taken into custody", and the other of which required such a person to be taken "before a justice without delay, to be dealt with according to law". Gibbs CJ said of these provisions (at 283) that they are "not inconsistent"; that they "require the person making the arrest to bring the arrested person before a justice in as short a time as is reasonably practicable"; and that this is "in effect … the same as the common law rule". Mason and Brennan JJ, in a joint judgment, referred to an earlier case, *R v Iorlano* (1983) 151 CLR 678; 50 ALR 291, where a similar section (section 212 of the Customs Act 1901, which used the expression "without undue delay", was construed in a joint judgment of Gibbs CJ, Murphy, Wilson, Brennan, and Dawson JJ. In the earlier case, their Honours had said (at 680):

> "There is simply nothing in the provisions of [the section], or in the context in which [it] appears, that suggests that the fact that the arresting officer desires to question the arrested person affords any legitimate reason for delay in taking him before a justice. The section gives no power to question an arrested person, and does not make justifiable a delay which resulted only from the fact that the arresting officer wished to engage in questioning."

Mason and Brennan JJ, in *Williams v The Queen* (at 292), commented:

> "The Court's statement of the principle does not depend on the particular language of s 212 of the Customs Act nor on the particular character of the officer who might be exercising the power to detain the person arrested. The principle is of general application to all statutory powers to detain a person after arrest for an offence although it can, of course, be excluded by statute.
>
> The right to personal liberty is, as Fullagar J described it, "the most elementary and important of all common law rights": *Trobridge v Hardy* (1955) 94 CLR 147 at p 152."

Their Honours also said, of the words "as soon as practicable" (at 297):

> "Those words are not intended to deny the operation of a principle which protects the liberty of the subject, and to construe those words as authorizing detention for interrogation and investigation runs counter to the rule that any statute which authorizes the detention of a person must be strictly construed … ."

They declined to apply *Holgate-Mohammed v Duke* to the Australian sections.

Similarly, Wilson and Dawson JJ, also in a joint judgment, construed the Australian sections by reference to the common law rather than the interpretation that had been given to the English legislation. They said (at 304):

> "This case turns upon what is meant by the words 'as soon as is practicable.' That question, although ultimately one of statutory construction, must necessarily be considered against the background of the common law which provides in this instance the spirit if not the letter of the law. The presumption which requires clear words to override fundamental common law principles has an obvious application in a matter as basic as the liberty of the person…".

They pointed out (at 306):

> "It is by writ of habeas corpus that the immediate restoration to freedom of a person illegally detained may be achieved. That is a remedy as old as the law and was declared by the Bill of Rights 1688 to be so. We know of no authority whereby the writ may be refused upon the basis that a person, having been arrested, is required for further questioning. The imprisonment of a person can be justified only by lawful warrant or in the limited circumstances where he is held under lawful arrest for the purpose of obtaining the warrant of a justice for any further detention."

They reached the conclusion (at 313):

> "As we have said, ultimately this case turns upon the proper construction of the words 'as soon as is practicable' in s 34A(1) of the Tasmanian Justices Act. Those words must be given a construction which, so far as is possible, is in accordance with the common law and it cannot be suggested that there is any difficulty in doing so. The common law requires an arrested person to be taken before a justice as soon as is reasonably possible and the words 'as soon as is practicable' should be taken to mean the same thing. Neither the common law nor the statute permits delay merely for the purpose of further investigation either of the offence for which the person was arrested or of any other offence or offences. What is reasonable will depend upon all the circumstances, including the availability of a justice, but it does not encompass delay of that kind."

The fact that s 22 of the Police Act of Tonga was enacted for the specific purpose, as the Privy Council pointed out in *Soakai*, of "safeguarding the rights of a citizen" lends weight to the consideration urged in the High Court of Australia that any authority given by this law to infringe individual liberty should be construed strictly. What section 22 insists must be done "without unnecessary delay" is not the interrogation of an arrested suspect, but his taking before a magistrate. There is no warrant for reading the provision as if it referred to the practicability of interrogation. Delay caused by a desire to ask questions is not authorised by the section; indeed, the bringing of the person arrested before a magistrate as soon as practicable is the safeguard for the citizen the legislature has chosen to provide.

In our opinion, it is not right to say that no questions may be asked by police about the offence of which an arrested person is suspected. A few simple questions

may resolve some doubt, and even lead to the immediate release of the suspect. But the safeguard requiring that the arrested person be brought before a magistrate without unnecessary delay is primary, and must be fully observed.

Before parting with the case, we should add some remarks about the question it raised concerning the right of appeal. The appellants conceded their purpose was to have this Court correct some aspects of the judgment below, but not to obtain any other relief. Generally, an appeal is against the order of a Court, not the reasons given for that order. However, there are exceptional cases where a judgment itself may ground an appeal. It may contain findings, that might have been expressed as declarations, which could have serious consequences for those affected. In some such cases, an appeal has been held to lie. For example, in *Secretary of State for Trade and Industry v Rogers* [1996] 1 WLR 1569; [1996] 4 All ER 854 (CA), an order made on the ground of dishonesty was insupportable on that ground, but correct in all the circumstances, nevertheless. The Court of Appeal allowed an appeal because of the significance of the error in the reasons, describing the matter as "unusual". It expressed its decision formally by setting aside the judge's order, and then making effectively the same order for the right reasons. This case was cited recently in the Federal Court of Australia in *Baxter Healthcare Pty Limited v Comptroller-General of Customs* [1997] ACL Rep 10 FC 13; [1997] 72 FCR 467 at 483, where the relevant authorities are collected.

However, in the present case, for the foregoing reasons, the appeal should simply be dismissed with costs.

Vea v R

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 8/98

31 July 1998; 7 August 1998

Criminal law — grievous harm — requisite intent
Grievous harm — mitigating factors

The appellant was tried and convicted by the Supreme Court upon prosecution for the offence of causing grievous harm against s 106 of the Criminal Offences Act (Cap 18). The trial Judge sentenced the appellant to three years' imprisonment, but suspended that sentence upon completion of six months' imprisonment. The appellant appealed against both his conviction and his sentence on the grounds that when regard was had to the whole of the surrounding circumstances, in particular the appellant's fear of the victim, his Honour could not have been satisfied, beyond any reasonable doubt, that the appellant had the requisite criminal intent.

Held:

1. The evidence established beyond any reasonable doubt that the appellant acted "wilfully" within the meaning of s 106(1); and "without any lawful justification" for the purposes of that provision.
2. The appeal against conviction was dismissed.
3. In sentencing, the trial judge properly took into account several mitigating factors and also had regard to the violent nature of the crime; there was no basis for interfering with the sentence.

Statutes considered:
Criminal Offences Act Cap 18

Counsel for appellant	:	Mr Veikoso
Counsel for Crown	:	Ms Simiki

Judgment

Introduction

The appellant was tried and convicted by the Supreme Court upon prosecution for the offence of causing grievous harm against s 106 of the Criminal Offences Act. Section 106 provides:

"(1) Every person who wilfully and without lawful justification causes grievous harm to any person in any manner or by any means whatsoever shall be liable to imprisonment for any period not exceeding 10 years.

(2) 'Grievous harm' means —

(a) any harm endangering life; or

(b) the destruction or permanent disabling of any external or internal organ, member or sense; or

(c) any severe wound; or

(d) any grave permanent disfigurement."

The trial Judge sentenced the appellant to three years' imprisonment, but suspended that sentence upon completion of six months' imprisonment.

The appellant now appeals against both his conviction and his sentence.

The Appeal against Conviction

(a) The Findings of the Trial Judge

His Honour made these findings:

The offence charged had its "beginnings" in a collision a few months earlier between a vehicle driven by a member of the appellant's family and one driven by Siosifa Latu, who was to become the victim of the offence charged. After the collision Latu, assisted by others, attacked and injured the appellant. For this Latu, and one other, were subsequently prosecuted and convicted.

A few days later, the appellant and Latu again encountered each other at a busy road intersection. Menacing words were exchanged. The appellant's car moved off, followed by Latu. There was some "silly driving" by both, and some "verbal exchanges". They reached another intersection, where the appellant proposed to turn. Whilst both vehicles were stationary waiting for the traffic to clear, Latu and the appellant left their vehicles. An incident then occurred between them. But in their evidence, each man gave a different version of what happened.

His Honour said:

> "It is plain that the truth lies somewhere between their versions of events. I formed the opinion that both of them were telling me whatever suited them, whatever was favourable to their own position. In each case each man claimed to have been wronged at the instance of the other."

The trial Judge went on to describe the appellant's version of the incident as follows:

> "At [a] Falekoloa [opposite the intersection at which the vehicles had stopped] [Latu] claims that the [appellant] attacked him with a bush knife. The [appellant] claims that he was indeed the victim since [Latu] attacked him with a wheel brace, narrowly missing the [appellant] twice and then dropping the brace and being thrown off balance by the [appellant's] manoeuvring.

> The [appellant] says that in the light of the attack upon him by [Latu] with the wheel brace, he became convinced of the need to defend himself against [Latu], who had already threatened to shoot him and was acting in a way consistent with that threat. The [appellant] then went to his vehicle and got the bush knife. The [appellant] says that [Latu] then retreated inside the Falekoloa. As he entered, the [appellant] says that [Latu] took hold of a shop girl and held her in front of him as protection against the attack of the [appellant] with the knife.
>
> The unfortunate shop girl was thereby forced in between the two while they played out their struggle for supremacy with each other. Her evidence confirms that [Latu] used her as a shield."

His Honour then made this finding:

> "I am satisfied that [Latu] produced no wheel brace. The shop-girl saw no such thing either before or after the event, what the shop-girl did see, was a man [Latu], very much afraid of what was about to happen to him. A man who was prepared to use her as a shield against the advance of the [appellant]. I find that the evidence of the shop-girl demonstrates that the [appellant] was an aggressor".

The primary Judge proceeded to make this finding:

> "What followed was that the [appellant] wielded the knife deliberately at [Latu] and seriously injured him. It is significant that in the main [his] injuries caused by the knife are in the region of his back. The position of the injuries is surely consistent with the Crown case that this was not a desperate man forced by circumstances to defend himself but rather the intentional and unlawful act of the [appellant] who was acting out of a sense of revenge for the [earlier] behaviour of [Latu] towards him … . I so find."

In rejecting the possibility of a reasonable act of self-defence on the part of the appellant, his Honour said:

> "I find that the [appellant] followed [Latu] into the Falekoloa with revenge in mind."

(b) The Grounds of the Appeal

On behalf of the appellant it is submitted, in essence, that when regard is had to the whole of the surrounding circumstances, in particular the appellant's fear of Latu, his Honour could not have been satisfied, beyond any reasonable doubt, that the appellant had the requisite criminal intent.

(c) Conclusions on this Aspect of the Appeal

In our view, the appeal against conviction must fail.

In his evidence in chief, the appellant gave this version of the incident:

> "As I was waiting for a break in the traffic I heard a banging at the door of my car and as I looked back I saw [Latu] with an iron used for unscrewing nuts for vehicles.
>
> I then understood that that was why [Latu] chased me — he was going to beat me up with the iron. Then my mouth and back were still injured [from the previous encounter] and my wounds had not healed and I was afraid I did not know what else to do. I knew that if I had accelerated he would have broken the window of the vehicle, so I quickly jumped out of the car. [Latu] went to strike me with the iron on the head as we were facing each other. I ducked and he missed twice. On the second strike he used both hands on the wheel brace to hit me. I ducked and because of the force he fell towards me and I used my left elbow to hit him in the eye. [Latu] fell on his back. *He lost hold of his iron. I ran to my car and got out the bush knife*. [Emphasis added]
>
> I felt strange. I was stunned. It was the best I could think of was to use the bush knife against this person. [Latu] turned and he ran at the time he saw the bush knife. *I stepped over and hit his back with the side of the knife. [Latu] ran into the shop and jumped over the counter. I entered the shop and I saw him holding the shop assistant in front of him.* I said to him 'Leave the girl she might get injured'. [Latu] said something to me. I said 'have not you had enough of beating me up you did it on Saturday and I was injured.' [Emphasis added]
>
> I swung the knife at [Latu] and the shop assistant where they were standing in front of me. No-one was hit. The shop assistant went outside. I knew he and I were left. [Latu] ran to the north side of the shop. A freezer was there. *I walked towards him. He picked up a box. I do not know what was inside it. He was holding it and pushing it towards me. I hit him with the knife when he was pushing the box at me. When I was striking I knew he was injured when I saw the blood on the different parts of his body*." [Emphasis added]

This evidence, in our opinion, establishes beyond any reasonable doubt that the appellant acted "wilfully" within the meaning of s 106(1); and that the appellant acted "without any lawful justification" for the purposes of that provision.

On the question whether the requisite criminal intent for wilful action existed, the appellant's own evidence we have cited establishes, to the standard of satisfaction required, the Crown case, that the appellant actually intended to wound Latu with his bush knife.

As to any "lawful justification" of his action, on no view of the appellant's own version of events could it be said that any question of legitimate provocation needed to be considered by the trial Judge. However, his Honour did, as we have noted, consider whether there might have been an act of reasonable self-defence. Yet, on the

appellant's own version of what happened, we agree with his Honour that the prosecution case proved, beyond any reasonable doubt, that the appellant's acts exceeded any reasonable act of self-defence.

Four matters of importance in this connection emerge from the appellant's testimony: (1) the appellant went back to his car to get the bush knife; (2) Latu had already dropped the brace; (3) the appellant, then armed, followed Latu, then unarmed, into the shop and began to pursue Latu within the shop; (4) the appellant continued to pursue Latu, even after Latu had taken hold of the shop assistant and attempted to use her as a shield to ward off any attack by the appellant.

There was thus ample evidence to support his Honour's findings. The appeal against conviction should be dismissed.

The Appeal against Sentence

We can dispose of this aspect of the appeal briefly.

In his remarks on sentence, the trial Judge properly took into account several mitigating factors. They included the appellant's family responsibilities and his excellent service to his Church. But his Honour also, again correctly, had regard to the violent nature of the crime which put at grave risk of serious injury not only Latu, but also an innocent bystander. The sentence, including as it did a term of six months' immediate imprisonment, was we think clearly within the limits of the primary Judge's discretion. We see no basis for interference with it.

Orders

The appeal is dismissed.

Vakameitangake v R

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 19/97

3 August 1998; 7 August 1998

Customs and excise — defrauding the revenue of duty — appeal against sentence
Criminal procedure — submission of no case to answer — appeal against rejection

On 29 October 1997, the Chief Justice, following a defended hearing, found each appellant guilty of two charges under the Customs and Excise Act (Cap 67) ("the Act"). On 12 November 1997 he ordered that the first appellant incur a penalty of $11,200.00 and the second appellant incur a penalty of $12,480.00. They were found guilty of taking two cartons of cigarettes from the Duty Free shop, concealing them, and dealing with them with the intention of defrauding the revenue of any duties payable. Both appellants appealed against conviction and sentence. The first appellant appealed on the grounds that there was insufficient evidence to support the finding that there was a case to answer and secondly, that there was insufficient evidence to support the finding that he was guilty. The second appellant appealed against conviction on the grounds that the Chief Justice erred in dismissing the no case application made on behalf of the second appellant. Since the second appellant did not call or give evidence, it was submitted that the Court of Appeal could determine whether the Chief Justice was correct in ruling that there was a case to answer. He also appealed against conviction on the grounds that the guilty finding was against the weight of evidence.

Held:

1. When a no case application has been declined and the defence calls evidence, following which the trial Judge finds that the charge has been proved and enters a conviction, the Court on appeal can only determine an appeal against that conviction by taking into account the whole of the evidence before the Court at the time the conviction was entered.
2. Where a Judge has ruled that there is a case to answer and where, after a defendant has elected not to call or give evidence, the Judge has found that the elements of the charge have been proved beyond reasonable doubt, the issue on an appeal against conviction is not whether there was a case to answer. It is whether there is sufficient evidence upon which the trial

Judge could properly conclude that each element in the offence has been proved beyond reasonable doubt.

3. The Court was satisfied that the first and second appellants were properly convicted on both counts.

4. The penalty the Court was required to impose is mandatory so each appellant was liable to the penalty of triple the value of the goods involved on each offence. However, the Court has an inherent power to order a stay if it considers that to enter a conviction would result in an injustice. In the circumstances of the present case, it was appropriate to order a stay in respect of the more general count two, and to uphold the conviction in respect of the more particular count one.

Cases considered:

Hunter v Chief Constable of the West Midlands Police [1982] AC 529; [1981] 3 All ER 727

R v Galbraith [1981] 1 WLR 1039; [1981] 2 All ER 1060

Statutes considered:

Criminal Offences Act Cap 18

Customs and Excise Act Cap 67

Counsel for first appellant	:	Mr Tu'utafaiva
Counsel for second appellant	:	Mr Tu'ivai
Counsel for respondent	:	Mr Cauchi

Judgment

On 29 October 1997, the Chief Justice, following a defended hearing, found each appellant guilty of two charges under the Customs and Excise Act (Cap 67) ("the Act"). On 12 November 1997 he ordered that the first appellant incur a penalty of $11,200.00 and the second appellant incur a penalty of $12,480.00.

Both appellants have appealed against conviction and sentence.

The facts found by the Chief Justice

The first appellant is employed as a customs officer. At the relevant time he was the principal security officer of the Customs Department at Fua'amotu International Airport. The second appellant was employed by the Ministry of Agriculture and Fisheries as a Technical Officer Grade II in the Quarantine Division, also stationed at Fua'amotu International Airport.

On 6th October 1994 'Emosi Fameitau arrived at Fua'amotu International Airport on a Polynesian Airlines flight. After collecting his luggage, Fameitau was approached by the second appellant, Kailahi, who asked Fameitau to accompany him to the Leiola Duty Free Shop. Fameitau agreed. Kailahi gave Fameitau a sum of money which he handed to a female store attendant. The attendant placed two cartons of "Winfield Blue" on the counter.

We were informed at the bar that there are ten packets of ten cigarettes in what is commonly known as a sleeve, and forty sleeves in a carton. The two cartons therefore contained a total of 8,000 cigarettes.

The second defendant wheeled the trolley through the customs hall and passed a customs officer, Felefoni Mapakaitolo. Mapakaitolo saw the cartons of cigarettes in the trolley. He asked the second appellant to whom the cigarettes belonged. The second appellant replied that they belonged to the first appellant. Fameitau and the second appellant continued on to the cashier, Lo'amanu Vatuvei. Upon being told that the cigarettes belonged to the first appellant, Vatuvei placed them in a room controlled by Customs which also served as the office of the first appellant. No duty was paid that day. A little later, Vatuvei saw the first appellant pushing a trolley with the cartons on it from the first appellant's office and outside into the unbonded public area.

On 6 December 1994 Manase Tonga, a customs officer, was approached by the first appellant with a request that he make out a receipt for $1,280.00. The first appellant told Tonga that he had been told by the Minister of Finance to pay that amount. He paid it. In a letter he wrote to the Civil Service Staff Board on 26 January 1995, the first appellant acknowledged that this amount was the duty payable on the Winfield cigarettes.

Both appellants were dismissed following an investigation into these events by the acting Auditor General. The cartons of cigarettes were never located.

The Charges against the First Appellant

Count 1

Knowingly harbour, keep, or conceal uncustomed goods contrary to section 210(1)(c) of Customs and Excise Act (Cap 67)

Particulars of offence

[The first appellant] on the 6th of October 1994 at Fua'amotu Airport took two cartons of Winfield cigarettes from the Leiola Duty Free Shop and concealed them from custom officials knowing they were uncustomed.

Count 2

Knowingly deal with goods with the intention of defrauding the revenue of any duties applicable to such goods contrary to section 210(1)(d) of Customs and Excise Act (Cap 67)

Particulars of offence

[The first appellant] on the 6th of October 1994 at Fua'amotu Airport did deal with goods namely two cartons of Winfield cigarettes with the intention of defrauding the revenue by not paying the proper duties on such goods.

The Charges against the Second Appellant

Count 1

Accessory to the crime of knowingly harbour, keep, or conceal uncustomed goods contrary to section 210(1)(c) of Customs and Excise Act (Cap 67) contrary to section 8 Criminal Offences Act (Cap 18).

Particulars of offences

[The second appellant] on or about 6th October 1994 at Fua'amotu Airport did abet the crime of knowingly harbouring keeping or concealing uncustomed goods by instructing one 'Emosi Fameitau to purchase two cartons of Winfield Blue cigarettes from the Duty Free Shop for Lisiate Vakameitangake contrary to section 8 of the Criminal Offences Act and section 210(1)(c) of the Customs and Excise Act (Cap 67).

Count 2

Knowingly deal with goods with the intention of defrauding the revenue of any duty applicable to such goods contrary to section 210(1)(d) of Customs and Excise Act (Cap 67).

Particulars of offence

[The second appellant] on or about 6th October 1994 at Fua'amotu Airport did deal with goods, namely two cartons of Winfield cigarettes with the intention of defrauding the revenue of duties due thereon contrary to section 210(1)(d) of the Customs and Excise Act (Cap 67).

The First Appellant's Appeal against Conviction

The principal submissions advanced by Mr Tu'utafaiva on the first appellant's appeal against conviction were, first, that there was insufficient evidence to support the finding by the Chief Justice that there was a case to answer, and, secondly, that there was insufficient evidence to support the finding by the Chief Justice that the first appellant was guilty of the offences charged.

At the end of the case for the prosecution, Mr Tu'utafaiva submitted to the Chief Justice that there was no case to answer. The Chief Justice found that the prosecution had made out a case and dismissed that submission. The first appellant then gave evidence in his own defence. Mr Tu'utafaiva submitted that, despite the first appellant having given evidence, this Court should review the Chief Justice's decision on the no case application by considering only the evidence that was before the Court at the time of the application, and disregarding any evidence that came before the Court after the application was made. For example, he submitted that this Court should not have regard to a letter from, and an affidavit by, the first appellant that had been produced to the Court in the course of the cross-examination of the first appellant.

We do not accept that submission. When a no case application has been declined and the defence calls evidence, following which the trial Judge finds that the charge has been proved and enters a conviction, this Court on appeal can only determine an appeal against that conviction by taking into account the whole of the evidence before the Court at the time the conviction was entered.

The approach to be adopted on a no case submission is set out in the judgment of the Court of Appeal in England in *R v Galbraith* [1981] 1 WLR 1039; [1981] 2 All ER 1060. The Court there held that where the Judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. But that is not the approach for an appeal Court to adopt where, as here, the defendant has

given or called evidence, and the Judge has based his finding of guilt on the whole of the evidence before the Court, including the evidence called by the defence. An appeal Court is, in that case, required to determine whether, having regard to all the evidence before the Court, the trial Judge was correct in finding the elements of the offence proved beyond reasonable doubt.

We pass to consider the insufficient evidence ground. Put shortly, it was the case for the prosecution against the first appellant that the cartons of cigarettes were wheeled into the first appellant's office. A little later, the first appellant removed both cartons from his office, taking them outside the terminal building into the public unbonded area. The Crown also relied on the appellant's later action in paying what he acknowledged was the duty payable on the cigarettes.

Mr Tu'utafaiva challenged the Chief Justice's finding that the first appellant had removed the cigarettes from his office. He relied on a passage in the cross-examination of Vatuvei where the witness made a reference to his having his back to the first appellant at the time he said the cartons were being removed by the first appellant. But the witness also said in cross-examination he knew that what the first appellant was removing were the cigarettes, because the first appellant was the only one left in the office at the time the cartons were removed. He had also said in evidence in chief he was certain it was the cartons of cigarettes that the first appellant pushed out of his office. The Chief Justice found Vatuvei to be a witness who was attempting to do his best to recall the events of 6th October, 1997 honestly.

We find no grounds to justify disturbing the Chief Justice's finding that Vatuvei saw the first appellant pushing a trolley with the cartons in it from his office and outside into the unbonded public area.

Mr Tu'utafaiva submitted that the Chief Justice was not entitled to draw an inference adverse to the first appellant because the first appellant paid the duty on the cigarettes. He submitted that the Chief Justice ought to have accepted the first appellant's evidence when he said he paid the duty "because I was the supervisor", an explanation that only emerged in cross-examination. The Chief Justice was entitled to reject this evidence. In his judgment he referred to the letter the appellant had written to the Civil Service Staff Board on 26th January 1995 in which he said:

> "There was no intention of smuggling and I made subsequent arrangements with the Minister to pay the revenue on the winfield (sic) which I have now done".

He did not claim in the letter that he had made the payment only because he was the supervisor and not because he was liable for the duty, as he could have been expected to do, had the reason he gave in evidence been true.

When regard is had to the whole of the evidence and the Chief Justice's findings on credibility, we are satisfied that there was ample evidence to support the findings that on the 6th of October 1994 the first appellant took two cartons of cigarettes that came from the Duty Free Shop and concealed them from customs officials knowing they were uncustomed, and that on the same day and as part of the same transaction, he dealt with the two cartons of cigarettes with the intention of defrauding the revenue by not paying the proper duties on such goods.

Subject to our conclusion when dealing with the appeal against sentence, we are satisfied that the first appellant was properly convicted on both counts.

The Second Appellant's Appeal against Conviction

The first ground advanced by Mr Tu'ivai in support of the second appellant's appeal against conviction was that the Chief Justice erred in dismissing the no case application made on behalf of the second appellant. Since the second appellant did not call or give evidence, Mr Tu'ivai submitted that this Court could determine whether the Chief Justice was correct in ruling that there was a case to answer.

We do not accept that submission. Where a Judge has ruled that there is a case to answer and where, after a defendant has elected not to call or give evidence, the Judge has found that the elements of the charge have been proved beyond reasonable doubt, the issue on an appeal against conviction is not whether there was a case to answer. It is whether there is sufficient evidence upon which the trial Judge could properly conclude that each element in the offence has been proved beyond reasonable doubt.

Mr Tu'ivai submitted that since no transcript of the Chief Justice's reasons for dismissing the no case application is available, the appeal should be adjourned to enable the reasons to be obtained, and counsel to research the no case ground in greater detail. For the reasons we have already expressed, we decline this application for an adjournment. As the no case finding cannot be the subject of an appeal to this Court, having the Chief Justice's reasons for dismissing the no case application would not assist.

The second ground advanced in support of the conviction appeal was that the findings of guilty on both counts were against the weight of evidence.

Mr Tu'ivai advanced a number of reasons in support of this ground. For example, he submitted that the evidence was unreliable because there were contradictions in the evidence concerning the cartons of cigarettes. Fameitau said that there was only one carton. Other witnesses spoke of there being two. Mapakaitolo spoke of there being two sleeves of cigarettes and two cartons. The Chief Justice considered these discrepancies. He said that although Fameitau said there was only one carton, his role was relatively transient, and that Fameitau's memory has led him into error. He was satisfied that there were two cartons.

Mr Tu'ivai further submitted that the Crown proof was inadequate because certain documentation, such as a receipt for the goods, was not produced. While it may have been open to the prosecution to produce further documents, that it did not do so does not, in our view, affect the probative value of the evidence that was before the Court.

We do not find it necessary to examine each of the other matters advanced by Mr Tu'ivai in support of the conviction appeal. We are satisfied that, in the case of the second appellant also, there was ample evidence before the Court to justify the Chief Justice's finding that the second appellant abetted the first appellant in harbouring, keeping, or concealing uncustomed goods. The second appellant requested Fameitau to purchase the two cartons of Winfield cigarettes from the duty free shop with money supplied by the second appellant. It was the second appellant who told Mapakaitolo, the customs officer on duty that the cartons were for the first appellant. It was the second appellant who told Vatuvei that the cartons were for the first appellant, enabling them to be placed in the first appellant's room without duty being paid. All of this evidence leads to the clear inference that the second appellant was actively assisting the first appellant to obtain the cartons of cigarettes and remove them without the payment of duty.

The Chief Justice was also justified in finding proved the count against the second appellant of dealing with the two cartons with the intention of defrauding the revenue of duties.

The Appeals against Sentence

Section 210 of the Act provides that every person who does any of the acts set out in paragraphs (a) to (e) of subs (1) "shall be guilty of an offence and for each such offence incur a penalty of treble the value of the goods or $200 which ever is greater …"

Section 257(1) of the Act provides that where any penalty, the amount of which is to be determined by the value of any goods, is sued for under the customs laws, such value shall be the price for which goods of the like kind were sold in bond at the relevant time, with the duties due added to such price.

The Chief Justice calculated the penalty in the following manner. The purchase price in bond was $800 per carton. The duty payable was $1,280, resulting in a total value for the purpose of assessing the penalty of $2,080. Three times that value resulted in a penalty of $6,240 on each offence. As there were two offences, the total penalty was $12,480.

In the case of the first appellant, the Chief Justice deducted from this amount $1,280, being the duty the first appellant had paid. Therefore the penalty was $11,200. We do not consider this approach to be correct. Section 210(1) requires the Court to impose a mandatory penalty of triple the value of the goods. Neither that subsection nor subs 257(1) permits the Court to make any deduction from the penalty required to be imposed.

It is clear from s 210(1) that the penalty the Court is required to impose is mandatory. For "each offence" for which a person is found guilty under any of the paragraphs in s 210(1), the person convicted "shall" incur the penalty of triple the value of the goods or $200 whichever is greater. The Court has no discretion. As each appellant was convicted of two offences under subs (1), each was liable to the penalty of triple the value of the goods involved, on each of the offences.

However we do not consider that to be the end of the matter. The Court has an inherent power to order a stay if it considers that to enter a conviction would be an abuse of process in the sense of resulting in an injustice. In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536; [1981] 3 All ER 727, Lord Diplock referred to:

> "… the inherent power which any Court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people."

Where a person, as the result of two or more separate and unrelated transactions, has been found guilty of two or more offences under s 210(1), there can be no injustice for the offender to incur the triple penalty in respect of each of the offences. But where, as here, a person is found guilty of two or more offences under the subsection, all of which relate to the same transaction, perhaps reflecting different aspects of it, for that person to incur the triple penalty for each of the offences, can, depending

upon the circumstances of the case, cause a manifestly unfair result. In such circumstances, the Court is justified in exercising the power to order a stay.

An injustice is more likely to result where the Court is required to impose a mandatory penalty. If the Court has a discretion as to penalty, as is the case with s 220, for instance, the total penalty can be assessed having regard to the totality of the offending. But this cannot be done where the Act requires a mandatory penalty.

In this case the two counts against each appellant arose out of the single transaction relating to the same goods, namely the two cartons of cigarettes. The two counts reflect different aspects of the one transaction. The prosecution was justified in bringing the two counts against each appellant where it had evidence that, if accepted, would justify a conviction on each. But when the trial Judge had reached the conclusion that both counts had been proved, he should, to avoid the injustice that would result from two penalties being imposed for the one transaction, have stayed one of the counts. In the circumstances of the present case, it is appropriate to order a stay in respect of the more general count two, and to uphold the conviction in respect of the more particular count one.

The Result

The appeals are allowed in part There will be an order that count two in each indictment be stayed. The convictions on count one in each indictment against each appellant are confirmed. The penalties ordered in the Supreme Court are quashed. In lieu thereof, each appellant is ordered to incur a penalty of $6,240.00 in respect of the offence for which each has been convicted.

Zerza v Lapi

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 17/98

3 August 1998; 7 August 1998

Contract — open contract — not void for uncertainty

Orders were made in a civil action brought in the Supreme Court by the respondents, Francesco Lapi and Sonia Donati, against the appellants, Klaus Zerza, his wife Marylin Rauter, and Herbert Sanft. The Supreme Court declared that the respondents were entitled to remain as tenants of premises known as the Sunset Restaurant at Fatafehi Road, Neiafu ["the premises"] until 5 July 2000 on certain terms. The Court further ordered that the appellants reconnect some services to the premises. The appellants contended that the agreement that was alleged by the respondents and found by his Honour to have been made, was so imprecise as to be void for uncertainty.

Held:

1. The trial Judge was correct in his conclusion that the agreement he found to have been made, was not void for uncertainty.
2. Provided the necessary elements are present, once the essential terms have been identified by the parties, an "open" contract is not void for uncertainty.
3. The appeal was dismissed.

Cases considered:

Plimmer v Wellington City Corporation (1884) 9 App Cas 699; NZPCC 250
Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd (1968) 118 CLR 429

Counsel for appellants : Mr Appleby
Counsel for respondents : Mr Niu

Judgment

Introduction

This is an appeal from orders made in a civil action brought in the Supreme Court by the respondents, Francesco Lapi and Sonia Donati, against the appellants,

Klaus Zerza, his wife Marylin Rauter, and Herbert Sanft. The Supreme Court declared that the respondents were entitled to remain as tenants of premises known as the Sunset Restaurant at Fatafehi Road, Neiafu ["the premises"] until 5 July 2000 on certain terms. The Court further ordered that the appellants reconnect some services to the premises.

The first and second appellants are Austrian citizens. The third appellant is a citizen of Tonga and the owner of the premises. The respondents are Italian citizens.

The Respondents' Claim at First Instance

By their statement of claim in the action, the respondents alleged, in essence, the following:

- In 1995, Mr Sanft leased the premises [then used as a two-storey dwelling house] to Mr Zerza and Ms Rauter for a term of five years on the terms that the top storey be used as a residence and the bottom storey be used as a restaurant.
- In March 1996, with the knowledge of Mr Sanft, the respondents verbally agreed with Mr Zerza and Ms Rauter that (a) Mr Zerza and Ms Rauter would convert the bottom storey of the premises into a restaurant at a cost of less than $15,000, which they would fund; (b) the respondents would assist with their labour in the execution of these works ["the works"]; (c) upon completion of the works, the respondents would (i) reimburse Mr Zerza and Ms Rauter for their cost; (ii) rent the restaurant for a period of four years at a monthly rent of $300, payable annually in advance; and (d) the respondents would be responsible for the management of the restaurant business and for the maintenance of that part of the premises, and would keep all the profits of the restaurant business and bear all of its costs and expenses, and bear any of its losses.
- The works were completed by July 1996, when the respondents paid Mr Zerza and Ms Rauter the sum of $15,400 on account of the costs of the works and $3,600 by way of rent for the year 5 July 1996 to 5 July 1997.
- During the period of the year 5 July 1996 to 5 July 1997, the respondents carried on the restaurant business.
- On 5 July 1997, the respondents tendered to Mr Zerza and Ms Rauter the sum of $3,600 as annual rent for the period 5 July 1997 to 5 July 1998 but Mr Zerza and Ms Rauter refused to accept it.
- By letter dated 19 July 1997, Mr Zerza and Ms Rauter informed the respondents that the respondents should (i) vacate the restaurant premises by 6 February 1998; (ii) keep all proper records of the business; (iii) give copies of those records to Mr Sanft every month; and (iv) until 6

February 1998, continue to manage the restaurant, pay all its expenses and keep all its profits as their remuneration.

- The respondent declined to accept these terms and re-tendered the sum of $3,600. However, in August 1997 Mr Zerza and Ms Rauter again rejected the tender.
- In October 1997, without the respondents' knowledge, the appellants disconnected the electricity, water and telephone services to the restaurant premises.
- Accordingly, the respondents claimed specific performance of the agreement for lease and a mandatory injunction directing the reinstatement of the services.

The Judgment under Appeal

The learned trial Judge found the primary facts to be, in all essential respects, the facts as pleaded by the respondents in their statement of claim, which, so far as is presently material, are set out above.

His Honour went on to say:

> "I say directly that I prefer the evidence of the plaintiffs to that of the defendants. It seems to me highly improbable that what the defendant Marylin Rauter Zerza has said is true about the nature of the agreement and its terms. Wherever and whenever there are differences in the evidence of the parties, I am persuaded that the account given by the plaintiffs is the probable one.
>
> I have already particularized the findings and the nature of the plaintiffs' claim. All the elements or ingredients of a valid and enforceable contract exist. I am satisfied that the parties were ad idem (that is of the same or like minds). There was certainty of object — the establishing of a sub-tenancy for the purpose of the running of a restaurant.
>
> The Rauter-Zerzas were in an unfortunate and difficult situation by reason of Marylin Rauter-Zerza's allergy and the language handicap suffered by her husband. They were now saddled with expenses already outlaid and improvements to the premises which they could not exploit.
>
> The Lapis came upon the scene at precisely the right time. There is no doubt about the agreement. The Lapis performed their obligations. They paid all that was required of them to pay and the rent in advance. The documentary evidence reinforces the evidence of the Lapis in that respect."

After rejecting some special defences, which are not pressed before us, the learned primary Judge granted the relief sought by the respondents.

The Grounds of the Appeal

The appellants do not seek to challenge the findings made by the trial Judge as to the credibility of the witnesses. But it is submitted on their behalf that the

agreement alleged by the respondents and found by his Honour to have been made, was so imprecise as to be void for uncertainty. Their argument is that there is no provision in the agreement sued upon which deals with several potential issues which might arise between the parties; for instance, the appellants suggest that there was no evidence of a concluded agreement on the questions (i) how a breach of the contract was to be determined; and (ii) what specific consequences, if any, would flow in the event of a breach occurring.

Conclusions on the Appeal

In our opinion, the trial Judge was correct in his conclusion that the agreement he found to have been made, was not void for uncertainty.

In the first place, the essential terms of the tenancy were spelt out in the arrangement, albeit informal, that was found to have been made by the parties. That is to say, in our view, the parties identified, with sufficient certainty, the necessary elements: the premises, the term, and the rent.

The initial capital contribution made by the respondents towards the costs of renovation of $15,400 should be treated, as indeed it was, in the nature of a premium paid for the grant of their tenancy. Nothing now turns on this payment for immediate purposes, as its character is certain, but it serves to reinforce the conclusion that all of the parties must have contemplated that the respondents were to be granted a tenancy of more than a limited duration, as the respondents claimed, and as his Honour found. In other words, the fact that the respondents were prepared to pay a premium for the grant of their tenancy in the same amount as Mr Zerza and Ms Rauter paid for a tenancy of five years' length, tends to confirm that the parties contemplated that the respondents' tenancy would be of equivalent duration, [or at least approximately so] to that granted by Mr Sanft to Mr Zerza and Ms Rauter.

Next, even if it were open to the parties, as of course it was, to agree on other matters such as the consequences of a breach of their contract, the course was equally available to them to proceed to identify the essential terms of their arrangement [ie, the premises etc, as stated above] yet to leave any other matter to the operation of the general law, modified by statute where legislation was applicable — in other words, to that extent, an "open" contract. Provided the necessary elements are present, as the essential terms were identified by the parties here, an "open" contract is not, for that reason, void for uncertainty.

It is true that there might be a question arising as to which of several possible meanings of an expression used by the parties, for example, "expenses", was intended. But it does not follow that an agreement using that expression is void for uncertainty. Thus, in *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429, it was held that the words "supplier's costs" were not meaningless, however wide might be the area of possible disagreement as to their denotation in a particular case.

Barwick CJ said [at 437]:

> "I do not think there is any uncertainty or for that matter ambiguity in the expression "supplier's costs" in cl 5, however wide may be the area of possible disagreement as to its denotation in a particular case. A contract to build a bridge at cost could not, in my opinion, be held void for uncertainty it could not properly,

> in my opinion, be said to be meaningless nor is it, in my opinion, ambiguous. Endless might be the arguments pro and con as to whether or not in marginal cases some item of expenditure is as claimed a cost or as to how much of an expenditure is a cost, of the particular activity. But to my mind, generally speaking, the concept of a cost of doing something is certain in the sense that it provides a criterion by reference to which the rights of the parties may ultimately and logically be worked out, if not by the parties then by the courts. There are no elements in the circumstances of this contract to deprive the concept of that certainty."

In these circumstances, it is not necessary for us to consider whether, even if contrary to our view, the contract sued upon was in truth uncertain, the Court might still have granted the respondents similar relief by virtue of their "equity of possession" [see *Plimmer v Wellington City Corporation* (1884) 9 App Cas 699; NZPCC 250; Halsbury's Laws of England, 4th Ed Vol 27(1) at 33-4].

In our opinion, the appeal must fail.

Orders

On the argument of the appeal, there was discussion about the form of the declaration made by his Honour, which was in these terms:

> "1. The plaintiffs be entitled to remain as tenants of the premises known as the Sunset Restaurant at Fatafehi Road Neiafu until the 5th day of July 2000 subject to the terms and conditions upon which they have occupied it since the 5th day of July 1996 or as the parties may mutually agree in writing."

In our view, such an order is appropriate for present purposes.

The terms of the mandatory injunction are not now challenged.

The appeal is dismissed, with costs to be taxed if not agreed.

Mo'unga v R

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 15/97

4 August 1998; 7 August 1998

Criminal law — imprisonment for property offences — where appropriate

The appellant and a co-offender pleaded guilty to one count of housebreaking and one count of theft. They were each sentenced to four years imprisonment on the count of housebreaking, and two years imprisonment on the count of theft, the sentences to be concurrent. The appellant appealed against sentence.

Held:

1. Imprisonment for a purely property offence is not appropriate, unless there are unusual circumstances that render imprisonment necessary.
2. There are a number of situations, intended to be neither exhaustive nor comprehensive, in which the suspension of the sentence may be appropriate:
   (i) Where the offender is young, has a previous good record, or has had a long period free of criminal activity.
   (ii) Where the offender is likely to take the opportunity offered by the sentence to rehabilitate himself or herself.
   (iii) Where, despite the gravity of the offence, there is some diminution of culpability through lack of premeditation, the presence of provocation, or coercion by a co-offender.
   (iv) Where there has been cooperation with the authorities.
3. The sentences of four years imprisonment for housebreaking and two years imprisonment for theft were confirmed. The sentence of four years was suspended in part by being suspended for the last year of the sentence.

Cases considered:
R v Petersen [1994] 2 NZLR 533 (CA)

Statutes considered:
Criminal Justice Act Cap 18

Counsel for appellant : Mr Niu
Counsel for respondent : Mr Malolo

Judgment

The appellant and a co-offender pleaded guilty to one count of housebreaking and one count of theft. They were each sentenced to four years imprisonment on the count of housebreaking, and two years imprisonment on the count of theft, the sentences to be concurrent.

The appellant has appealed against sentence.

The Offending

On 12 January 1997 the appellant and the co-offender decided to rob the warehouse of the Tonga Co-operative Federation Limited. That night they travelled to the warehouse in a van. Using boltcutters, they cut through the compound fence. They each used the boltcutters to gain entrance through louvre windows. The co-offender entered the warehouse and removed twelve cartons of Winfield cigarettes and two cartons of 3lb cans of "Palm" corned beef, passing them to the appellant, who stayed outside.

The appellant and the co-offender loaded the stolen property into a van, and drove to a house where it was divided between the appellant, the co-offender and another person who had driven the van. Later, the appellant endeavoured to conceal his share of the cigarettes on a tax allotment. Some time afterwards he was apprehended. At the time of this offending, he was intoxicated.

The twelve cartons of cigarettes were valued at $11,289.60 and the two cartons of corned beef at $279.36.

The appellant's history

The appellant is now aged 49. During his early life he was brought up by his grandparents and an uncle. When he was at secondary school, he began to mix with others who were a little older and more "street wise". In October 1961 he and some others stole some buns and bread. When they were brought before the Court, they were given 10 strokes. In March 1964, when the appellant was 20, he was sentenced to four months imprisonment for, with others, stealing a pig. If the Court thought that this prison sentence for a property offence would straighten the appellant out subsequent events proved it wrong. He embarked on a life of crime. It must have been only a few weeks after his release that he was back behind bars.

From then until August 1988, he amassed no fewer than 54 convictions, mostly for theft and housebreaking, but also six for escaping from prison and some for other offences. For all but a few, he was sentenced to prison for terms that varied from two months to seven years. He has no convictions for any offence involving violence.

In 1975 he married. He and his wife had one daughter. The marriage ended in divorce in 1983. In 1992 he remarried, and now has a young family. In November 1996 their five month old baby died, which caused him and his wife considerable distress. His wife has confirmed that he is a good father, although there have been upsets caused by his drinking.

Reasons for sentence

The Chief Justice, when sentencing the appellant and the co-offender, referred to the facts, to the appellant's history of convictions, to the pressure on his family of a prison sentence, to the need to protect the public, and to his being entitled to lean

toward mercy. He said the offending and background were such that he was unable to suspend the sentence. He imposed the sentences to which we have referred.

Submissions in support of the appeal

Mr Niu submitted that the appellant should have been sentenced to imprisonment, but that the sentence should have been suspended for the whole of the four year term. In support, he submitted that the appellant should never have been sentenced to imprisonment at what he said was the age of fifteen (it is apparent from the sentence records that he was twenty) for the theft of the pig, that it was during this and subsequent sentences that he received, as Mr Niu put it, intensive training in the art of stealing and housebreaking. He referred to the poor conditions in which he and his family were living, to the child dying from pneumonia, and to his attempts to save to build a house for his family. His wife remains supportive.

Mr Niu submitted that his past criminal life can be traced back to the original imprisonment for a minor property offence, and that if that had not occurred, his history may well have been different. For that reason, as well as the four and a half years that had passed without any offending at the time of this offence, he submitted that the interest of the community in rehabilitating the appellant justified suspending the sentence.

The sentence of imprisonment

This Court has said before that imprisonment for a purely property offence is not appropriate, unless there are unusual circumstances that render imprisonment necessary.

Such circumstances are present in this case. This was no minor impulsive theft and breaking in. It was a major, carefully planned operation. The offenders had armed themselves with the necessary equipment and vehicle. They selected premises where a quantity of goods would be present. And they removed such a large quantity of cigarettes that it can only be regarded as a commercial operation for profit.

Also relevant is the appellant's criminal history. He has been punished for each of those offences. He is not to be punished for them again. The relevance of the history is two fold. First, it demonstrates that the penalties that have been imposed in the past have not acted as a deterrent. This can be a reason for imposing a longer prison sentence than would otherwise be considered appropriate. Secondly, where a person has been an habitual offender, the protection of the public can require a lengthy prison sentence, if only because he cannot offend again while he is in prison. This may have been the reason for the very lengthy sentence of seven years imprisonment for a series of housebreaking offences imposed on 7 January 1969. Yet immediately following what appears to have been an early release, he was at it again. We do not accept Mr Niu's submissions that the events of March 1964, now some 34 years ago, have any relevance in considering an appropriate sentence for the present offending.

Both the considerations mentioned above apply in the present case. For these reasons we are satisfied that the sentence of four years imprisonment was entirely appropriate.

Should the sentence be suspended?

The real issue on this appeal is whether the sentence should have been suspended in whole or in part. Section 24(3), giving the Court jurisdiction to suspend the whole or part of the sentence for any period up to three years, is silent on the criteria to be considered in deciding whether a sentence should be suspended. In New Zealand, where there also are no criteria in the relevant statutory provisions, the Court of Appeal, in *R v Petersen* [1994] 2 NZLR 533 (CA), in a judgment delivered by Eichelbaum CJ, said that the suspended sentence is intended to have a strong deterrent effect, so that if the offender is incapable of responding to a deterrent, it should not be imposed. Apart from that, the Court suggested a number of situations, intended to be neither exhaustive nor comprehensive, in which the suspension of the sentence may be appropriate:

(i) Where the offender is young, has a previous good record, or has had a long period free of criminal activity.
(ii) Where the offender is likely to take the opportunity offered by the sentence to rehabilitate himself or herself.
(iii) Where, despite the gravity of the offence, there is some diminution of culpability through lack of premeditation, the presence of provocation, or coercion by a co-offender.
(iv) Where there has been cooperation with the authorities.

We see no reason why this approach should not be followed in Tonga. To apply it in this case, the appellant has had four and a half years free of criminal activity. Normally, that can hardly be regarded as a long period. But given his previous pattern of continuous offending, it does show a desire to break that pattern. This, no doubt, has been in large part due to his marriage in 1992, the birth of his children, and his wife's influence. We note the comment in the probation report that his wife was angry and upset at the offending, having believed that he was now a law abiding person.

The earlier pattern of continuing offending suggests that rehabilitation is unlikely. But again, the offence free period gives some grounds for concluding that he may be able to cease further criminal activity, despite the offences on this present occasion. He is now 49. Whilst the offending was continuous up to 1980, when he would have been 32, since that time he has appeared before the Court on four occasions, including the present.

We do not find any diminution of culpability, as referred to in *Petersen*. Although there may have been some encouragement from the co-offender, who suggested the undertaking in the first place, that does not lessen the appellant's culpability for the offending. There has been some co-operation with the authorities, if only to the extent that he pleaded guilty to the charges.

Conclusion

Two considerations need to be reconciled. First, the serious nature of the offending, coupled with the long criminal history, require a lengthy sentence that will be a deterrent to this appellant and to others, and will mark the community's condemnation of criminal conduct of this kind and degree. Secondly, it is in the

community's interests for the sentence to be one which will encourage the appellant in his rehabilitation, and will help him to break the cycle of offending.

We have reached the conclusion that these considerations can best be reconciled by affirming the sentence of imprisonment of four years, and by suspending the last year of that sentence. The three years he will spend in prison should itself be an effective deterrent, and the year with the sentence hanging over him should be an added encouragement to put a life of crime behind him.

We draw attention to s 24(3)(b) of the Criminal Justice Act (Cap 18), which provides that a suspended sentence is conditional on the offender not being convicted of an offence punishable by imprisonment during the period of the suspension. If he should be convicted of such an offence during the term of the suspension, we expect that he will be sentenced to serve the term of the suspended sentence, that is the whole of that term, in addition to any sentence imposed for the offence for which he has been convicted, pursuant to s 24(3)(c). We direct the Registrar of the Supreme Court to give to the appellant a notice stating in simple terms the consequences of re-offending.

Had we the power to do so, we would have placed the appellant on probation for that last year while the sentence is suspended, with conditions that would, along with the guidance of the probation officer, have helped the appellant with his rehabilitation. But s 198, concerning the probation of offenders, does not give the Court power to order probation during a suspended sentence. We recommend to the Government that consideration be given to re-enacting the probation provisions to enable this to be done, as is commonly the case in overseas jurisdictions. The rehabilitative effect of a suspended sentence will be significantly enhanced if, during the time the offender is serving the suspended sentence, he or she has the benefit of the supervision of a probation officer, and is required to comply with appropriate conditions, such as abstaining from alcohol. Any such provisions will need to provide an effective sanction for the breach of any conditions imposed. At the same time, the legislature may think it appropriate to review and modernise the provisions generally dealing with the suspension of sentences, the powers and discretions of the Court in respect of sentencing, and probation.

The result of the appeal

The sentences of four years imprisonment for housebreaking and two years imprisonment for theft are confirmed. The sentence of four years is suspended in part by being suspended for the last year of the sentence.

Napa'a v Vaka'uta

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 5/98

5 August 1998; 7 August 1998

Negligence — post-traumatic stress disorder — appeal as to damages

On 20 December 1995 the respondent's son, aged 9 years, was crushed by a front-end loader before her eyes. That was on a roadway at the village of Fata'ulua in the island of 'Eua. The respondent's son was with two other children near the road, and the front-end loader, which was owned by the second appellant, was being driven by the first appellant. The respondent suffered the inevitable grief reaction, and after the lapse of some time developed a post-traumatic stress disorder. The Court awarded damages of T$50,000 plus interest at 5% per annum from 11 February 1997 (the date of the issue of the writ), together with costs, in respect of nervous shock which was held to have been inflicted upon the respondent by the negligence of the first appellant, for whom the second appellant was vicariously liable. The case, the Court was told, was, so far as is known, the first of its kind to be heard in Tonga. The appellants appealed from that award.

Held:

1. An award of T$50,000 dollars for pain and suffering and the loss of amenities, in a case where nothing in the nature of economic loss was shown, can not be regarded as within the range of acceptable verdicts. It must be regarded as excessive.
2. A proper and just award was the sum of $17,000, taking into account all of the circumstances and the fact that a part of the damages was being awarded for deprivations, pain and suffering over a period commencing in the past.
3. There was no justification for an allowance of interest in respect of so much of the award as related to pain and suffering and deprivations not yet endured. However, interest at the rate of 5% per annum would be allowed from the date of judgment until payment.
4. The appeal was allowed; the award was set aside and in lieu, it was ordered that the appellants pay damages in the sum of $17,000. The costs order was not disturbed.

Cases considered:

Cropper v Smith (1884) 26 ChD 700

Queensland v JL Holdings Pty Ltd (1997) 189 CLR 146; 141 ALR 353

Statutes considered:

Mental Health Act 1992

Counsel for first appellant	:	Ms Tonga
Counsel for second appellant	:	Mr Cauchi
Counsel for respondent	:	Mr Niu

Judgment

This is an appeal from an award by Lewis CJ of T$50,000 plus interest at 5% per annum from 11 February 1997 (the date of the issue of the writ), together with costs, in respect of nervous shock which was held to have been inflicted upon the respondent by the negligence of the first appellant, for whom the second appellant was vicariously liable. The case, the Court was told, was, so far as is known, the first of its kind to be heard in Tonga.

The tragic event out of which the action arose was the death of the respondent's son, aged 9 years, when he was crushed by a front-end loader before her eyes. That was on 20 December 1995, on a roadway at the village of Fata'ulua in the island of 'Eua. The respondent's son was with two other children near the road, and the front-end loader, which was owned by the second appellant, was being driven by the first appellant. The respondent suffered the inevitable grief reaction, and after the lapse of some time developed a post-traumatic stress disorder.

At the hearing, evidence was called from which the trial judge found that the first appellant had seen children running about in the vicinity, and that he was driving at a speed which was reckless in all the circumstances, particularly as the brakes of the vehicle were to his knowledge in a defective condition. The roadway, described as a "track", was unpaved and narrow. So far as the brakes were concerned, the first appellant had several times reported their defective condition to the mechanic at the relevant Ministry, but the fault had not been rectified. In the circumstances, the judge's finding in favour of the respondent on the issue of negligence was inevitable.

The Notice of Appeal filed on behalf of the Kingdom of Tonga does not raise any ground of appeal with respect to liability, although it purports to challenge the decision on that issue. The other appellant does raise a defence of estoppel. This is based on the proposition that this appellant, who was very remorseful, was assured by the respondent and her husband that the respondent would not claim against him, except, perhaps, in a technical respect. But the fact is that the circumstances entitled the respondent to maintain her claim. And there is no basis for the suggestion that the elements of an estoppel could be made out.

The first appellant could not show that he had suffered any detriment in reliance on the alleged representation.

The arguments in respect of damages are more formidable.

The facts to be taken into account in relation to the issue of damages should be set out briefly. In the first place, it is important to note that the trial judge, who heard

and saw the witnesses, found expressly that he had no doubt the respondent was "a truthful witness". She was a housewife and mother, aged at the time some 30 years. The child who was killed was the second son in a family of three children, a fourth being born after the accident on 15 June 1996. The respondent was pregnant at the time her son was killed.

The respondent's claim was originally limited to the sum of T$10,000 dollars, and was unsupported by any significant medical evidence. It appears that, as a result of a comment by counsel for one of the appellants about the inadequacy of a case so presented, the respondent's counsel decided to obtain psychiatric evidence and arranged for a medical examination accordingly during an adjournment. Perhaps the novelty of the claim explains what occurred, but we think it appropriate to emphasise that, in all cases of personal injuries, the available medical evidence should be obtained in writing well in advance of the hearing, and all parties should be provided with copies of medical reports. Otherwise, unfortunate delays and difficulties will prove unavoidable. It is the responsibility of those appearing for a plaintiff to ensure that the extent of the claim is explored in good time, and that notice is given to the defendant of the full claim with proper particulars.

However, it was emphasised by Bowen LJ in *Cropper v Smith* (1884) 26 ChD 700 at 710-711 that the Court, in hearing a claim or defence, endeavours not to punish the parties for mistakes of procedure, but rather to ensure that each of them receives the full measure of justice. Over the period of more than a century since Bowen LJ wrote his judgment in that case, it has repeatedly been followed, and recently by the High Court of Australia in *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146; 141 ALR 353. Accordingly, we have no doubt that the trial judge was right to allow the respondent's claim to be amended to a claim of T$50,000, and to allow the psychiatric evidence which became available, although very late, to be adduced. Had the appellants sought an adjournment, they might have been entitled to it, but that did not happen. Very fairly, counsel for the Kingdom conceded that the medical practitioner called was acceptable to his client.

The psychiatric evidence was presented by way of a report of Dr Puloka, who has the ordinary medical qualifications, and, in addition, diplomas which qualify him to give evidence on the subject of psychiatric illness. Dr Puloka examined the respondent on four occasions, on 21 October 1997, 22 October 1997, 30 October 1997 and 31 October 1997. He obtained a history of the respondent's problems since the death of her son, which included the onset of left-sided headache, and what might be summed up as feelings of depression. After some time, she and her husband decided to move to Tongatapu and joined a Bible School there, "which in fact alleviated her psychiatric problem". The doctor referred to the horror of what the mother saw immediately after the accident and to her having fainted upon seeing her son's dead body. He recounted that she experienced distressing recollections of the event, and various physiological symptoms of her psychological reactions. She was "emotionally labile" upon examination, and the doctor thought it to be the fact that "she had been really unwell since October, 1996." He specifically recorded that "she evidenced no grandiosity, delusion, hallucination or brain damage per se." He found:

> "The most prominent features of her emotional illness are severe anxiety and severe depression that relate to the recollection of the accident."

The doctor submitted the respondent to a serious of standard psychological tests, each one of which revealed severe disturbance and, in particular, severe depression. He considered that her condition constituted a mental disorder within the meaning of the Mental Health Act 1992, and was incapacitating in nature. He concluded his summary by saying:

> "As a result of her very dramatic experience, Lineti has gradually developed [a] severe form of anxiety and depression that is characterized by signs and symptoms that fit in the DSM-IV (Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition) diagnosis for Post-traumatic Stress Disorder (PTSD)."

The doctor also stated:

> "In my opinion, Lineti's PTSD has been precipitated by the fact that she witnessed the nature of the death of her son. She has undergone the normal stage of bereavement after the death of her son but the incapacitating symptoms of PTSD [have] significantly affected her since October, 1996. … Lineti has developed great insight to her Mental Illness and this has rendered her not to become dangerous to other[s] or herself. Thus, a need for admission to the Psychiatric Unit is not warranted. The treatment plan for Lineti is a long term one since the prognosis of her psychiatric illness is somewhat poor."

He added that he had prescribed a drug for her symptoms and that close monitoring and treatment would follow.

There were no special damages.

In any claim for damages, the onus is on the plaintiff to prove what those damages are. The evidence here is that no ongoing treatment was received until the time of the hearing itself. We give full weight to the judge's acceptance of the credit of the respondent, and to Dr Puloka's opinion. But there is no evidence of the result of any significant period of treatment to guide the Court in the making of an assessment of the probable future for the respondent. It is well known, and a Court is entitled to take judicial notice of the fact, that after the catharsis of a trial, psychologically injured persons often make a significant degree of recovery. In this case, the doctor makes no specific prediction for the future. Notwithstanding that he foresees a need for ongoing treatment, he does not suggest, and indeed expressly discounts, any need for admission to a Psychiatric Unit.

Bearing in mind all the circumstances, we are unable to accept that an award of T$50,000 dollars for pain and suffering and the loss of amenities, in a case where nothing in the nature of economic loss was shown, can be regarded as within the range of acceptable verdicts. In our opinion, it must be regarded as excessive.

Since we have held the award made at first instance to be excessive, it falls to us to reassess the damages. We do so accepting the primary judge's findings of fact, and his view of the credit of the witnesses. Taking into account all of the matters we have mentioned and which are referred to in the judgment under appeal, and that a part of the damages is being awarded for deprivations, pain and suffering over a period commencing in the past, we have concluded that a proper and just award in this case is the sum of T$17,000 dollars. Having regard to the way in which we have assessed

this figure, it is unnecessary to allow any amount in respect of pre-judgment interest, but we should point out that the judgment under appeal is in error in allowing such interest on the full amount awarded. There is no justification for an allowance of interest in respect of so much of an award as relates to pain and suffering and deprivations not yet endured. However, interest at the rate of 5% per annum should be allowed from this date until payment of the judgment upon so much of it as remains outstanding. Accordingly, the appeal is allowed; the award is set aside; and in lieu of the award, it is ordered that the appellants pay damages in the sum of T$17,000 dollars. The costs order made below is not disturbed. The order in respect of interest
180 is varied in the manner we have indicated. There will be no order as to the costs of the appeal.

Tafolo v Vete

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 2/98

5 and 6 August 1998; 7 August 1998

Land — equity of possession — varied / discharged by subsequent arrangements
Practice and procedure — no evidence in crucial areas — new trial ordered

Semi Vete and Tevita Fetuli, the first and second respondents, brought ejectment proceedings in the Land Court against Siaosi Tafolo and his son Fasi'apule, the appellants, seeking possession of a town allotment ["the allotment"]. The Minister of Lands, the third respondent, was joined as a third party to the proceedings. The Land Court made an order for possession against the appellants. The appellants appealed that judgment.

Held:

1. The main matter that appeared to have been raised by the appellants in their pleadings was an equity of possession.
2. Any such equity could be varied or discharged by subsequent arrangements made between the parties. There appeared to be two such arrangements.
3. The parties failed to lead evidence in crucial areas in relation to the arrangements. It followed that through no fault of his Honour, the trial miscarried because both sides failed to plead, and adduce evidence on, those two matters.
4. Given the failure of the parties to address the real issues in their respective pleadings, and in their evidence, there would be no order for costs on the appeal.
5. It was necessary and appropriate to order a new trial

Statutes considered:
Land Act Cap 132

Counsel for appellants	:	Mr Tu'utafaiva and Mr Fakahua
Counsel for first and second respondents	:	Mr Muller
Counsel for third respondent	:	Mr Malolo

Judgment

Introduction

Semi Vete and Tevita Fetuli, the first and second respondents, brought ejectment proceedings in the Land Court against Siaosi Tafolo and his son Fasi'apule, the appellants, seeking possession of a town allotment ["the allotment"]. The Minister of Lands, the third respondent, was joined as a third party to the proceedings.

The Land Court made an order for possession against the appellants. They now appeal from that judgment.

In order to understand the context in which the findings of the Land Court were made, it is necessary to describe the issues tendered by the parties in the pleadings, and to outline the evidence at first instance.

The Claims Made by the First and Second Respondents

The statement of claim alleged:

- The first appellant resided on the allotment.
- The second respondent agreed, subject to the approval of the third respondent and of Cabinet, to lease the allotment to the first respondent.
- On 5 October 1993, Cabinet gave its approval.
- On 21 June 1994, a Deed of Lease was issued to the first respondent for a term of fifty years commencing on 21 June 1994.
- Despite requests to move, the first appellant remained on the allotment.
- An order for possession was sought accordingly.

The Appellants' Defence and Counterclaim

In answer to this claim, the appellants pleaded the following:

- It was "unreasonable" for the first appellant to be asked to move off the allotment: the first respondent understood that the appellants had occupied the allotment for over forty years.
- The first and second respondents misled the third respondent into granting the Deed of Lease.

By their counterclaim, in addition to the matters pleaded in their Defence, the appellants alleged the following:

- The first appellant and his family had lived on the allotment since 1948. He built a big dwelling house there in 1956 in which the second appellant resided. The appellants resided on the allotment with the intention that, in accordance with a promise made to them, a deed of grant would be issued to the second appellant.
- Since 1945 the first appellant looked after and cared for and provided maintenance for the late Tevita Moeata

Fetuli, who was the former holder of the allotment and father of the second respondent. The late Tevita Moeata Fetuli and his wife Vaopolo, in consideration and appreciation of their love and maintenance, promised the appellants to grant them the allotment.

- The first appellant, in reliance on the promise of a grant of the land by the late Tevita Moeata Fetuli, moved into the allotment with his family in 1948 and built their dwelling house on it in 1956. The late Tevita Moeata Fetuli and Vaopolo were staying in their own separate house on the allotment.
- After the death of Vaopolo in 1967, the first appellant continued to serve and maintain the late Tevita Moeata Fetuli and his second wife, 'Elenoa, and their children.
- In 1982, after the death of Tevita Moeata Fetuli, the late 'Elenoa asked the first appellant for $1,500.00. The first appellant gave her this amount and she assured him of the registration of the allotment.
- Later in 1982, instead of registration of the allotment in the name of the appellants, the late 'Elenoa only allowed a short-term lease permit to the first appellant.
- In 1990 the second respondent approached the first appellant and asked for $2,000.00, promising registration of the allotment in the name of the second appellant.
- The first appellant, in reliance on this representation, gave $2,000.00 to the second respondent.
- The second respondent, notwithstanding receipt of the $2,000.00 from the first appellant, and despite his promise to register the allotment in the name of the second appellant, entered into only a lease with the second appellant, instead of having the allotment registered in his name.
- The second respondent "holds equitable right in favour of" the appellants in respect of the allotment.
- The appellants have occupied the allotment for forty-seven years.
- The first respondent was "wrong" and the second respondent misled the third respondent to grant a Deed of Lease to the first respondent. Moreover, the respondents understood that the appellants had occupied the allotment for over forty years.
- The appellants claimed that the Deed of Lease granted to the first respondent was unlawful since -

(a) it was granted as a result of the fraud or misrepresentation of the second respondent upon the third respondent.

(b) the land was "not available for grant" for the purposes of the Land Act, as it was occupied by the appellants.

(c) there was a mistake or misunderstanding on the part of the third respondent.
(d) it was "inequitable."
(e) the second respondent was estopped from denying his letter dated November 1988.

[The second respondent's letter dated November 1988 was in these terms:

"I hereby respectfully convey in this letter that I am truly satisfied that [the second appellant] continue on living on the land that he leased pending to his legal status on the land.

I authorise that his house remain where it is in 1956 (October) and the water cistern [and] shop, I authorise those assets to remain on the land forever and it is my consent with respect.

I show respect with the truth with kindness, refer to my writing and signature. (sgd the second respondent).

I [second appellant] have authorised [the first appellant] the father of [the second appellant] to draw up this agreement.

I Rev. Siaosi Tafolo (Free Methodist) of Tonga [the first appellant] is the author of this agreement as authorised by [the second respondent]."]

- Accordingly, the appellants counterclaimed for:

(a) an order cancelling the Deed of Lease
(b) any other order the Court deemed just.

The First and Second Respondents' Answer to the Appellants' Counter Claim

In their answer, the first and second respondents denied, or did not admit, the substantial allegations made by the appellants in their counterclaim. The first and second respondents added the following specific answer:

> "14. The first and second [respondents] deny that the lease was granted based upon fraud or misrepresentation. Deny that the land was not available or say that [the appellants] were illegally occupying the land. Deny that the third [respondent] has made a mistake. Deny that the lease is inequitable and [say] that the second [respondent] is not estopped from denying the letter of November 1998."

The Respondents' Evidence

The first respondent said that he made the leasing arrangement with the second respondent in 1993 and had paid rent since 1994. He knew that the appellants occupied the allotment but the second respondent had told him that the appellants' lease had expired, and that they had been required to vacate.

The second respondent said that the allotment had previously [in 1986 — see below] been leased to the first appellant. That previous lease had expired [in 1988]. [It is common ground that in 1986, the first appellant was granted a lease permit by the second respondent for a term of two years, expiring in 1988]. In 1989 he commenced ejectment proceedings against the appellants. Those proceedings were settled [in 1992 — see below]. Under the settlement, he agreed to a renewal of the lease to the first appellant for five years, but the first appellant failed to register it.

[A copy of an application to the third respondent for the renewed lease, signed by the first appellant, was in evidence. It bore date 8 May 1991. The first respondent's typed signature appeared on it. It provided for a term of five years and a rent of $100 per annum.

Court papers in the 1989 proceedings were also in evidence. They indicated that, on 2 May 1991, counsel for the parties informed Webster J that the appellants were "making arrangements for the payment due;" that on 9 May 1991, his Honour was informed that "the payment agreed has now been made and a lease application signed;" and that on 2 July 1991, counsel said that the approval was ready for submission to Cabinet for approval with a view to its registration.

The Court papers also indicated that on 14 February 1992, Dalgety J noted the following and made these orders:

> "Upon hearing counsel for the parties (Hola, Niti, and Mrs Tafea) who represented that between them parties have agreed upon a renewal of the lease in question, suitably backdated, and that said renewal is now before His Majesty's Cabinet for approval; and accordingly that all contentious issues between the parties have now been resolved extra-judicially; therefore, (by) consent
>
> IT IS ORDERED AND ADJUDGED:
>
> 1. That the action be dismissed: and,
> 2. That no order for costs be made against or in favour of any of the parties to this action."]

The second respondent was cross-examined about his 1989 ejectment action and the settlement of the litigation in 1992. He agreed that it was settled by the first appellant for $8,000. He denied that this amount was paid to him so that the first appellant could continue to occupy the land. He first said the amount was "for rental". He then said that the settlement was entered into on the basis that, if he was paid $8,000, he would extend the lease for five years.

The First Appellant's Evidence

The first appellant, now resident in United States of America, said that he had occupied the allotment since 1945. For many years, he looked after the previous holders, who promised to register the allotment in his name. He built a substantial dwelling house on the allotment in 1956 at an estimated cost of $350,000. In 1982 he asked the second respondent to honour his family's promise to register the allotment in the first appellant's name, but the second respondent did not do so. In November 1988, the parties signed the letter set out above. The subsequent litigation commenced by the first respondent against him was settled. The first respondent was paid $8,000; and he agreed that the allotment would be registered in the name of the first appellant, who "would live on the land forever."

The Judgment under Appeal

The learned primary Judge first considered the appellants' claim that the grant of the Deed of Lease was vitiated by fraud or mistake. His Honour said:

> "I have treated the allegation of fraud … as being one which the [appellants] must prove on the balance of probabilities. This they have not done. It may truly be said that they have raised a suspicion that events have not gone as they would ordinarily be expected to go, but beyond that suspicion there is no evidence whatsoever … that this land passed to [the first respondent] as a consequence of fraud. That however does not deal with the allegations of innocent misrepresentation or mistake."

Having said that he was convinced of the honesty of the appellants, the primary Judge found that the first appellant moved onto the allotment in 1948 and looked after the previous holders. He cleared, filled and levelled the allotment. He believed that he had been promised the allotment. He built a substantial house upon it. Of this, his Honour said:

> "It is not the kind of construction which one might reasonably expect the [first appellant] to put up unless he had a clear unconditional expectation of the land upon which it is built to be registered in his name."

His Honour noted that a document held by the Ministry of Lands dated 19 September 1963 indicated that an instruction was given to prepare a Deed of Grant of the allotment to the first appellant. The primary Judge said:

> "Why the instruction to prepare a deed of grant for [the first appellant] was not carried out or if it was, why the Deed has now not appeared is now unable to be answered. The [appellants] have not been able to demonstrate the reason for the failure of the Land office to carry out what was the unequivocal direction of the Minister of Lands in 1963."

His Honour went on to refer to the discussion between the first appellant and the first respondent in 1982 and said:

> "The [first appellant] asked [the first respondent] to register the [allotment] as his father had promised. He refused. Instead he agreed to allow [the second appellant] to lease the [allotment] for a term of two years in consideration of a payment of money.
>
> It is sufficient to say that the agreement broke down and there was some litigation which was settled by [the first appellant] paying to [the first respondent] the sum of about $8,000. The fact of the settlement was recorded by Dalgety J. Before Dalgety J the terms of settlement were not recorded. The order simply dismissed the action and recorded that there would be no order as to costs. However, in the preamble the document records that the parties have agreed:

> 'upon a renewal of lease in question suitably back dated … and accordingly all contentious issues between the parties have now been resolved …'
>
> 'The parties' were [the first respondent] [the appellant] and [the third respondent]. It was at that point that [the first appellant] had an opportunity to resolve the unfulfilled promise of Tevita Fetuli Moeata to register the land in [his] name and he failed to do so. The order was made on 14 February 1992."

His Honour next referred to the letter dated November 1988 and found, despite the denial of the first respondent, that the first respondent had signed it. The trial Judge said:

> "What does the document mean? In my opinion it means that in November 1988 [the first respondent] expressed permission for [the second appellant] to remain on the land that he leased 'pending his legal status on the land'. Whatever that last phrase may mean it does not convey any interest save perhaps a licence to [the second appellant] to conditionally reside on the 'land that he leased' - land which is unidentified. The document purports further to authorise 'assets' house, water cistern and shop to 'remain on the land forever'. It does not convey to [the appellants] or either of them any right to registration of any land including the land the subject of this action pursuant to the Land Act provisions or at all. It was never clear just what, if any, part the document played in the litigation which was settled."

His Honour went on to note first, that although the process of granting the allotment to the first appellant was "well in train by 1963 at the instance of the Minister", yet the appellants "did nothing to further their hold on … their claim in equity for a legitimate grant …"; and secondly that there was no evidence of what inquiries were made by the Lands Ministry as to the existence of any agreement between the holder and the lessee, or as to whether there was an occupancy at the time of the lease to the first respondent.

In concluding that the first and second respondents' claim for possession was made out, his Honour said:

> "However the real question seems to me to be whether this case is one of those that fits within the contemplation of the judgments in relation to equitable defences. I conclude that it does not. The [appellants] and each of them have settled litigation in a way which is inconsistent with the claim that estoppel or any other equitable defence would afford them protection against the claims of the [first and second respondents]."

The Grounds of the Appeal

By their notice of appeal, the appellants now challenge the judgment on these grounds:

- Fraud in the grant of the lease to the first respondent should have been found.
- Since the first appellant had no control over a grant or its registration, his Honour should not have held that the first appellant failed to take "an opportunity to resolve the unfulfilled promise of Tevita Moeata Fetuli to register the land in [the first appellant's] name."
- The November 1988 letter conveyed an interest greater than a licence.
- There was evidence of an occupancy at the time of the lease to the first respondent.
- His Honour erred in failing to consider the appellants' submission that the Deed of Lease was granted by the Minister of Lands to the [first respondent] upon 'misrepresentation or mistake.'
- His Honour should have held that an equitable defence had been made out.
- His Honour erred in holding that the appellants had settled litigation in a way which was inconsistent with their claims of estoppels or other equitable defences.

Conclusions on the Appeal

We agree with the primary Judge that, upon proof of the Deed of Grant, the first and second respondents were, at common law, entitled to an order for possession. The onus then shifted to the appellants to establish a defence at law, or in equity, that would answer the claim for ejectment; and, as has been seen, a number of defences and counterclaims were advanced by the appellants in their defence and counterclaim.

The main matter that appears to have been raised by the appellants in their pleadings is an equity of possession of the kind described by *Halsbury's Laws of England* [4th Ed Reissue] Vol 27(1) at 33 as follows:

> "Equity recognises and enforces rights (sometimes referred to as 'equities of possession' or 'equitable licences') so as to restrict the revocation of licences to occupy or use premises which at common law would be regarded as revocable. This restriction occurs where a person who is occupying or using land has acted in reliance upon the representation or the acquiescence of the person having a proprietary interest in respect of that land. Where a person has established an express or implied licence to occupy premises, the role of equity is supportive and supplementary, but, if the legal relationship between the parties is such that the true arrangement between them will be frustrated if they are left to their legal rights and duties at law, an equity will arise notwithstanding that there has been no agreement (so that there is no contractual licence), and notwithstanding that the representation made or the belief which has been acted upon is so imprecise as not to define the duration of the right to occupy or use the premises; in such circumstances it is for the court to

> determine what period of occupation or use is sufficient to satisfy the equity. Such rights arise by operation of the principles of equitable estoppel."

Of course, if such an equity were to be made out here, it would prima facie bind only the second respondent. But if it was shown that the first respondent, as the holder of the legal leasehold estate, also had notice of the appellants' equity, he would also be bound.

Any such equity could, of course, be varied or discharged by any subsequent arrangements made between the parties themselves. In the present case, it appears that there were two such arrangements:

(1) the November 1988 letter; and
(2) the settlement of the litigation in 1992.

His Honour correctly appreciated that either or both of these were significant, perhaps critical, to the outcome of the proceedings. Yet, as has been noted, neither was pleaded by either side in any substantive sense [the 1988 letter was barely mentioned in the appellants' counterclaim]. Moreover, no attempt was made by either side to lead evidence to explain the true context of the 1988 letter. Given its patent ambiguities, such evidence was essential. The evidence about the 1992 compromise was equally unsatisfactory. Again, despite the conflict in the evidence given by the parties in cross-examination as to the terms of the settlement, no attempt was made by either side to call the legal representatives involved in the negotiation, notwithstanding the obvious significance of their evidence.

The position then is that, although no objection was taken to this course, the parties proceeded to depart from the pleadings in substantial respects in their conduct of the case. The problem was severely compounded when the parties failed to lead evidence in the two crucial areas we have mentioned. It followed, we think, that through no fault of his Honour, the trial miscarried, because both sides failed to plead, and adduce evidence on, those two matters.

In the circumstances, it is necessary and appropriate to order a new trial. We reach this conclusion with regret, but we can see no alternative if justice is to be done in this case. Given the failure of the parties to address the real issues in their respective pleadings, and in their evidence, there should be no order for the costs of the appeal.

Orders

We make these orders:

1. Appeal allowed.
2. Set aside the orders of the Land Court.
3. Order a new trial of the proceedings.
4. No order for the costs of the appeal.

Kaufusi v Kaufusi

Court of Appeal, Nuku'alofa
Burchett J, Tompkins J, Beaumont J
CA 3/98

6 August 1998; 7 August 1998

Land — disposition, like sale or conveyance, of allotment — null and void

The Supreme Court made a decision declaring null and void a purported transfer by the first appellant to the second appellant of a town and a tax allotment, and made a declaration entitling the late Viliami Fetukutuku-he-tau Kaufusi to make an election pursuant to the provisions of the Land Act to take the allotment in question as the heir of the first appellant. The appellants appealed that decision.

Held:

1. Any attempt to bind Viliami Kaufusi to a voluntary arrangement with his father of the kind alleged would encounter the difficulty that section 6 of the Land Act makes null and void a disposition "which purports to effect a voluntary conveyance [or] an out-and-out sale" of an allotment.
2. Section 82(c) of the Land Act gave him the inheritance, as the eldest son. Section 54 provided that upon the surrender the allotment devolved "immediately" upon him as the heir. Section 84 gave him, as a son, the right "to elect between the allotment already held by him" and the allotment surrendered by his father.
3. The appeal must be dismissed with costs.

Cases considered:

Hakeai v Minister of Lands [1996] Tonga LR 142 (CA)
Vailea v Sakalia (Court of Appeal, unreported, CA11/95, 31 May 1996)

Statutes considered:

Land Act Cap 132

Counsel for appellants	:	Mr Tu'utafaiva
Counsel for respondents	:	Mr Hola
Counsel for Minister of Lands	:	Ms Bloomfield

Judgment

This is an appeal from a decision of Lewis J (as he then was) declaring null and void a purported transfer by the first appellant to the second appellant of a town and a tax allotment, and making a declaration entitling the late Viliami Fetukutuku-he-tau Kaufusi to make an election pursuant to the provisions of the Land Act to take the allotment in question as the heir of the first appellant.

This Court has previously held, in *Hakeai v Minister of Lands* [1996] Tonga LR 142 (CA) and *Vailea v Sakalia* (Court of Appeal, unreported, CA11/95, 1 May 1996), that section 54 of the Land Act operates according to its terms upon the surrender of an allotment. By it, any allotment or any part of an allotment surrendered by the holder, with the consent of the Cabinet, shall, subject to the provisions of the Act, immediately devolve upon a person who would have been the heir if the holder had died. In a case where the heir is a son or grandson of the holder, section 84 entitles him to make an election between an allotment already possessed, which is of the same kind, and the allotment in question. As was pointed out in *Vailea v Sakalia*, "there is no provision in the Land Act for a person surrendering land to impose conditions to that surrender." It follows that the eldest eligible heir is entitled subject to the provisions of the Land Act, upon a surrender. Nor, it was held, can a surrender be cancelled, at least in the absence of "significant mistake or fraudulent conduct causing the surrender".

In the present case, the first appellant surrendered an allotment, apparently with a view to the eldest legitimate child of his second marriage obtaining title to it. However, the late Viliami Kaufusi was then alive and was his eldest legitimate son, by a prior marriage. Viliami Kaufusi had elected to surrender another allotment held by him in order that he should be able to take the allotment surrendered by his father. Nevertheless, the appellants' plan succeeded at first, insofar as the Minister of Lands registered the second appellant as entitled to the allotment surrendered. But he did so on the basis of an application the correctness of which the second appellant had verified by oath, which falsely stated the second appellant was the heir, and omitted any appropriate reference to Viliami Kaufusi. The present proceeding was then initiated by Viliami Kaufusi, seeking the setting aside of the registration of the second appellant and an order enabling his own registration. There was no counterclaim to set aside the surrender effected by the father, the first appellant.

By the judgment appealed from, Viliami Kaufusi obtained in substance the relief that he sought.

At the hearing, a great deal of attention was given to a dispute to whether, following the death of the first appellant's second wife, there had been a family meeting, during which the late Viliami Kaufusi had deferred to his father's wishes in respect of the succession to the allotment. The appellants asserted there had been an understanding of this kind, while Viliami Kaufusi denied it strongly. The trial judge did not state expressly, which version he accepted on this issue, but he did make it clear that the second appellant's evidence deserved little credit, since he had been prepared to swear falsely when applying for registration of the allotment. The first appellant was also involved in that application. Reading the judgment as a whole, it seems clear to us that his Honour was not prepared to find that Viliami Kaufusi had ever bound himself to renounce his inheritance. When the matter was debated at the hearing of the appeal, counsel for the appellant conceded that it was not suggested the

meeting bound the son, but that it explained the action of Mo'ale [ie the second appellant].

Of course, any attempt to bind Viliami Kaufusi to a voluntary arrangement with his father of the kind alleged would encounter the difficulty that section 6 of the Land Act makes null and void a disposition "which purports to effect a voluntary conveyance [or] an out-and-out sale" of an allotment. Counsel doubtless had this in mind.

Once this concession was made, only one possible answer remained to the claim made by the late Viliami Kaufusi. Section 82(c) of the Land Act gave him the inheritance, as the eldest son. Section 54 provided that upon the surrender the allotment devolved "immediately" upon him as the heir. Section 84 gave him, as a son, the right "to elect between the allotment already held by him" and the allotment surrendered by his father. The one argument raised by counsel for the appellant was that section 84 should be read as subject to an implied proviso excluding an allotment already held by family inheritance from the category of allotments a son or grandson could elect to give up in favour of taking a further inheritance. But the section contains no such proviso, and we do not think the Court could possibly avoid its clear language by an implication of that kind. To do so would be to rewrite the section, not to interpret it. Accordingly, the appeal must be dismissed with costs.

It should be recorded that, Viliami Kaufusi having, died during the pendency of the appeal, the Court by consent appointed his three sons as representatives of him and his estate.

R v Lavakei'aho

Supreme Court, Nuku'alofa
Finnigan J
Cr 823/97 and 879/97

24 and 25 August 1998; 25 August 1998

Evidence — admissibility of confession — voir dire
Evidence — question whether confession made voluntarily — Crown to prove

Counsel for both accused challenged the admissibility of the record of interview, formal charge document and confession statement which the Crown sought to tender in respect of each accused. Both counsel relied upon s 21 and the proviso to s 22 of the Evidence Act (Cap 15). The Crown accepted the onus of establishing beyond reasonable doubt that the statements were made voluntarily.

Held:

1. The court was unable to say that the statements made by each of the two accused were made voluntarily.
2. The documents were ruled inadmissible.

Cases considered:

R v McCuin [1982] 1 NZLR 13 (CA)

Statutes considered:

Evidence Act Cap 15

Counsel for prosecution	:	Mr Cauchi
Counsel for defendant	:	Mr Kaufusi and Mrs Taufaeteau

Judgment

There has been a challenge by counsel for both accused to the record of interview, formal charge document and confession statement which the Crown wishes to tender in respect of each accused. Both counsel rely upon s 21 and the proviso to s 22 of the Evidence Act, Cap 15. The Crown accepts the onus of establishing beyond reasonable doubt that in each of the three documents in the case of each accused the statements of the accused were made voluntarily.

I have heard the evidence of the police officer who took down the answers in each of these three documents for each of the two accused. He has been

cross-examined by both counsel. No other evidence has been called. I have noted the following passages in the police officer's evidence, first about his dealings with the accused Lavakei'aho and second about his dealings with the accused Tukutau.

The police officer was frank and direct in all his answers to counsel. (Reads passages from notes of evidence. In respect of the accused Lavakei'aho, these included answers that the police officer had been told by another police officer and by the accused that he did not want to make a statement, but the police officer told him he must; and that after the forms were completed by the police officer, including the answers of the accused, he told the accused he must sign them. The recorded interview commenced at 2:00 am and finished at 3:3l am, after which the charge was put and further statements recorded. This was the second interview, the first having yielded, to the other police officer, answers that were thought unsatisfactory. In respect of the accused Tukutau, the evidence included answers that the police officer had kept the accused briefly in a police-station cell before taking him to confront the alleged accuser, (in Hu'atolitoli prison where the accuser was a sentenced prisoner). Further, that he had told the accused to speak up and not tell lies because after the meeting with the accuser he would put him in the cell. The accused had replied that he knew nothing of the alleged offence, and upon return from Hu'atolitoli the police officer had put him in the cell. The police officer told him that if he did not admit the offence, he would be gaoled for eight days.)

I have to consider that evidence in the light of s 21, which is as follows (reads the whole section). From the authorities mentioned to me, I am satisfied that one is sufficient, *R v McCuin* [1982] 1 NZLR 13 (CA). That case is also the authority in New Zealand for the onus which has been accepted in this voir dire by the Crown. There, the New Zealand Court of Appeal in the judgment of the majority in a five-judge court, said:

> "… confessions obtained by improper methods are excluded, not only because of their potential unreliability, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subject to ill treatment or improper pressures in order to extract confessions …"

After considering the above evidence, I am unable to say that, without reasonable doubt, the statements made by each of the two accused, in turn, to the police officer were made voluntarily. Pursuant to s 21 of Cap 15, I am bound to rule each of the three documents, in respect of each accused, inadmissible to prove the statements of the accused that are recorded in them. I rule accordingly.

Polynesian Airlines (Investments) Ltd v Kingdom of Tonga

Supreme Court, Nuku'alofa
Finnigan J
C 126/97

14 – 28 April 1998; 28 August 1998

Negligence — forseeability of risk — stowing away in wheel well too remote
Negligence — culpability of defendant — not culpable

A Polynesian Airlines aircraft was damaged in an emergency landing at Faleolo airport in Samoa. A person ('the stowaway') had entered the wheel well of the plaintiffs' aircraft at Fua'amotu airport during its turnaround in the early hours of 14 September (local time) 1994. At the time of entering, the stowaway was carrying a machete and was wearing construction boots on his feet, many layers of clothing and outside those a jacket like a parka. He died from lack of oxygen and his body thereafter became lodged in the right main landing gear. This caused a malfunction of the aircraft landing gear, so that the aircraft landed in Samoa with the right main wheel retracted and was damaged. The plaintiffs' case was that the stowaway boarded the aircraft as a result of the defendant's negligence in failing to provide proper security. The cause of the plaintiffs' losses was the boarding by the stowaway, which was a natural and probable result of the defendant's complacent and inadequate attitude to security. The defendant accepted that it owed invited or permitted visitors to the airport a duty to take reasonable care that the visitor and his/her property would be reasonably safe, and that owners and/or persons interested in and/or operators of aircraft (such as the plaintiffs claim to be) were invitees and licensees to whom a duty of care was owed. The defendant pleaded that the admitted duty of care did not extend to prevention of damage to the property of a visitor damaged by the action of third party, lawful or otherwise. It denied that the admitted duty of care included a duty to provide reasonable security and protection to all users of the airport. The defendant claimed that its duty was to take care to preclude foreseeable risks, and that what occurred on 13 — 14 September 1994 at Fua'amotu airport and at Faleolo airport was outside the ambit of foreseeable risks and outside that duty

Held:

1. The factual contentions of the plaintiffs about an insufficient standard of security as a cause of the boarding by the stowaway were not substantiated by the evidence.

2. The incidence of stowing-away in a wheel well was too unlikely an event for the defendant, as operator of the airport at Fua'amotu, to foresee reasonably as a probable event at Fua'amotu.
3. The law of negligence was concerned less with what is fair than with what was culpable.
4. The plaintiffs' action was dismissed.

NOTE: The plaintiffs subsequently appealed the Supreme Court decision to the Court of Appeal. The appeal decision will be reported in a subsequent volume of the reports.

Cases considered:

Allison v Rank City Wall Canada Ltd (1984) 6 DLR (4th) 144; (1984) 29 CCLT 50

Bolton v Stone [1951] AC 850; [1951] 1 All ER 1078

Candlewood Navigation Corpn Ltd v Mitsui OSK Lines (1985) 3 NSWLR 159; [1986] AC 1; [1985] 2 All ER 935 (PC)

Caparo Industries Plc v Dickman [1990] 2 AC 605; [1990] 1 All ER 568

Fardon v Harcourt-Rivington (1932) 146 LT 391

Home Office v Dorset Yacht Co Ltd [1970] AC 1004; [1970] 2 All ER 294

Hughes v Lord Advocate [1963] AC 837; [1963] 1 All ER 705

Jolley v Sutton London Borough Council [1998] 1 WLR 1546; [1998] 3 All ER 559 (CA)

Overseas Tankship (UK) Ltd v Miller Steamship Co Pty [1967] 1 AC 617; [1966] 2 All ER 709 (PC)

Smith v Littlewoods Organisation Ltd [1987] AC 241; [1987] 1 All ER 710

Stansbie v Troman [1948] 2 KB 48; [1948] 1 All ER 599 (CA)

Sutherland Shire Council v Heyman (1985) 60 ALR 1; 59 ALJR 564

Statutes considered:

Civil Aviation Act 1990

Occupiers' Liability Act 1957 (UK)

Counsel for plaintiffs	:	Mr Waalkens, Ms Barlow, Mr Myles
Counsel for defendant	:	Mr Webb QC, Mr Lydiard, Mr Gimblett

Judgment

The Pleadings

A Polynesian Airlines aircraft was damaged in an emergency landing on 13 September 1994 at Faleolo airport in Samoa. The plaintiffs claim that the defendant is liable to them for losses said to have been caused to them thereby. The pleadings in their final form are extensive and clear. The defendant, the operator of Fua'amotu airport in the Kingdom of Tonga, is said to have breached its duties to the plaintiffs in permitting access by a stowaway to the wheel well of the aircraft while it was at the airport preparing to depart for Samoa. The breaches alleged are said to have been

breaches of the common law duty of care, breaches of statutory duties under the Civil Aviation Act No 17/1990 (Part V), and breaches of duties under the Occupiers' Liability Act 1957 (UK). The plaintiff, in counsel's closing address, characterised the action as being primarily a simple negligence action. In argument, counsel for both parties dealt with the common law duties and the Occupiers' Liability Act duties as being in law the same. The plaintiff acknowledges that the distinction is not marked, although the common law claim is wider in scope.

The plaintiffs' case is (1) that the defendant had the duty of care, above: (2) that the plaintiffs, to the defendant's knowledge, relied on the defendant's undertaking of and performance of security services: (3) that the defendant charged the plaintiffs a fee to use the airport: (4) that the risk of damage as occurred in the present case was apparent and foreseeable (from an event the previous month, and from domestic circumstances in Tonga) and (5) that the defendant actually knew:

(i) that the airport perimeter fencing was inadequate, (with inadequate patrols);
(ii) that there was unacceptable overgrown scrub on the airport;
(iii) that there were risks from these facts including a risk of intruders on the airport; and
(iv) that the previous month there had been a serious breach of access to the controlled part of the airport, because of the inattentiveness of the defendant's security staff.

In respect of causation, the plaintiffs' case is that the stowaway boarded the aircraft as a result of the defendant's negligence in failing to provide proper security. The cause of the plaintiffs' losses, as summarised in counsel's closing address, was the boarding by the stowaway, which was a natural and probable result of the defendant's complacent and inadequate attitude to security.

Several of the plaintiffs' major claims are admitted by the defendant. It acknowledges that at the relevant date it was the occupier of Fua'amotu airport under the Occupiers' Liability Act 1957. It accepts that it owed invited or permitted visitors to the airport a duty to take reasonable care that the visitor and his/her property would be reasonably safe, and that owners and/or persons interested in and/or operators of aircraft (such as the plaintiffs claim to be) are invitees and licensees to whom this duty of care was owed. It pleads however, that the admitted duty of care did not extend to prevention of damage to the property of a visitor damaged by the action of third party, lawful or otherwise. It denies that the admitted duty of care included a duty to provide reasonable security and protection to all users of the airport. It accepts that the first plaintiff was lessee of the aircraft and is entitled to sue in tort for damage to the aircraft, and for losses consequential on such damage. However, it queries the nature of the second plaintiffs' interest in the aircraft and in any consequential losses.

In particular the defendant argues that to establish liability in negligence, the plaintiffs must show, and cannot, (1) that the defendant owed them a duty to avoid causing the types of loss claimed, (2) that the defendant was in breach of that duty and (3) that what the defendant did in breach of its duty caused the losses claimed. The essence of the pleaded defence is that the defendant's duty was to take care to preclude foreseeable risks, and that what occurred on 13-14 September 1994 at

Fua'amotu airport and at Faleolo airport was outside the ambit of foreseeable risks and outside that duty.

In respect of causation, the defendant's case is that, whether or not the boarding by the stowaway was within the ambit of foreseeable risks, the plaintiffs cannot establish a causal link between that and the losses claimed. As summarised in counsel's closing address, it is that the plaintiffs must prove more than negligence, they must prove a negligent failure to do something which was owed by duty and, if done, would have prevented the plaintiffs' losses.

The Claimed Heads of Damage

The damages being claimed by the plaintiffs were summarised in counsel's closing address as follows:

a) Recovery and Repair Costs

Under this head, with concessions after the evidence concluded, the plaintiffs claim US$2,001,060.45 for the recovery and repair of the aircraft.

b) Consequential Economic Losses

Under this head, the plaintiffs claim a total of US$300,000, although the itemised amounts total a higher sum. The itemised amounts are:

a. US$273,659.94 as the cost of two charters, the cost of sending disrupted passengers to other airlines together with their meals and accommodation for those passengers and for the repair and recovery team;
b. US$30,000 for loss of use and other economic losses;
c. US$25,000 for loss of business chance; and
d. US$50,000 for loss of goodwill.

c) Other Recovery and Repair Costs

Under this head the plaintiffs seek resolution of further disputed claims, namely for AU$24,275 paid as administration fees in the recovery and repair operation, and for inclusion of the costs of full removal and transport of the starboard engine.

d) Consequential Economic Loss

Under this head the plaintiffs claim the costs associated with providing alternative carriage, accommodation and meals to passengers stranded while the aircraft was out of service between 13 September and 2 October 1994.

The defendant contests all these claims, both on the merits and as to quantum, save now as to quantum the amended amount of recovery and repair costs. In respect of all claims for economic loss it raises a defence as follows: if the pleadings and the evidence of the plaintiffs is taken to show that the economic losses were borne by the second plaintiff, they cannot be recovered. This is because the second plaintiff is not entitled to sue in tort for economic loss unless such loss is consequent upon damage to property in which the second plaintiff has a proprietary or possessory right,

Candlewood Navigation Corpn Ltd v Mitsui OSK Lines (1985) 3 NSWLR 159; [1986] AC 1; [1985] 2 All ER 935 (PC).

The Facts

1. Introduction

It is common ground that a person ('the stowaway') entered the wheel well of the plaintiffs' aircraft at Fua'amotu airport during the Polynesian Airlines' turnaround in the early hours of 14 September (local time) 1994. There is no dispute that at the time of entering he was carrying a machete, and was wearing construction boots on his feet, many layers of clothing and outside those a jacket like a parka. It is common ground that he caused subsequently a malfunction of the aircraft landing gear. He died from lack of oxygen and his body thereafter became lodged in the right main landing gear, so that the aircraft at its next landing in Samoa landed with the right main wheel retracted and was damaged. The one major factual dispute in this part of the case is about where the access by the stowaway happened. The defendant submits that it is more likely that he climbed into the wheel well at the threshold of the runway, and that there can scarcely be liability on the defendant to guard against such an unlikely event. The plaintiffs seek to refute those claims, both of fact and of law. It is their case however that it does not matter where the stowaway gained access, inasmuch as the defendant's perimeter fencing, lighting, access control and security patrols were insufficient to deter premeditated intrusion onto the airport and/or to apprehend an intruder, wherever the stowaway boarded. They nonetheless contend that the more likely entry place was the apron outside the terminal.

It is not part of either party's case to suggest that boarding occurred at any third place.

2. Security at the Airport Apron, and 'the Apron Theory'

Security of the aircraft while it was on the apron was a responsibility undertaken by both the plaintiff and the defendant independently. The responsibilities of the plaintiffs were vested in Mr PD Karalus, the Tonga station manager of Polynesian Airlines, who gave evidence about what they were. In general, his role in meeting the plaintiffs' flights at Fua'amotu was supervisory, and after ensuring that airport facilitation services, which included security, were in place, he tended to concentrate on working with the aircraft while it was on the apron. He supervised loading and unloading, cleared the documentation with the flight crew after loading and gave the all-clear for departure. Under his supervision were up to twelve other staff engaged in handling passengers, cargo and documents, up to six of whom would be working around the apron. These were the aircraft marshaller, cabin cleaners and baggage handlers. In addition there were refuellers and the crew of the fire tender, but these were not under his control. In September 1994, security staff he said were not on the apron, except to stand at the bottom of the steps during disembarkation, and he said he saw none on the apron during the turnaround on 14 September, though he said that changed after the events of that night. However, he felt no unease about security that night, to the extent that he was able to identify the people who were on the apron. After the cabin door was closed and the steps removed on the night in question, he checked visually the front and rear hold doors, checked to see whether the aircraft

fuel display panels were secured and checked the position of the fire tender on the apron. He signalled the all-clear and the aircraft taxied away.

Mr Karalus acknowledged in evidence that he was the person responsible on behalf of the plaintiff during the aircraft turnaround. As Tonga station manager with the plaintiff he was also its security manager. The formal statement of the duties of that position is in a document entitled the "Polynesian Airlines Aviation Security Programme, April 1991". I put aside for the moment any legal duties. The plaintiffs' security programme recognised two levels of security: 'Standard' and 'Raised Level of Alert'. Clearly, the standard level was appropriate for the night with which this case is concerned. The manual produced in evidence specified basic security measures for Faleolo International Airport but no others, so I presume those measures were standard for other similar airports such as Fua'amotu. At the other end of the scale were the security measures provided for the domestic airports on Savaii. For the international airports, the manual stated:

> A vital part of the programme is to maintain an acceptable level of vigilance.
>
> Even though there may be no specific security alert, experience shows that by the very nature of its operation an airline is constantly at risk. Accordingly at all times the following basic security measures are to be implemented:
>
> (a) …
> (b) …
> (c) Polynesian Airlines staff should be alert to challenge unauthorised persons or unmarked vehicles.
> (d) Periodic checks to be conducted of doors/gates which should be kept locked to ensure that they are secure.
> (e) …
> (f) …
> (g) Pre-flight check — (International aircraft). Flight crews and maintenance staff will ensure that the interiors and exteriors of aircraft are inspected for questionable or unaccounted-for articles prior to boarding or loading. This procedure must apply at all ports. …

The level of security prescribed as standard for the domestic airports on Savaii was different:

> Pilot-in-command to use his judgment regarding appropriate security action, dependant upon prevailing circumstances.

In the manual, the duties of the security manager included:

> (1) …
> (2) …
> (3) Ensuring that airport access points are guarded, locked or kept under surveillance as appropriate.
> …
> (7) Arranging for tarmac patrols as appropriate to cover the Airline area of responsibility.

…

(11) Maintenance and monitoring of security practices. The Security Manager will establish and maintain a quality assurance system to confirm that all aspects of the airline Security Programme are maintained to the established standards for all departures. Records for quality assurance checks and procedures are to be maintained and the results of all checks recorded and made available for inspection by persons authorized by the various Civil Aviation Authorities of countries to which Polynesian Airlines operates.

(12) …

In evidence Mr Karalus said that most of the responsibilities of the security manager were delegated to and performed by the airport authority, and the plaintiff expected the airport authority to attend to them. His responsibility under the manual he said was to ensure that the airport authority did attend to them. As an example, he mentioned a meeting of the Airport Facilitation Committee (the security liaison committee of administrators and users of Fua'amotu). It was he who had raised an issue about a gate, which several times had not been manned by the civil aviation authority, even though this was a security point in the civil aviation authority's own security plan. I must say in passing, lest it later be overlooked, that this action seems to me not to have been an example of delegation of his responsibility. Rather, it seems to have been a direct action taken under responsibility (3) above, whereby the security manager was responsible to ensure that airport access points were guarded — in this case by the appropriate people, the airport security officers. That impression is reinforced by Mr Karalus' further answer, that in that instance the standing orders of the civil aviation authorities were not being carried out.

Mr Karalus was strong in cross-examination and re-examination, almost insistent, in stating that the plaintiff relied upon the civil aviation authority to provide security. I take him to mean the physical ways of ensuring security, such as fences and guards. He stated in particular in that context, that the plaintiffs' concern at the time in question had been about people on the air-side of the terminal without identification.

There had in fact been an incident exactly a month before, on 13 August 1994, when two unauthorised persons gained access to the air-side of the terminal during the turn-around of an Air New Zealand aircraft. This incident occurred in daylight. Two youths were lingering at the end of the line of boarding passengers, and when observed by the Air New Zealand station manager, Mr Lui 'Aho, they ran to the wheel well and one climbed up into the starboard well. The other was about to follow when the ground staff stopped him. The youths were said by Mr 'Aho to be drunk. In a report to the Director of Civil Aviation on 15 August 1994, Mr 'Aho pointed out the potential for fatalities from tampering with the fittings etc in the wheel wells. In a memorandum to the Director of Civil Aviation written on 15 August, the chief airport supervisor, Mr S Patolo, notified that the incident had occurred as a result of the failure of the aviation security service to comply with the procedure then in place to prevent unlawful access to the air-side through the central part of the terminal building.

In that memorandum, Mr Patolo went on to note that the procedure provides for three separate points of defence, which should be manned while an international flight was being processed; these were the domestic departure access, the cargo make-up area and, significantly, the apron. He himself found no fault with the security procedures, only with the deployment of the staff on duty at that time. The director disagreed to a point, and wrote to one of the then principal civil aviation officers (Mr Sitafooti ‘Aho, now Assistant Director) that the failure had been by the officer on duty at the entrance to the departure hall. His immediate action, on 16 August, was to require the airport security staff to adopt rigid checking and patrolling procedures for the following thirty days. This was designed to prevent a recurrence of unauthorised access through the terminal building, particularly at the check-in area, but he required no new security measures. In an associated memorandum to the police commander he described what would have happened had the two men not been detected. In a few words he graphically forecast the death of the stowaway in the present event, which was to occur within the thirty-day period.

As Mr Karalus noted in evidence, he was present when that event had been discussed at the next meeting of the Airport Facilitation Committee on 9 September, and the written minute of that discussion is worth noting. It commenced with a commendation by the civil aviation representative of the airline ground staff “for the efficient manner in which they met their security obligations … by preventing two youths, who had penetrated the airport security defence and reached the aircraft while passengers were boarding.”

That is significant, and it is appropriate now to pause and note the provisions in the International Civil Aviation Organisation (“ICAO”) security manual (about which more in detail below), for surveillance and guarding of commercial aircraft, because they were relevant in both those boarding instances. The particular provisions are clauses 4.7.3 to 4.7.27, at pages 1-4-30 to 1-4-32. It is the plaintiffs’ case to raise the ICAO documents and to plead that the defendant was in breach of its duties to them by failure to meet ICAO standards. The security manual provides, at cl 4.7.5, that “[t]he first line of defence against unauthorized access to aircraft is the safeguarding of the land-side/air-side boundary. The prevention of unauthorized access to aircraft within this boundary also depends on security measures taken in the immediate proximity of the aircraft and in the general area”. The manual thereafter provides, at cl 4.7.21, that the “[b]asic responsibility for the security of aircraft rests with the operator, whose plans should take into account the airport security programme so that there may be co-ordination of effort and response”.

So, by ICAO provision at least, there was a clear security onus on Air New Zealand ground staff in the first incident and, in the second, on the plaintiffs. However, I think it is important at this point to note that it was only the civil aviation authority that provided security surveillance. The plaintiffs did not and by no security programme were they expected to. And while this seems self-evident in the terminal building, it is valid also in respect of access via the perimeters of the airport. It was not part of the plaintiffs’ security programme to provide security staff at the land-side/air-side boundary and thus ensure a safe airport. Nonetheless, by the documents so far seen, the plaintiffs did have their own (“basic”) responsibility to provide vigilant ground-handling staff and a safe turn-around.

It is appropriate now to turn to the formal security responsibilities of the defendant. My concern at present is with security on the apron. I shall turn to the

perimeter shortly. Again, I put legal duties aside for the moment. Those formal responsibilities were rather more extensive than those of the plaintiffs, and are set out in:

> (a) two documents of the International Civil Aviation Organisation, ("ICAO"), ie the 7 December 1944 Convention on International Civil Aviation ("the Chicago Convention"), particularly Annex 17, and the Security Manual of the International Civil Aviation Organisation ("the ICAO Security Manual"), and
>
> (b) the defendant's own aviation security programmes. These latter included at the time the **Draft Tonga National AVSEC** [Aviation Security] **Programme**, and, subordinate to that, the **Aerodrome Security Program for Fua'amotu International Airport**. There are as well more specific documents, in particular the Fua'amotu aviation security service **Local Unit Orders**.

An expert witness who gave evidence for the defendant, Mr RM Armstrong, stated, and I accept, that the Draft Tonga National Aviation Security Programme focussed on policy directives rather than on operational details. I accept also his statement that the methods by which the national policy statements are implemented are contained in such documents as the defendant's aerodrome security programme and the security programmes of the user airlines. I accept also his statement that the local unit orders are considered (by the Tongan authorities) to be reasonable security instructions for the circumstances of Tonga.

The AVSEC Programme had been presented to the airport users, including the plaintiffs, at the airport facilitation committee meeting on 9 September 1994, mentioned above, which was only a few days before the present incident. The minutes of that meeting record the defendant's stated objective in the programme, which is to enable it to meet to the maximum extent its (ICAO) obligation to safeguard international civil aviation against acts of unlawful interference. The Chief Airport Supervisor Mr Patolo, who has done a lot of work on the draft, said in evidence that it describes Tonga's methods of compliance with the standards and recommended practices of Annex 17 (Appendix A) to the ICAO Convention. I have no doubt, and detected no dispute, that this programme, together with the Aerodrome Security Programme, arise from acceptance by the defendant of the safety and security protocols set out in the international documents. As pointed out by Counsel for the plaintiffs in opening, the defendant undertook, for example in the Aerodrome Security Programme at cl 3.2, to "[e]stablish and maintain an airport environment in which aircraft operations can take place with safety and security …" and to "[maintain fences] and other such general access control measures … for the purpose of preventing inadvertent unauthorised access and deterring premeditated access to the designated security are of the airport." It undertook also to "[p]rovide adequate security lighting of aircraft parking and adjacent areas."

At cl 3.3 that document noted that the "prime objective of the Aviation Security Service … [is] … to prevent acts of unlawful interference against civil aviation by … (a) screening … (b) [f]oot and mobile patrols … in the security area of the airport for

the detection and apprehension of intruders or any other threat which may be a threat to the security and safety of aircraft operations."

In cl 7.1 of that document, "physical security measures" are defined, and "constant vigilance" emphasised as "a vital factor in the maintenance of optimum security relative to this programme". As well, "[s]ecurity fencing, gates and doors" are to be subject to "frequent inspections and surveillance", in order, inter alia, "to create a physical and psychological deterrent to persons attempting or contemplating unauthorised entry", and "to delay intrusion enabling operating and security personnel to detect, interrogate and, if necessary, apprehend intruders".

There was considerable argument about the standard of care that was created by the international and the local documents, which I shall address later.

I turn now to the evidence of the events. The sequence of what occurred emerges particularly from the evidence given by the plaintiffs' station manager, Mr Karalus, who was on the ground, and from that of the flight crew, Capt. TW Gilfillan and First Officer GM Dragicevich. The aircraft arrived and taxied to its blocks on Gate 2. That is the central position of three, on the open concrete apron. The apron is centrally situated in front of the terminal building. The aircraft was on an angle, perhaps 45 degrees to the terminal building, pointing towards the right hand end of the terminal (looking from the aircraft) and presenting to the terminal — and to the apron lights — its left hand side. There are four tall light towers for the apron, in a line on the terminal edge of the apron. Two only of those towers were lit for this turnaround, ie, the two central. Accepting the evidence of Mr Patolo, the chief airport supervisor, these two carry halogen lamps with a total output of 8,400 watts. The aircraft was on its blocks at 1:54am. Passengers descended the aircraft steps on the left side of the aircraft, the side nearer the terminal and the lights, and walked across the apron into the terminal. The captain also went into the terminal, then about 10 or 15 minutes after arrival, began his routine pre-flight exterior inspection of the aircraft.

He started in the left main wheel well, by turning on the switch to the light which illuminates the interior of the well. He stood with his head inside the well, checking hydraulics and other details specified in the aircraft operations manual. He then examined the exterior of the aircraft, including among other items wheels, tyres, wings, engines and the fuselage generally. He completed his walk-around by returning to the right-hand well, where he made similar checks and then turned off the switch, which is inside the well. He then went up the steps to the flight deck, joining the first officer who had not left the aircraft. After that, by 2:15am, cargo and baggage operations were complete, as was refuelling. The rear cargo hold was closed. Passengers were then walked out to the aircraft to board. At this time the forward cargo hold door, on the right side of the aircraft beneath and slightly behind the first officer's side window, remained open while a search was conducted inside the hold for baggage of an alighting passenger. The first officer, sitting on the right side, put his head out the window twice; first to check the reason for the open cargo door, and second, to enquire whether a luggage trolley noticed earlier by the captain had been removed. Engaged in both those activities on the ground was the plaintiffs' local manager, Mr Karalus.

By 2:22am the passengers were all on board and the hold door was closed; Mr Karalus came up to the flight deck then left, after which the steps were wheeled away. At 2:25am start up procedures commenced and at 2:29am the aircraft moved off. It travelled to its right towards and then along a taxiway at a right angle to the runway.

Almost immediately upon its entry onto the taxiway the apron lights were extinguished. While it was on the taxiway its speed reached 8 to 10 knots. Illumination was provided thereafter by the aircraft itself. The lights turned on were the nosegear light, which shone ahead, the wing-root lights which shone 15 to 20 degrees to each side, and, at takeoff, the main landing lights. At the end of the taxiway it turned right and accelerated to about 30 knots travelling along the runway to its western end. There is a turning area, a widening of the runway surface, near the threshold and approaching that the aircraft, as described above, slowed to about 5 knots, veered right, circled left and without slowing below 5 knots rolled down the runway towards its takeoff. It cleared the ground at 2:32am.

The Chief Airport Supervisor, Mr S Patolo, gave evidence that the apron lighting towers are 18 meters high. He said that, to meet ICAO requirements, the two outer masts carry four sets each of quartz halogen lamps totalling 2,800 watts and the centre two, six sets each, totalling 4,200 watts. They are all on the terminal edge of the apron. The apron is 70 meters wide and 120 meters long. It has three separate standard parking positions, the central one of which was the one in use at the time, along with two of the four towers. Mr Karalus noted that the nearest of these was at least 35 meters from the aircraft, and that the far side of the aircraft, the starboard side where refuelling took place, was shadowed. He called it a deep shadow. He gave evidence that visibility in the shadow was good enough to work by, but that out toward the edge it was hard to see. He described the conditions as almost a halo-like effect, and said one would have to walk to the edge to see. He did not specify where the edge was, but said that the thick, high bush and saafa grass that covered much of the airport at that time grew to 20 meters from the edge of the apron. The aircraft captain also said that the shadow was a deep shadow.

It needs be noted at this point that the scrub and grass just mentioned was continuous at the western and northern sides of the runway. It grew from a 30 meter line parallel with the runway out to the perimeter fence and along the perimeter fence to within a short distance — said by Mr Karalus to be as little as 20 meters — from the apron. Because of the aircraft's parking angle, it was closest to the right rear part of the aircraft, which was furthest from the terminal.

Speculating during re-examination about the time required for the stowaway to enter the starboard wheel-well, Mr Karalus referred back to his evidence about the timings. It does no harm to revisit in this context the details of the timing. Mr Karalus timed the aircraft on blocks at 1:45am. Passenger disembarkation began at about 1:55am, and re-embarkation began when the activities around the aircraft were mostly complete, ie, at 2:15am. The rear cargo hold door was closed at about that time. After this, the only security officer whom Mr Karalus recalled seeing on the apron came out to the aircraft with a disembarking passenger to search for and identify some missing luggage. Mr Karalus went to the forward hold with the baggage handlers, the security officer and the passenger, and the baggage was found in the forward hold. At about 2:22am there were one or two baggage handlers on the apron to close the forward hold, the last of the passengers was aboard, and Mr Karalus went up to the flight deck. The engines were started at about 2:25am, and he made his visual check of the front and rear cargo hold doors and the fuel display panels. The aircraft left the blocks at about 2:29am. He suggested that the only times when a stowaway could have approached would have been (i) the period of about 3 minutes when the ground staff including himself were gathered at the forward hold searching for baggage ie, from

about 2:15am, plus (ii) the following 7 or so minutes until 2:25am when he visually checked the hold doors and fuel display panels.

Capt Gilfillan speculated a longer period, ie, from the time he finished his walk-around until taxi. Mr Karalus was actually on the ground and in charge of the ground arrangements. His timing estimate is based on better knowledge, but there is not much in it. The period is in any event about the same, and the little extra time suggested by Capt Gilfillan is that part of the time during which the passengers were boarding before the search in the forward hold. On the longer view, it is still a period of no more than about 12 minutes. That is the period of time on which the plaintiffs' claim (vis-à-vis the apron) focusses. This evidence of the plaintiffs' witnesses is important, because it defines the time during which the defendant's surveillance at the apron was, in the plaintiffs' claim, negligent.

Throughout all this time the fire tender had been parked on the apron, with the crew on board. Mr Karalus differed from the fire officer and security guards who gave evidence, and said that from where the fire truck was placed, the crew inside could not have had good visibility. I however have not been able to see how it could be that their view of the aircraft and the people on the apron was not good, from either position.

Then there was the lighting. The plaintiffs' witnesses gave evidence about deep shadow on the unlit (right) side of the aircraft. I have considered carefully what they said. I am satisfied that there was shadow, but there was sufficient light for the ground crews to do their routine work on the unlit side. Some witnesses agreed with Mr Karalus' evidence of difficulty arising when one looked toward the far side of the apron, describing it as a "halo" effect. There was evidence that there had not been, and there never has been, complaint by the plaintiffs or anybody else that the ground staff had insufficient light for moving about on the right side, or for refuelling, or for external cargo and baggage handling, or for checking the closure of the cargo hold doors before giving the clearance to move. The evidence suggests that there has never been complaint that there was insufficient light for the captain's exterior check of the aircraft, or for any of the other work which the plaintiffs' employees were there to do. The lighting towers are permanent and are all on the terminal side of the apron. They seem to have been thought sufficient till now. The two closest towers were said by Mr Karalus to be at least 35 meters from the aircraft. The photographs show that they shine downwards from the edge of the apron, and although only the middle two were in use on 13 September 1994, there was no complaint in the evidence that the light cast was insufficient for any normal purpose associated with the turn-around. I have difficulty accepting the suggestion that there was deep shadow that made significantly easier a clandestine approach from the scrub at the rear — said by Mr Karalus to be only 20 meters from the edge of the apron — to the underside of the aircraft.

During the entire turn-around, Mr Karalus said, there was no airport security officer on the apron at all, except for the one who came out with the passenger looking for baggage. There had been one at the steps, but only during disembarkation.

Mr Karalus disputed the evidence of the fire officer about the position of the fire truck, but there is no dispute that the fire officers were on the apron and on duty.

The evidence of Mr Karalus is important for the security issues, because the safety of the aircraft was among his personal responsibilities. He was aware that not only the airport authorities but also the aircraft operator had to maintain security surveillance while the aircraft was on the apron. He was not on the apron constantly,

and his functions there were wider than surveillance, nonetheless he impressed as being experienced and aware, both of the environment and of his responsibilities during the turnaround. He was off and on the apron constantly during the turn-around. Although for a time he was in and about the terminal, and for a time he was in or looking into the forward cargo hold, and for a time he was climbing to and descending from the flight deck, he was nonetheless a busy presence and a deterrent. He had security in mind, he removed a baggage trolley from under the wing, he checked the aircraft from the front and side after the captain did his check, he checked the cargo doors and fuel display panels. Certainly in my estimate of this witness's evidence, so long as he was on the apron, a heavily clad man on the apron carrying on his person a machete was bound to be seen.

I turn now to the evidence on this topic from the defendant's witnesses, which was given by the refueller, the Chief Airport Supervisor, a number of the security officers and one of the fire officers. There was as well the independent expert Mr Armstrong. The refueller in reexamination stated that the period between the end of the pilot's walk-around till departure was 10 to 15 minutes. In cross-examination, he said that he released his hose from the wing when the passengers were boarding and then packed his gear. He then took the fuel documents to the flight deck for clearance. After that he disconnected the earth wire as the last thing he did before leaving the apron, and then he saw Mr Karalus waiting on the grass to signal the all-clear to the aircraft. In evidence-in-chief he stated there was a security guard walking around the apron, but did not specify when. Neither did he specify how long he had worked as a refueller, but he stated that from the years when he had done so, until his employment was terminated for unsatisfactory behaviour, he finds it impossible to accept that anyone could gain unauthorised access to the right-hand main landing gear wheel well without being detected, because there are lights in the compartment which enable him to see clearly any person who may have got in there. This statement must of course in the present case be read with the captain's evidence that he turned off the wheel well light at the end of his inspection, ie, at the beginning of the period which I accept is the only time that access could have occurred.

The chief airport supervisor, Soane Patolo, was acting as airport manager at this time. What I have stated above about the lighting is his evidence. Further to that, he stated that the apron is well lit during night turn-arounds, and he said it is quite wrong to suggest that there is normally deep shadow on the apron and/or near the aircraft. He responded to the Air New Zealand incident of 13 August by accepting that there should be increased surveillance of the apron. So did his superior Mr Vainga Palu who directed Mr Patolo to carry out this measure, and others (identity card enforcement and more rigid enforcement by duty staff). He directed verbally that an additional security guard was to patrol around the aircraft on the apron during the turn-arounds. The addition of the guard at the apron Mr Patolo described as a procedure, and he said the procedure had been in place since that time. He said that observance of it by the officer in charge had been required since then. On 11 September 1994 the officer in charge had been Falanisese Fiva.

Mr Fiva gave evidence that in 1994 he was a shift supervisor. On 13 September as shift supervisor he was in charge of the shift and there were twelve security guards on duty at the terminal. Ten of them had assigned security positions, of which three provided security for the air-side of the terminal. These three positions were (i) immediately outside the gate by which boarding passengers left the terminal, (ii) at or

near the open access from the airside to the cargo area and (iii) the area immediately in front of the entrances for arriving passengers. Indicating position (ii) in cross-examination, Mr Fiva seemed to say that the post itself was within the terminal, ie, on the land-side. Mr Fiva was the eleventh of the twelve, and he had no assigned guard post, because his role was to supervise the other staff. He was rostered for patrol. He ensured the other guards were at their posts and performing their duties and, once an aircraft stopped on the apron, he would stand at the bottom of the steps until all passengers were off, then patrol the apron during the turn-around. In particular he would move to the starboard side of the aircraft to observe the cargo holds and refuelling. He said he did this since about four years before 14 September 1994, and that he did it on 14 September. He said as well, that on that night, the fire truck followed the aircraft onto the apron as usual and, as usual, parked behind it at a spot indicated in evidence by one of the fire crew (below). All of this evidence was disputed by Mr Karalus (above), who added that he had very rarely seen people on the starboard side of the aircraft including security officers.

Also on duty was the assistant security officer Mr T Moeaki. Mr Moeaki, after finishing the screening of out-going passengers, had the duty of patrolling to check that other guards were in position. He did that, and assured himself that the guards were in position outside the entrance to the arrivals hall and outside the transit lounge. He then positioned himself in front of the cargo area and had a good view of the apron.

The twelfth security guard on duty that night was Sosefate Holi. His rank (and his role) was senior security officer. He said that he, with another senior security officer, made up the rosters and, when on duty, maintained the airport duty officer's diary of all movements and events during the shift. He said that the nature of his job was that it was mobile, patrolling the airport terminal mainly on the airside. Like Mr Fiva, he supervised the other officers at the ten security positions, and he supervised Mr Fiva who was also on patrol. He said he remembered that on the night in question he did random checks on the other officers and when the aircraft arrived he was standing on the air-side of the terminal, between the departure and arrival lounges. He checked on one of the security officers at the terminal, then went to the apron. He said he went around the aircraft at least twice, and then continued circulating to check the security officers at the other posts. He said he remembered seeing one of the flight crew walking around the aircraft. He said he remembered seeing Mr Fiva on the apron. He also recalled the presence of other security officers, fire service personnel, the refueller and baggage handlers, and Mr Karalus. He said he saw no unauthorised person during the time he was on the apron. He mentioned the lighting, saying that though there was a shadow cast by the aircraft on one side, visibility was still very good.

The defendant's aerodrome security programme stated that the:

> "prime objective of the aviation security service is to prevent acts of unlawful interference against aviation by carrying out … foot and mobile patrols for protection of civil aviation facilities, aircraft and equipment in the security area of the airport for the detection and apprehension of intruders or any occurrence which may be a threat to security and safety of aircraft operations" (cl 3.3.1).

Some of the defendant's witnesses, in particular Messrs Patolo, Holi and Fiva, agreed that this called for security guard presence on the apron during a turn-around. They all said that this requirement in fact was met. The defendant's expert witness Mr Armstrong put the number of guards who should have been on or near the apron at five. If the three at the terminal and Mr Moeaki were in position on 14 September 1994, and if both Mr Holi and Mr Fiva were on and off the apron, then at most times if not at all times there were five. In closing submissions counsel for the plaintiffs submitted that the evidence of Messrs Patolo, Holi and Fiva about the regular presence of a guard on the apron had been contradicted. He pointed to the local unit orders of the security service, which did not require an apron guard, and the evidence of Messrs Karalus, Mokofisi, Gilfillan, Berking and Church. He examined the conflict of evidence in detail, but it needs to be said that, Mr Karalus and Capt Gilfillan excepted, these witnesses did not see the events of 14 September 1994. My conclusion after considering all of the relevant evidence is that the conflict does not establish the plaintiff's contentions.

After hearing the security guards give evidence and submit to cross-examination, my impression is that those whose assigned duties gave them responsibilities on the apron were on the apron for those duties. Messrs Holi and Fiva, were performing their assigned tasks, which took each of them to the apron, and there is no evidence to suggest any inference that they were not attentive. At the terminal were Mr Moeaki and at least two other witnesses not yet named, Mr Tu'uholoaki (near the arrivals gate) and Mr Ulukivaiola (outside the departure gate). In the absence of evidence for any other inference, one must find that these guards were all in position and watchful as they said they were. It is only the argument of the plaintiffs that they allowed an intruder to enter the aircraft wheel well that raises an inference that there were not enough of them there, or if there were they were not keeping a proper lookout. Against that, the facts presented to me for evaluation are that, of the twelve security guards overall, at least three had positions outside the terminal on the airside. There they were enabled to conduct general surveillance of the apron, one of them, however, for only the latter part of the turnaround; and that in addition two supervising officers patrolled the apron.

Of the fire service personnel on duty, one gave evidence, he was Tupou Fakatou. He drove the fire truck. His evidence of where the fire truck stood was disputed by Mr Karalus, but it was on the apron behind the aircraft and both firemen were in it. Their primary task was to stand by during refuelling and during start-up. Between times their duties included surveillance of the apron. Mr Fakatou remembered the refueller's actions. He said the refueller had parked on the starboard side, close to the wing and the wheel well. He said there was one guard patrolling the apron around the aeroplane, and three in front of the terminal. He said he saw Mr Fiva patrolling on the apron. He saw also the baggage handlers moving back and forth between the terminal and the cargo holds, which were on the same side of the aircraft as the refuelling. He said he saw Mr Karalus. In cross-examination he was adamant that he saw both Mr Fiva and another security guard, he did not know which one but he had been on the apron when Mr Fakatou came in the fire truck.

He said the apron was well lit, and he clearly identified the two operating light towers as the two that were central, ie, closest to the aircraft which was on the central parking stand. He said that any intruder on the apron attempting to get into either

main wheel well would have been seen by himself and his colleague, and by the personnel working in and around the aircraft. He himself saw no-one.

There was other evidence about the security and surveillance at the apron in addition to what I have set out, and I have it all in mind when assessing my overall impressions. I have made assessments of the credibility of each of the relevant witnesses, and about the extent to which the evidence of each is acceptable in forming an overall picture of what occurred on the apron that night. I have kept those assessments out of the narrative till now, and they emerge in what follows.

One needs I think to try to imagine what is said by the plaintiffs to have occurred. Their claim is that the stowaway came from the scrub 20 meters or so from the edge of the apron at the rear or rear right of the aircraft, onto the apron, alongside the aircraft, one assumes on the far (right) side, until he reached the wing root between the fuselage and an engine. Once there he put his upper body into the wheel well and pulled himself up, and disappeared. Thereupon he found himself a position where he would be clear of the retracting wheels. The photographs show that the fuselage masks the body of an adjacent person from about the waist up. If there was nobody able to see, or nobody at the time looking, alongside the right side of the aircraft, the only persons with any chance at all of seeing this intrusive movement were those on the left of the aircraft centre line. However, the closer they were to the aircraft, the less likely they were to catch sight of the movement. If this situation did occur, it occurred when there were no persons observing the right side of the aircraft. This was after the fueller had withdrawn, perhaps while the forward hold occupied everyone's attention; otherwise after the forward hold had been closed and the baggage handlers had withdrawn, probably while Mr Karalus was engaged in visiting the flight deck.

The defendant, with some support from the evidence, contends strongly that the stowaway had opportunity at the threshold to watch unobserved and choose his moment, but he equally had opportunity at the apron, if he went there. Clearly he had had both opportunities for as long as he had been on the airport. I shall discuss under the next heading, below, the evidence about the time of entry to the airport. I can state here that there is no evidence that he was inside the perimeter for more than several hours, but I accept that in the time he was there he had had time to consider what he might do. If he were to board an aircraft he could choose the aircraft and how to board it. For boarding, he could choose the better place, and the best moment. At the apron he had the advantage of clear visibility and the leisure to pick his moment. He also had there the advantage of reflected light within the wheel well. It is inescapable that he needed light, to assist him find hand holds and a resting place (about which more later). Whatever light he had at the apron from the lighting towers, I conjecture that it must have been better than the reflected aircraft runway lights available at the threshold.

On that topic, the evidence about the range of the apron lights is not precise, but the evidence is clear that the lights were to ICAO standard. The impression I have formed is that the light reached beyond the aircraft to the far edge of the apron, but beyond the aircraft it was reduced, and there was shadow. The light did not reach to the scrub, which was 20 meters or so from there. The lit distance therefore for the stowaway to cover to the wheel well, if he boarded at the apron, was not great. The evidence of one of the plaintiffs' witnesses (Mr PP Knight, below) is that a person like the stowaway would have taken at the threshold about 16.5 seconds to run 80

meters. The distance at the apron must have been less, so that, if he ran, the time he needed to run up to the wheel well at the apron must be measured in seconds, and fewer than 16.5. But what evidence is there about that? There is only a conjecture, that running on the apron should have been unlikely, as that movement would have been so unusual as to attract attention. Perhaps one should postulate a rapid walk, but either way the time needed must have been measured in seconds.

I now state my conclusions of fact, which are based on all the considerations above and my assessments of the witnesses whom I found material:

(1) The security of the aircraft while it was on the apron was a joint responsibility undertaken and shared by the plaintiffs and the defendant. Each had adopted their own separate security programmes which were not in conflict, each being designed to ensure the safety of the aircraft and the people using it, during the time it was on the apron.

(2) The primary responsibility for physically ensuring that the aircraft was secure was undertaken by the defendant. It was the defendant that specifically intended to provide a safe environment, and provided a purpose-trained body of security guards. These employees of the defendant were the only people present who were at the apron, and elsewhere on the airport, for the purpose of keeping the aircraft and its people secure, who devoted their whole attention to the security of the aircraft on the apron. The employees of the plaintiffs at the apron and elsewhere in the airport were present for the purpose of getting on with their jobs, which for none of them, (other than the flight crew), included the primary responsibility of devoting themselves to security surveillance. Their security duties, apart from the flight crew's pre-flight check at (g) above, were defined (above) as being to "be alert", "make periodic checks", etc.

(3) Nonetheless, the responsibility for security was shared, and the plaintiffs, on the facts, are not able to establish that security was the responsibility of the defendant alone. They had themselves assumed, in their own security programme, the (ICAO) basic responsibility for the security of the aircraft.

(4) The duties of the defendant's security officers in respect of the apron were not clearly defined at 13 September 1994. No security guard was formally rostered and specifically assigned to stand at his post on the apron while the aircraft was there. Ten of the twelve rostered officers were specifically assigned to posts elsewhere, seven of them doing necessary work within the terminal. Of the seven three, possibly four, had sight of the apron, and they were all assigned to remain near the terminal

attending to their assigned duties there. Actual presence on the apron was specifically required only of the shift supervisor and the senior security officer, and each had other supervisory duties which required them to be elsewhere from time to time. The only officers required to remain on the apron throughout a turn-around and conduct security surveillance were the fire officers. Their duty to keep a lookout was clearly established in the evidence of Mr Fakatou, but their authority to act as security guards was not made clear to me in the evidence.

(5) Nonetheless, during the period of the turn-around, two of the defendant's security officers (Mr Holi and Mr Fiva) were present on the apron and conducting security surveillance. As well, there were three other security officers in the vicinity of the terminal, and while the evidence suggested that the one whose post was at the cargo area may have been stationed actually at the land-side, ie, inside the terminal, nonetheless a fourth (Mr Moeaki) stationed himself immediately outside the terminal, and he and at least two of the others had general surveillance of the apron.

(6) However, it is not established that Messrs Holi and Fiva or either of them, were present constantly. There was no arrangement between Mr Holi and Mr Fiva whereby one of them maintained constant surveillance while the other left the apron to perform supervisory duties elsewhere, and no specific evidence that the other three were in fact watching for unauthorised activity on the apron.

(7) Present constantly throughout on the apron were the two fire officers, who remained in their truck. Present for most of the turn-around time there was at least one of the plaintiffs' ground staff, but it is not possible to be more precise than that.

(8) The crucial time, during which the boarding by the stowaway must have occurred if it took place on the apron, was the time between the end of the pilot's pre-flight check and the commencement of taxi. This was the last 12 or so minutes of the aircraft's turn-around.

(9) When that time commenced, the pilot's security check of the aircraft was complete, and the wheel well light, recently on, had been turned off. The passengers came out and went up the steps into the aircraft. The refueller went up to the flight deck and returned to his equipment on the starboard side, then left. Mr Karalus and others came to the forward cargo hold, and were engaged in a search in that hold for baggage, then those concerned returned to the terminal. Mr Karalus went up the steps and returned. The first officer looked out of the cockpit window on the

right side, on two occasions. The baggage trolley under one wing was taken away. Mr Karalus checked the exterior of the aircraft and signalled that it was ready. After that, any opportunity had gone.

(10) The number of people present around the aircraft at any one time during that period, except during boarding, was relatively small, each was there for an assigned task and each was wearing a uniform. There is no strong indication that either Mr Holi or Mr Fiva were still on the apron, or that they became aware of any particular one of these events. However they had been patrolling the apron and had stood on it, and there had been no break in the coming and going of people employed by the plaintiffs, all of whom had a duty to be alert for unauthorised persons on the apron.

(11) The stowaway at the time of boarding the aircraft was conspicuously dressed, wearing construction boots, many layers of clothing and a parka-like jacket over all, and he was carrying a machete. There was no evidence about the appearance of the machete, but that it was conspicuous in an airport is not disputed.

(12) For any person wishing to approach undetected the central parking position on which the aircraft stood at the time in question, cover was available up to the edge of the light cast by the halogen lamps. This cover was provided first by the darkness, which, outside the range of the halogen lights, was complete, especially to those looking towards it. It was provided also by the growth itself, which was sufficient to conceal a person up to a point 20 meters from the apron. The range of the lights is not stated in the evidence, but there is no evidence that the light reached the scrub.

From these conclusions of fact, and others yet to be drawn from the evidence about boarding at the threshold, I must reach a conclusion about whether the undetected boarding occurred during the final 12 or so minutes that the aircraft was stationary on the apron. At this point after considering these conclusions, I am able to say with confidence that boarding during that time is established in my mind by the evidence as a factual possibility, and has not been excluded by the evidence.

3. The Whole Question of Boarding by the Stowaway, and 'the Threshold Theory'

In respect of access to the aircraft, the range of negligence allegations that are potentially causal shrinks if the stowaway actually boarded at the threshold, and lighting, security etc at the apron becomes irrelevant. The court therefore has either,

(a) to find that the stowaway boarded at the airport apron and decide whether the defendant was negligent for that to occur or,

(b) to find that the stowaway boarded at the runway threshold and decide whether the defendant was negligent for that to occur or,

(c) if it is not possible to determine where the stowaway boarded, to decide whether the defendant was negligent in not taking reasonable precautions to prevent it wherever it occurred.

As for the threshold, it is common ground that the aircraft was in continuous motion, turning 180 degrees for take-off without coming to a stop. The evidence of the two pilots was that the speed of the aircraft during this continuous manoeuvre did not drop below 5 knots.

The threshold theory was advanced by the defendant before the hearing and the plaintiffs called expert evidence to counter it. This evidence is essential, but by and large I shall avoid turning this judgment into a discussion on the boarding of moving jet aircraft.

The first of the plaintiffs' independent expert witnesses on this topic was Mr PP Knight. Mr Knight was an impressive witness, but his qualifications were questioned by counsel for the defendant. His expertise and his experience are broad, and in the areas of electrical and electronic engineering, and instrumentation engineering. He has been self-employed in these fields since 1991. He holds a qualification in telecommunications engineering. I am bound to say that I accept the submission of counsel for the defendant that his evidence is closer in nature to argument than it is to expert evidence. Having said that, I found his evidence, both in chief and under cross-examination to be coherent, cohesive and authoritative in the areas which it traversed.

Mr Knight examined in great detail the evidence about the aircraft's movements from the time it left the apron, and particularly while it was turning at the threshold. To this evidence he applied a scientific method and made what are essentially simple calculations that are easy for a lay person to follow. He drew certain conclusions about the threshold theory, which were fully reasoned and were well-illustrated by diagrams and photographs. These were his conclusions: first, approaching the aircraft from the rear was the only feasible option for the stowaway, and second, approaching the aircraft from the rear is theoretically possible, but would be extremely difficult.

In his opinion there was a very narrow window of opportunity during the turning manoeuvre, during which a person approaching from the rear must time his run. There were many difficulties which he postulated from the evidence about the movement of the aircraft. He stated that a person must withstand the jet blast and run very fast, or sprint, for 80 meters, (if able to run at 5 meters per second), following a critical trajectory in order to keep behind the aircraft as it turns, intercept it, then hoist himself into a moving wheel well in darkness, using unknown and very limited secure hand-holds. With only narrow ledges available, and hindered by equipment, pipes and hoses, he must find in the dark a secure place to rest in the middle, between the two open bays on top of a hydraulic reservoir and pump, and the pump motor. This would be after running 80 meters in 16.5 seconds. He would have at most 12 seconds from

then to find a place and secure himself before application of take-off thrust, from the time he arrived under the open wheel bay. For the last part at least of his run he would have to run crouching because the fuselage at this point is the height of a person's midriff above the runway.

The next independent expert witness called by the plaintiffs was Mr GA Oldfield. This witness was well qualified for opinions on this topic, being a pilot of over 8,000 flying hours, 24 years' service in the RNZAF including 6 years as an aircraft accident investigator, and 19 years with Air New Zealand as a flight safety officer, safety manager and manager, safety and environment. While with Air New Zealand, he obtained qualifications in aviation safety and aircraft accident investigation. He is a published author on all aspects of aviation safety. He put before the court, and was cross-examined on, a coherent body of technical information about an aircraft of this precise type, fitted with engines of the same type as the aircraft in this case, the engines and the jet wash from the engines. He explained the intake danger area forward of each engine on this aircraft. He explained what jet wash is, what its components are, and what were its characteristics on this aircraft. He spoke about the thrust from a jet engine, at idle and under power. He set out in detail the velocities and temperatures of the jet wash from this aircraft at the different power settings mentioned by the flight crew in their evidence, and at different places behind the engines.

Mr Oldfield expressed his opinions with detailed reasons, supported by diagrams and tables. He stated that it is extremely unlikely that a person could physically approach the main undercarriage of the aircraft in this case and climb into the main wheel well during the 20 seconds which he calculated it took for the aircraft to turn at the threshold of the runway. Mr Oldfield agreed with Capt Gilfillan's evidence that the time from slowing for the turn and increasing power for take-off was between 20 and 30 seconds, and that during this time the forward speed of the aircraft was 5-8 knots. Before application of full power, with the engines at or near idle, the jet blast behind them was approximately 110 kilometers per hour. As the aircraft lined up at the end of its turn, the increase to full power created two jet wash plumes, which effectively joined at the rear of the aircraft. The velocity of the plumes 29 meters behind the engines and 15 meters behind the aircraft was approximately 113 kph and at that distance the temperature was approximately 40 degrees Celsius. The lower edge of the wheel well he said was about 1 meter above the ground. Having run through the jet wash, a person would then have to get down to enter the wheel well, then pull himself into the well. He would then have to take a crouched, kneeling or sitting position on the keel beam among or on the equipment there, between the spaces to be occupied by the wheels. Further, he stated that the position of a person within the wheel well is very important and that, since the pilot did not become aware of his presence there, the stowaway in this case had positioned himself carefully on the keel of the aircraft between the two bays. In Mr Oldfield's opinion, he would not have had time for that if he had entered during the turn at the threshold. To a lesser degree Mr Oldfield relied also on the facts noted by the pathologist Dr Potoi in her evidence. He said he was supported in his opinion that boarding in the present case did not occur at the threshold by the circumstances that there was minimal physical injury, and that the clothing was not tom or ripped and had no immediately apparent smell or other sign of contamination from fuel exhaust or exhaust sediment. One must remember as well that the stowaway carried with him

into the wheel well a machete. A witness (Capt Berking) said it was found on the sill of the right wheel well after the body was removed.

I have assessed these two witnesses while they gave their evidence, while they were cross-examined, and while considering subsequently their oral and documentary evidence. I have no difficulty holding that their opinions are well substantiated by the reasons which they explained to the court, and I do so hold.

Nonetheless, it is I who have to make the decision.

To assist me balance the opinions I have just evaluated, I have the evidence of an independent expert called on behalf of the defendant. This was Mr RM Armstrong, a person who is also impressively qualified in matters of aviation security. Mr Armstrong did not specifically commit himself to a decision about where the stowaway boarded, but he was clearly against the apron theory. He commented (not correctly, but he had not heard the evidence), that the next place the aircraft halted its forward movement was at the threshold. He pointed out what he thought were relevant considerations. First, he said that from his own observations of another aircraft turn-around in January 1998, he had concluded that it would have been impossible for anybody to gain access to the aircraft during the turn-around, ie, on the apron. This was because of the lighting which was being used on that occasion, and because of the fact that all people whom he saw on the airport were wearing identifiable uniforms. He pointed out, and seemed strengthened in his opinions by this observation, that so far as the night in September 1994 is concerned, the persons on duty had all said they saw nobody, and that the captain had seen nobody in the wheel well during his walk-around.

I turn to consider the evidence. There is no dispute about the evidence of the captain and the first officer; the aircraft taxied via the taxiway from the apron and back-tracked on the runway to the threshold at about 30 knots. There it slowed, veered right then made a sweeping circular left turn at about and not less than 5 knots until it was lined up on the takeoff runway, then it continued without pausing to gain speed until it left the ground. It was relatively light, and left the ground relatively quickly. There can be no doubt from the evidence that if access occurred here, the stowaway performed an unusual and difficult feat. He was wearing several layers of clothing including boots, trousers and jeans. He had with him a machete, the dimensions and condition of which were not disclosed by the evidence. The aircraft was moving at speeds which did not fall lower than 5 knots, though one may walk for a time at that speed. The wheel well itself was in darkness. Access to it was not so low that a person might jump into it, rather it obliged any person entering to pull on handholds inside. The handholds were the fixed pieces of operating equipment with which the wheel recess was cluttered. A resting place inside was not readily available and had to be selected with care, in advance of retraction, in a position between the resting places of the retracted main wheels. The stowaway found such a place and avoided injury by the wheels when they retracted.

The aircraft was showing powerful lights to the front, and access to the wheel well could not have occurred frontally without risk of detection by the pilots, and without great and obvious danger of ingestion into an engine; access from behind the wings is prima facie more likely. Behind the wings were engine emissions. These were noisy, hot and forceful at any of the positions through which a person had to pass during that turning and lining-up manoeuvre. Whatever contaminants those emissions may contain, there was no trace of contaminants detectable by smell or the

naked eye on the body or clothing of the stowaway at the time his clothing was removed, which Dr Potoi's report shows was shortly after 11am local time in Samoa, five hours after the landing.

Mr Knight and Mr Oldfield addressed these facts in great detail. They wholly agreed in the opinion that threshold access was challenging, difficult and dangerous. At this point I can conclude that it is, in principle, less likely than access while the aircraft was stationary.

I have to take into account also the evidence of Mr Fangupo, and of Mr Pringle (about whom more below). The stowaway had been seen in the forest of Tupou College the day before the event, and on the day after it, a person-sized hole was discovered, cut in the airport perimeter fence near that spot and about opposite the end of the runway where the aircraft had turned. About six weeks later, a hideaway was discovered in the scrub on the airport. This was opposite the turning point, and just inside the heavy growth which grew to a line 30 meters from the runway's edge. The photographs produced by both parties make it clear that the part of the perimeter fence where the hole was cut, and the part which ran from there towards the apron, are in a parallel clearing, about a vehicle width either side of the fence. The fence itself at the time was in a cleared line in scrub grass and trees about the height of a human being. On the inside, that clear space was the perimeter road. There is nothing about these facts which directly links the hole and the hideaway to the stowaway and there is nothing in the evidence which precludes the possibility of a person's moving from that region of the airport to the apron area, particularly in the darkness of the night in question.

This perhaps favours the threshold theory. However, for either theory there is mostly inference, and really very little evidence. The evidence, as counsel for the defendant pointed out in submissions, is the evidence of the hole in the fence and of the hideaway, and the evidence of considerable activity on the apron in the few minutes after the captain's walk-around inspection.

Against the theory, there is the evidence that favours the apron theory, discussed above. Against it as well are the opinions of Mr Knight and Mr Oldfield. Counsel for the defendant submitted, in detail, that these opinions do not stand up to scrutiny. I agree with what he said about Mr Knight's evidence being more an argument than an exposition by an expert, but the argument was advanced on known facts and empirical principles. I do not accept his submission that Mr Oldfield's opinions had no admissible basis in the evidence, and were of no value whatever. In assessing the likelihood of a threshold boarding, Mr Oldfield was guided to a considerable extent by the largely undisputed evidence of the flight crew and by his personal experience. It is true that he relied to a great extent as well on data supplied by the manufacturer of the aircraft which he could not substantiate himself. However nothing put to Mr Oldfield during his evidence created a basis for me to think that the manufacturer's information about its products, some of it in its maintenance manuals, was unreliable. To the contrary, from what other source would he get reliable basic information about the aircraft?

Those factors lead in my view to the conclusion that threshold boarding is, ipso facto, not an attractive proposition. It cannot be ruled out as a complete impossibility, but it has much against it. If the apron is available on the evidence, then it clearly is to be preferred. If however the apron is, on the balance of probabilities, ruled out, then the parties accept that by inference the threshold is the only likely place. There is no

room for any third conclusion. Neither is there room for making no finding. I have to make the best I can of the evidence.

About the apron theory, I adopt what I said above, where I reached a conclusion that boarding at the apron is established in my mind by the evidence as a factual possibility, which has not been excluded by the evidence.

After considering each option, I am forced to the conclusion that boarding at the apron is the inference that is favoured by the balance of probabilities. It seems unlikely, particularly in view of the impressive list of events that occurred during the relevant time, (which counsel addressed in closing submission, and most of which I have set out above). However, it is the more likely of the two, and no alternatives were allowed by the evidence which I heard.

After considering the evidence, I cannot bring myself to think it even probable that the heavily-clad man wearing construction boots and carrying a machete described in evidence got into the wheel well while the aircraft was making its 180-degree turn and/or during the subsequent rolling start. I first found it could have been the apron. After considering the alternative, I find it must have been the apron. So I conclude it was the apron.

Having come to that conclusion, I am bound to say that, as the plaintiff claims, it may not matter for present purposes where the stowaway boarded.

4. Security around the Airport Perimeter

A great deal was said about this in evidence and in submissions. It is good that it was so, because the thorough exploration of this topic led me to a clear state of mind about it.

First, the facts of the topic must be approached only in the light of the factual circumstances in the present case. It is not for this court to make factual pronouncements about security at airport perimeters generally. Second, the topic should be discussed only insofar as is necessary to decide the factual and legal issues raised by the plaintiffs in the pleadings, about whether the defendant negligently allowed this stowaway to board.

My deliberations are about whether the defendant had a duty of care to the plaintiffs to prevent the boarding that occurred. All of the ICAO protocols and the defendant's security programmes that were mentioned in the pleadings, the evidence and the submissions must all be judged in the light of the reasonable likelihood of an event of this nature at this airport. From what I have heard and read, I am satisfied that nothing in those documents can create for the defendant, as defendant in the present action, any obligation to the plaintiffs in tort or otherwise to guard against an event not reasonably foreseeable. In other words, they cannot create any greater duty for the defendant than the law already provides for it as occupier of this particular international airport.

There was comment adverse to the defendant by witnesses for the plaintiffs about the condition of the perimeter fence. Some said it clearly did not meet the ICAO standard for such fencing. Among the witnesses, the expert witness Mr Anderson emphasised that the wire and post portion was far short of ICAO standards. He said that portion reduced the delay and detection capabilities of the fence, and by itself reduced to nil its deterrent capability.

The question I have to decide is, were the defendant's actions or inaction in the matter of guarding the airport, as proved in the evidence of this case, reasonable and

sufficient to meet the reasonable threat of the particular event that gave rise to the claim I am deciding? In particular, in respect of the fence, did the defendant negligently omit to do something which, if done, would have prevented the person concerned from entering the airport through a hole cut in a *portion of the fence that was constructed to ICAO recommended standards*?

I turn now to recount briefly the facts about the security that was provided by the defendant at the airport perimeter. I include here all my consideration of the topics that relate to this, ie, the fence itself, the patrols of the fence, the existence of scrub and grass inside the fence and outside. In doing this I have in mind the plaintiffs' claims that the airport perimeter fencing was inadequate, that there were inadequate patrols of the perimeter, that there was unacceptable overgrown scrub on the airport, that there were risks from these facts including a risk of intruders on the airport, and, that the previous month there had been a serious breach of access to the controlled part of the airport, because of the inattentiveness of the defendant's security staff.

The chief witnesses for the plaintiffs who gave evidence about this were Mr Karalus, Mr 'Aho, Mr Tevita Fangupo, Mr Molisoni 'Otukolo and the expert witness, Mr Anderson. Mr Karalus is very familiar with the airport. He said that the perimeter security fence is not complete, and that most of the south side and parts of the east side have no security fencing at all. From the evidence of defence witnesses, particularly Mr Patolo, the unfenced portion is 5.2 kilometers. The overall perimeter is 12 kilometers. As well, he said that in 1994 there was unmown undergrowth at the western end, particularly its north frontage, with the exception of a narrow strip adjacent to portions of the security fence. For most of the year, he said, the saafa grass and shrubs in that area were permitted to grow higher than the shoulder height of a person, except in the June-July dormant season, and could easily hide an animal or person from casual observation. These conditions were shown in photographs.

Mr 'Aho's evidence on this topic was about patrols. He said, as Mr Karalus had said, that sometimes he had seen an aviation security vehicle drive down the runway and back at about 50 or 60 kilometers per hour. Mr 'Aho said this was required before every take-off and landing, by statute.

Mr Fangupo was a person who had encountered the person who was later to become stowaway, whom he knew, while that person was on the land of Tupou College, which is adjacent to the security fence. Mr Fangupo's evidence was given orally at the hearing, from a statement which he had signed on 20 March 1998. Some other factual remarks by him are contained in another statement made on 27 March 1998 that was put in by the defendant as one of its witness statements. This witness was called actually by the plaintiffs, and the defendant did not raise any further facts from this other statement in cross-examination. Although this later statement was not referred to by either party during the witness' evidence, I have referred to it to see if it might help without causing prejudice. In the later statement he gave the date of this encounter as 12 September 1994, while he was patrolling the plantation area of the college, where he was a student. After meeting and talking with the stowaway, he and his two companions went into the bushes from which the stowaway had come, which were near the airport perimeter fence. There they found a cooked pig, a cane knife, a bicycle and a cleared area which had a fireplace. In the later statement he added a fact not in his oral evidence, that when seen, the stowaway was wearing a pair of long camouflage trousers, and a light blue T-shirt over which was a long-sleeved light blue jacket and outside that a sleeveless greenish jacket. He subsequently heard of the

aircraft incident, and the next day after that incident he went to look at the security fence near the place where he had spoken to the stowaway, and found a hole in the fence. This hole was shown in photographs. Those photographs showed grass growing on the airport side of the fence to about head height, but this witness said that at the time it had not been so high. He said he had patrolled the college land daily at that time and had never seen any foot patrols by the airport security officers.

Mr ‘Otukolo, an employee of the plaintiffs, said he had inspected the security fence in or about November 1997, on the north side of the runway which is the area described by the previous witness. He said it was in an area where the forest on the north side of the runway came right up to the fence, except for the track immediately outside the fence on which he was driving. From the evidence of the previous witness and of Mr Patolo I conclude that this was the forest or plantation of Tupou College. At a place in the northern perimeter fence, about 500 meters from the western end of the fence, he found a hole in the mesh that had been repaired with new or different wire, and ascertained from the previous witness that it was the hole that he had found in 1994.

Some factual evidence on this topic was given also by Mr Anderson, the plaintiffs’ expert witness. Mr Anderson confirmed that the defendant is a contracting state to the Chicago Convention, and has not given notice to ICAO of any differences between its practices and those international standards established by the Chicago Convention. He stated that a contracting state may depart from those standards only by giving such notice. The purpose of notice is to enable ICAO to notify other states and thus international operators, of those differences. He described the methods of compliance with the standards in the Chicago Convention and its Annexes as being “not exclusive, and contracting states may adopt other equally appropriate methods of compliance”. From the evidence of other witnesses, and the Convention document itself, I take his terms to mean that the standards are in fact recommended standards.

Mr Anderson gave a useful summary of some of the relevant procedures and measures which are set out in Annex 17, and which were discussed by other witnesses. He said that they include the establishment of security restricted areas at international aerodromes which are delineated by barriers sufficient to *prevent inadvertent access* and *deter premeditated access*. The barriers should, inter alia, define the areas to be protected, create a *physical and psychological deterrent* to persons attempting or contemplating unauthorised entry, and *delay* intrusion, enabling operating personnel to detect, interrogate and if necessary apprehend intruders. The emphases supplied are mine, because these key words became the subject of differences. It was the opinion of Mr Anderson, and the submission of the plaintiffs, that the defendant had failed to meet those standards as a matter of fact. It was the opinion of Mr Patolo and other defence witnesses, and the submission of the defendant, that they had in fact been met.

The defendant called a number of witnesses who gave evidence about what the defendant actually did about security at the perimeter. It called the independent expert mentioned above, Mr RM Armstrong, who gave evidence (inter alia) on the topics of the security fence or airport perimeter fencing. This witness pointed out the recommendation in the ICAO security manual, at page 1.4.44, paragraph 4.10.26 about security fencing:

> "Where this cannot be achieved, priority should be given to fencing vulnerable points, working outwards until the perimeter protection is complete as called for in Annex 14 of the Chicago Convention."

In the vicinity of that recommendation in the manual one may encounter many related provisions, such as 4.10.6, the prevent, deter and delay provision mentioned by Mr Anderson, above. As well there is, eg, 4.10.10 which recommends that obstructions such as trees should be cleared away from 3 meters within the fence line and for 3 meters without, wherever possible; and 4.10.11 which recommends that only metal fences be installed. There is an illustration of a recommended fence which seems similar to the one shown in the photographs of Fua'amotu airport. The evidence of this witness and of others made it clear to me that these provisions are indeed recommendations as they say, and that paragraphs 4.10.26, 4.10.10 and 4.10.11 (and others) were met to a not inconsiderable degree at Fua'amotu airport in September 1994. In particular, construction was of metal and according to an ICAO-recommended pattern, and was proceeding outward from the most-used area of the airport.

Among the other defence witnesses the more substantial were Mr Va'inga Palu the Secretary of Civil Aviation, Ms Fekita 'Utoikamanu, Deputy National Authorising Officer in the Ministry of Foreign Affairs, and Mr Patolo (above). In addition, a brief of evidence (in reality a report written on 5 October 1994) was read on behalf of its author Mr Alister Pringle. It was Mr Pringle who, on 5 October 1994 while employed by the defendant, discovered within the airport, not far from the hole in the security fence, a "hide", "where a person had obviously spent several hours in hiding". It was in the long grass adjacent to the turning bay at the threshold of the runway which the aircraft had used on 13 September. It is not disputed that, as stated by Mr Pringle, the stowaway, if it were he, would have had from there undetected excellent observation of the turning bay; and that to travel from the hide to the turning bay he would have had to cover only "the minimum distance from the long grass at the western end of the runway". If Mr Patolo's evidence is accepted, that was a distance of 30 meters. It was Mr Pringle's opinion, stated in the report, that it "appear[ed] certain that the stowaway … [had] … entered the undercarriage area at the turning bay on the western end of the runway prior to roll and take off and during the hours of darkness". I respect that eye-witness opinion, but confess that on the evidence before me I cannot be so certain.

Ms 'Utoikamanu gave detailed evidence of the financial and policy background to the security services the defendant provides at the airport. All capital projects in Tonga, including the upgrading of facilities at Fua'amotu airport, were at all relevant times financed by development funds. Development funds at the time came almost entirely from overseas, in the forms of loans and grants, and, she said, for such projects the Kingdom of Tonga is heavily dependant on the financial assistance of overseas governments and multinational aid agencies. She said that all the major capital installations at the airport have been funded by overseas government aid or other bilateral aid programmes. She gave details of the funding arrangements that had been entered into from time to time so that the perimeter fencing at the airport could be upgraded. She showed how, while the construction of the fencing had commenced in 1991, completion of the fencing could not have been possible by September 1994.

She said that there has in fact been a contract signed in March 1998 for completion of the fence.

This evidence was expanded by Mr Palu, who went on to be the first of several witnesses to give evidence of security staff training.

It was Mr Patolo who gave the defendant's detailed evidence about the security work actually done at the airport in 1994. He had day-to-day responsibility for the airport security services. He addressed in detail the security at the runways, the apron lighting, the scrub on the airport, the perimeter fence and security at the boundary, mobile patrols and the defendant's detailed programmes for security over the whole of the airport.

About the runways, he said that threshold surveillance during take-offs was not provided. He did not think it reasonably necessary to guard aircraft at the threshold, because in the absence of terrorist threat, which has never existed in Tonga, the only threat to guard against was the possibility that a person might attempt to board the aircraft, at that point. Before the present incident he regarded that, he said, as a most unlikely event. About the scrub on the airport he said, with reference to photographs, that there were, and had been since he started in 1974, clear areas of mown grass on both sides of all movement areas including runways in accordance with ICAO specifications for non-precision approach, international operations. Beyond that — the main runway had 30 meters clear on each side — there was long grass, saafa and scrub. The scrub and saafa grass grow rapidly, and since a time before September 1994 the defendant has conducted controlled burning of the scrub on the southern side to ensure good visibility for the control tower towards the western threshold. He said that the security concern in funding applications had been the fencing and the scrub. As well as the ICAO clear areas, the defendant has maintained clear strips along the boundary fence and at both ends of the runway.

About the boundary fence, he said that it is 12 kilometers overall. The airport is roughly rectangular with the short sides being the eastern and western boundaries. Outside the fence on the eastern side there is a military camp and a public road. The southern boundary is bordered by farming land, producing yams, squash and other vegetables. The western boundary, the shortest, and about one kilometer of the northern boundary are bordered by the grounds of Tupou College, which are farmed and forested. The rest of the northern boundary faces one of the royal estates. The history of the fence is that construction to ICAO recommended standards was commenced in the late 1980's, at the place where the need was greatest and in accordance with development funds made available for that purpose. That was around the then terminal building. The fence is of metal chain link (diagonal pattern) supported by steel posts. It is over two meters high, and along the top there are three strands of barbed wire, angled toward the land-side. After the present terminal building was constructed in the early 1990's, funding for the airport was sought in respect of several projects, of which fencing was one. The funds were provided by the European Union, but that part allocated to fencing was not enough to complete the unfinished perimeter. There remained a 5.2 kilometer section on the southern and eastern boundaries, which Mr Patolo said is maintained by the defendant as stock-proof fencing, as and when the budget allows. More than a kilometer of this fence was upgraded as stock-proof fence, from two barbed-wire strands to four, in 1993 and 1994. It is the evidence of this witness and of Ms 'Utoikamanu and of Mr

Armstrong that shows me clearly that the recommendation in paragraph 4.10.26 of the security manual (above) is being met.

In 1994, he said, patrols were carried out around the boundary fence and elsewhere when the security officers were not in position for flights. The purpose intended for the fence by the defendant, he said, is to define the extent of the airport, to keep out wandering stock and to warn and deter people from entering. It is not able to prevent unauthorised entry by a determined person, much less a determined group of persons. The fence is relatively easy to breach, even though it is of ICAO recommended standard. It can be cut and climbed. In his opinion, even a regular patrol of the fence would not prevent entry to the airport.

There were patrols of the perimeter fence in 1994. A Land-Rover vehicle, funded by the European Union, patrolled the fence on a track just inside the fence. There were other patrols as well, particularly full aerodrome inspections on days of operations, when checks were made of the crash gates in the perimeter fence. The runway inspections mentioned by Mr ‘Aho were carried out before landings and take-offs, as well as by daily routine, but these were not security inspections.

In 1991, a New Zealand aviation security expert had recommended in a periodic review that once the EU vehicle became available, there should be security patrols of the airport including the perimeter roads every two hours. Mr Patolo said he had considered and rejected that recommendation as not warranted by the level of risk, or as a use of the limited budget available. However, he said, there were regular patrols, and he agreed in cross-examination that a form was completed by the security officers every time a patrol was done. He could not explain the defendant’s production in evidence of a file containing only 29 such report forms for the 290 days preceding 14 September 1994, except to say that it was a file that a lot of people handled.

It is Mr Patolo’s opinion that the level of security threat to civil aviation in Tonga is very low, but that the defendant should and does take all proper security measures appropriate to Tonga’s situation. I am required to comment on those opinions, and shall do so a little later. Among the measures factually taken by the defendant, he mentioned acceptance of the standards and recommendations for international civil aviation set out in Annex 17 to the Chicago Convention, particularly the recommendation that there should be a national civil aviation security programme, an airport security programme and contingency plans. He said that in July 1994 the Ministry of Civil Aviation had completed a written draft security programme in compliance with Annex 17. This is the document which was seen by Mr Karalus at the airport facilitation committee on 9 September 1994, the document referred to above as the AVSEC programme. It sets out the defendant’s security obligations and objectives. It describes the defendant’s compliance with the standards and recommended practices of Annex 17. The document has been developed and now awaits the approval of the Minister.

In order to implement the AVSEC programme, Mr Patolo said, the defendant has developed an aerodrome security programme for Fua’amotu international airport and, although not yet in operation it sets out, he said, what in reality happens at the airport and, presumably, what he would say was happening in September 1994.

Further to that, there are local unit orders, and in 1994 the edition in use was that issued in 1990. These set out the duties of aviation security staff in detail. There is also a document called Emergency Orders, which aims to ensure a co-ordinated and orderly response to any foreseeable emergency situation.

Mr Patolo pointed out a basic fact, that the defendant does operate Fua'amotu as an international airport, and does so by means of capital contributions from the international community, and does so in the knowledge that it has not yet had the funds to comply with all of its ICAO-recommended security obligations in respect of a fully-enclosing security fence. He said that the then Director of Civil Aviation was aware of that in 1994, but had no choice other than to continue operating the airport pending procurement of funding for full compliance with ICAO recommendations. From the documents referred to by Ms 'Utoikamanu, it is clear that the Director was actively involved in acquiring those funds. Mr Patolo then made detailed factual responses to the detailed allegations of negligence made by the plaintiffs. Because they are factual, I refer to them here briefly as part of my summary of his evidence.

He saw the negligence alleged as falling under three heads: (i) insufficient measures to make the air-side/land-side boundary a deterrent to unauthorised access, (ii) insufficient measures to detect the presence of unauthorised persons on the air-side, and (iii) insufficient measures to make the apron more secure. About the first claim, his detailed comment amounted to this: the defendant has acted diligently and reasonably in its efforts to establish a security fence to the recommended international standards, those standards requiring for all airports world-wide only a fence which deters, not one which prevents. So far as the perimeter was in 1994 as yet unfenced to that standard, the fence was still reasonable for the purpose of deterrence, in that it was in place where most needed and was maintained, and was the best deterrent that could be built with the money then available. In respect of increased patrols, he thought that more patrols were a counsel of perfection, claimed by the plaintiffs in hindsight, and unrealistic as against the known level of risk. He noted that no specific function for the patrols had been mooted by the plaintiffs. If it were thought that they would be an added deterrent, he commented that there had been, until September 1994 no known attempt to breach the perimeter fence, other than by occasional stray animals at the stock fence.

On the topic of ICAO standards, it will do no harm to refer here again to the surveillance and guarding provisions in the ICAO security manual, which I mentioned under heading 2 above:

> "4.7.11 One of the methods utilized to deter or detect individuals trying to obtain illegal access to aircraft is the use of frequent, irregularly timed patrols by security staff … The use of patrol dogs can significantly increase the effectiveness of security patrols.
>
> "4.7.17 *Aircraft on runways and taxiways*. Aircraft may be subject to attack while on runways and taxiways. Attackers could be positioned either outside the airport perimeter or they may have penetrated the perimeter and be positioned on the airport itself.
>
> "4.7.18 to protect against such an incident and for general security purposed, security staff should patrol the entire airport and its environs on a frequent but irregular basis …"

Two points arise for emphasis — first, the recommendation is for patrols that are irregular, and second, he recommendations must be read in the context of local

conditions. Not everything in the ICAO security manual will apply. Aircraft under attack from outside the perimeter is not a likelihood for which the Fua'amotu security service has prepared itself, I understand. On the evidence that is not a departure from a reasonable standard.

In respect of the second and third claims, Mr Patolo mentioned his earlier evidence about the scrub and grass on the airport, and commented that until the present time, removal of that growth had got no further than being a desirable project, to be accomplished when funds were available. The funds available in the Ministry's budget had been prioritised, and there had till September 1994 been nothing to suggest that removal was an urgent priority. He suggested that, even with the airport fully cleared, the incident in question could have occurred, with a person waiting in the growth plentifully available outside the perimeter fence until darkness covered him; whereupon he could have cut or scaled the security fence when the aircraft arrived and advanced to the apron. So far as the apron is concerned, he made the comments which I have noted above, and described it as well lit during night turn-arounds. He said it is quite wrong to suggest that there is normally deep shadow. He claimed that the normal provisions for security surveillance of the apron, as shown by the evidence, were adequate and reasonable, and that the arrangements actually in force on the night in question, as shown by the evidence and referred to elsewhere, were sufficient to preclude any reasonably foreseeable risk.

In respect of security guard training, he noted that no specified allegations of inadequacies had been made, and he relied on the extensive evidence, both in documents and by the defendant's witnesses about the training, in order to say that it was reasonable and adequate.

There was much other evidence, both oral and documentary, about the security and surveillance around the airport perimeter in addition to what I have set out, and I have it all in mind when assessing my overall impressions. The documents are to be read at face value, in the context shown for them by the oral evidence. I have made assessments of the credibility of each of the relevant witnesses, and about the extent to which the evidence of each is acceptable in forming an overall picture of the part played by perimeter security in the incident which occurred on the airport that night. I have kept those assessments out of the narrative till now, and they emerge in what follows. My conclusions of fact, based on those assessments, are these:

(1) The perimeter fence was in September 1994 in the course of construction in accordance with a clear policy and in accordance with ICAO recommendations and as funds became available.

(2) In September 1994 the perimeter fence did not prevent access by people over the airport boundary, because it did not completely enclose the airport, but in the places where it was, it was as effective a deterrent as the ICAO recommendations intended it to be.

(3) In September 1994 the aviation security service frequently conducted a surveillance patrol of the perimeter fence by Land-Rover, around the track or road in the air-side of the fence. This patrol is not shown by the evidence to have been conducted daily, or by any regular standing order.

(4) At some time before the early hours of 14 September 1994, the stowaway gained access to the airport without authority. Somebody at about this time, and before 15 September, had cut a hole in the ICAO-standard perimeter fence near where the stowaway had previously been living, on the land of Tupou College which adjoins the airport. The aviation security service had no knowledge of his being in the vicinity, or reason to suspect that he would enter the airport. No sign was seen by any patrol, or by any person on the airport, of the stowaway. The hole which was cut in the perimeter fence was never seen by any regular patrol.

(5) There is no evidence for any decisive conclusion about when the hole was made in the fence. There is however evidence about a 'hide' later found within the airport nearby. The person who found it and saw it thought it had been occupied for several hours, and there is no other evidence about how long it had been there, only evidence that the stowaway was seen on nearby property the day before the night in question by Mr Fangupo. About when it was made, that may have been at any time around the time he was seen on 12 September, but from the evidence all I can conclude is that it was made before 15 September, when it was first seen. If it was made by the stowaway, it was made at least several hours before the departure of the plaintiffs' aircraft at 2:32am on 14 September. There is no evidence by which to be more precise.

(6) Those being the probable facts, the questions whether the perimeter fence was or should have been completed to a state where it was an effective physical and psychological deterrent to persons attempting or contemplating unauthorised entry, or sufficient to delay intrusion, and whether there were sufficient security patrols of the fence, are not strongly material questions in the facts of the present case.

5. The part played by Scrub and Long Grass

There was comment adverse to the defendant by witnesses for the plaintiffs about the condition of the non-operational areas of the airport. The scrub and saafa grass clearly created a hazard in September 1994, and this was pointed out by the Secretary of Civil Aviation to the Minister in October. As I shall shortly mention, he wrote a memorandum and project proposal for removal of the heavy growth. It clearly was a cause for concern, for at least four good reasons such as fire risk which the Secretary set out. The defendant's expert witness Mr RM Armstrong, stated that there is nothing in the ICAO guidance material that refers to the clearance of scrub on airports. Among the plaintiffs' expert witnesses, Mr Anderson emphasised that the unmown vegetation created a fire risk and offered a habitat to birds which increased

the risk of bird strikes, as well as offering concealment to a human being. These comments may be true, but I am not required to decide whether they are.

The question I have to decide is, were the defendant's actions or inaction in the matter of guarding the airport, as proved in the evidence of this case, reasonable and sufficient to meet the reasonable threat of the particular event that gave rise to the claim I am deciding?

Mr Armstrong told in evidence of seven other airports in the south-west Pacific, including Manila and Singapore. Among the departures from ICAO recommendations at those airports he mentioned lack of national aviation security programmes at some, incomplete fences at others and in some places scrub and jungle growing up to and within the boundary.

The evidence about this which impresses me most is that of Mr Karalus and Mr Patolo, but several other witnesses gave relevant evidence. I accept the evidence of Mr Patolo, and am satisfied that there were clear areas of mown grass on either side of all movement areas including aprons, taxi-ways and runways in accordance with ICAO specifications for non-precision approach, international operations. I accept his evidence that this was a strip 30 meters wide. I find nonetheless that a large part of the airport on the night in question was covered by growth that was high enough to shield from sight a human being who chose to go inside it. This growth extended from the perimeter track inside the security fence at the point where Mr Fangupo found a hole in the metal chain link mesh to a point near the western end of the runway, adjacent to the turning bay at the western threshold. It contained within it near the threshold a 'hide' in which a person had stayed for more than a fleeting time. I have no reason to dispute the unchallenged evidence of Mr Pringle that it appeared "a person" had "spent several hours" in the 'hide', although I have wondered about the significance, if any, of the items found within it and listed by Mr Pringle. These included a watermelon, some used drinking coconuts, a jacket and a woven mat wrapped in plastic, which may indicate more than one visit to the hide, or more than one person, and perhaps an intention to stay, or to return some time. However, that is conjecture, and I prefer to find what solid ground there is in the unchallenged conclusion of Mr Pringle who saw and assessed the scene. The stowaway, if it was he, stayed only several hours. The time between the onset of darkness and the arrival of the plaintiffs' aircraft at about 1:50am was several hours.

It is however necessary to point out, as counsel for the plaintiffs did in his closing submissions, that there is no evidence showing who occupied the 'hide'. It was discovered only on 5 October 1994, and it was mostly the events of 14 September that suggested a link between it and the stowaway. Other circumstantial evidence was provided by Mr Fangupo's sighting and the hole cut in the fence near the place of that sighting.

I am satisfied that this high growth was to be seen near the apron, stopping about 20 meters from it. It probably stretched unbroken between the fence the threshold and the apron, but I do not see great relevance in that for the present proceedings. It was available to the stowaway for cover should he have chosen to use it, and I accept he must have done so for getting to and staying in the 'hide', if it was he who used the 'hide'. The growth was available to him also as cover for travelling, for example, from the hole in the chain mesh to the apron, simply by walking on the perimeter track. It would have been available to him also as cover should he have chosen to take cover in it near the apron. However, there is no evidence that he did

use it for cover in these latter ways, or that he needed to do so. Had he been in that vicinity at the time in question he surely had adequate cover from the darkness itself, outside the range of the halogen lights. As cover, it seems to me that it may have been useful to the stowaway in the act of cutting a hole in the fence, if he did, and in keeping him hidden while he waited for the movements of aircraft turning for take-off at the western threshold. It may possibly have served his purpose as an intruder also by keeping the hole in the fence from general view, and thus from detection by the defendant.

However, it is not clear from the evidence when the hole was made. If it was made in the darkness of night on 13/14 September, the high growth has no relevance as cover, it was not needed. Neither is there any relevance in the frequency or thoroughness of perimeter patrols, which neither reason nor the evidence suggest should have taken place in darkness. Neither can I accept as reasonable the submission of the plaintiffs that the growth should have been patrolled, particularly near the threshold. What until 14 September suggested that to be a reasonable precaution? There was no known threat there, and according to the evidence there never had been. As for the 'hide', the only direct evidence given about how long anybody had occupied it suggests it had been occupied only a matter of hours. There is other, indirect evidence. It was Mr Fangupo who met the stowaway near the hole in the perimeter fence, ie near the 'hide', and in the unread statement he gave the date, 12 September. This witness found evidence of a lifestyle on the Tupou College side of the perimeter fence, a cooked pig etc. On the other hand, Mr Pringle later found items in the 'hide' on the airport side of the fence that apparently were not seen by Mr Fangupo. Perhaps they were already in the 'hide' on 12 September. Perhaps they were brought by other people. One cannot know on the evidence available.

As well, there was the clothing worn by the stowaway. When seen on 12 September, he was wearing what Mr Fangupo described, above. When found in the wheel well of the aircraft two days later, he was wearing clothes that were seen, at least as to the outer layer, by Capt ME Berking, and described by him in evidence. They were seen also, but not described in evidence, by the pathologist Dr Potoi and probably by the Polynesian Airlines' Chief Executive Officer and General Manager Mr Gates. They are shown in two photographs which were taken under Mr Gates' direction, and identified from those photographs by Dr Potoi. The stowaway was then wearing a blue denim jacket and outside that a green jacket, which fits the description given by Mr Fangupo, but the trousers that were shown being worn on the outside were not the camouflage trousers that he saw. Those trousers may have been acquired after the sighting by Mr Fangupo, or may have been already stored in the 'hide' if it existed then. There is no way of telling. The evidence does not lead to any firm conclusion. The only indicative suggestion, albeit three weeks after the event, is that of the eye-witness Mr Pringle, who thought the 'hide' had been occupied for several hours.

The evidence about the 'hide' being so inconclusive, it is difficult to see any relevance in the scrub and long grass for the purposes of the present action.. On the balance of probabilities, which is as far as the evidence goes, the events giving rise to the present action occurred largely or wholly under cover of darkness and not under cover of the growth on the airport. That is my conclusion under this head, and I so hold.

Before departing from this topic I must refer to some of the evidence of the Secretary for Civil Aviation, Mr Palu, about this topic and to documents that he wrote about it in October 1994. It is clear that within weeks of the incident in question the defendant was taking serious steps at high level to eradicate the growth of bush, scrub and saafa grass on the airport. In a memorandum to the Minister, the Secretary stated that "[t]he clearing of this growth is now of paramount importance, as it was recently used as a 'hide' by the person who later lost his life and who placed the safety of a Polynesian Airlines B737 and its passengers in great jeopardy, by stowing away in the aircraft's wheel bay. It has now been proven beyond reasonable doubt that the person involved hid for a period in the tall grasses and also used it to mask his approach to the aircraft as it turned for takeoff at the end of the runway." The Secretary then gave four further good reasons for having the growth eliminated, including fire and bird risks, and recommended that money be appropriated for the purpose. A project proposal was prepared, in which the first justification for the expenditure was stated to be the safety of aircraft and people using the airport and the obligations of the defendant that arise from the various Annexes to the ICAO Convention. The latter were said to address, inter alia, the acceptable standards for safe flight operations. The same four further matters were raised, in detail, as further justifications.

In forming my conclusions of fact, I had to give these admissions a primary place. They were in accord with the preliminary views of more than one other. Capt Gilfillan had much earlier suggested a threshold boarding. During the de-briefing held at Faleolo airport shortly after the landing (which was recorded), Capt Gilfillan recalled that he lined up the aircraft for take-off, he said "it was a rolling start so we didn't actually stop — which might have given somebody time to hop into the wheel well". Mr Pringle also, on 5 October after finding the 'hide', thought it had been used for a threshold boarding. These statements have all demanded of me a careful approach to a contrary conclusion. In the end I concluded that they are not evidence of fact, but opinions of fact on an issue that I have been charged with settling. I had for consideration a great deal more evidence than was available to any of the authors of the above words. After I had considered all the evidence which the parties marshalled before me at the trial, including those statements, I found that the conclusions to which I was driven were contrary to those early opinions.

I feel bound to make one other material observation. I have considered separately the state of the airport with its considerable area of unmown growth, to assess whether, on the assumption that the stowaway were present as a trespasser in daylight, it amounted to a breach of the defendant's duties as an occupier, as pleaded. There were clearly unsatisfactory consequences arising from the presence of the growth, eg the hazard of fire, but those are not relevant to the facts of this case. The question for me is whether the growth was an act or omission of negligence that contributed to or caused, as a reasonably foreseeable consequence, the undetected boarding by the stowaway. The conclusion appeals to me very strongly that it did not, because the topic of reasonable expectation of what occurred was explored thoroughly, particularly in cross-examination of the witness Mr Armstrong. With that assistance and from subsequent consideration of the rest of the evidence, I feel sure that the concealed presence on the airport of a trespasser intending or likely to cause harm to persons or property was not something that the defendant had any reason to suspect or expect until it occurred.

For consistency and convenience, I re-state my relevant conclusion under this head, as follows. It is a conclusion of fact. On the balance of probabilities, which is as far as the evidence goes, the events giving rise to the plaintiffs' claims which occurred in the vicinity of the perimeter fence and of the runway threshold, occurred largely or wholly under cover of darkness, outside the scope of mobile patrols, and not under cover of the growth on the airport. Under this head also, I hold that the growth on the airport of scrub and saafa grass were not a material contributing cause, for the same reasons.

6. Was Security Guard Training a Factor?

For the plaintiffs, the claim was made that training of the defendant's security officers was inadequate, and that this contributed to the defendant's failure in duty towards the plaintiffs. Of particular importance to the plaintiffs' case is the evidence of Mr RC Anderson, an independent expert. As well as being impressively qualified in the field of airline security, Mr Anderson is an experienced presenter at aviation security seminars. Counsel for the plaintiff relied also on cross-examination of many of the defendant's witnesses especially those directly responsible for the day-to-day airport security.

In Mr Anderson's opinion, the officers in the aviation security service at Fua'amotu airport on 13 September 1994 were inadequately trained, in that the training that each had done before that date did not comply with the standards of Annex 17 to the Chicago Convention. He had considered the training record of each of these officers in turn. He illustrated his conclusion by reference to the lack of any increase in security surveillance after the Air New Zealand boarding incident of 13 August 1994, even though Mr Patolo had admitted in internal correspondence that the security service had been at fault.

On the other hand, the independent expert who gave evidence on behalf of the defendant Mr RM Armstrong, also assessed the training that had been received by the security officers before September 1994. He based himself on the training courses shown in evidence to have taken place, and which I shall shortly mention. In his opinion the degree of training that had been given was reasonable.

I noted that neither party isolated this topic for special emphasis in closing submissions. In my opinion, rightly so. There was not much in it. I have studied the folder of material on the topic of training which was put in by counsel for the defendant, which indicates and gives some details about what the defendant has done in this area since 1991. I have considered the answers of the various witnesses to questions designed to explore this topic. It appears to me that in 1991, when a security review was conducted by an aviation security consultant from New Zealand, there was a demonstrated need for more discipline and training in the airport security force. This was addressed by a basic training course held in conjunction with the review made in September of that year. The need for basic training of all officers before commencing duty was emphasised in the report, and plainly the standard of performance reflected in the review needed improvement.

A refresher course for the aviation security service was given in August 1993 by another New Zealand consultant. It had the object of better enabling the security personnel to take preventative measures in accordance with local approved programmes, a healthy emphasis in my view. In October 1993 two representatives from Tonga attended an aviation security seminar in Nadi Fiji which was addressed

by the aviation security expert Mr Anderson. In November 1993 there was one individual attendance by the Ministry's principal civil aviation officer at an ICAO aviation security seminar in Auckland New Zealand. In January 1994 Mr Patolo and one other attended a national civil aviation security workshop in Penang.

I feel bound to conclude that I cannot see in the evidence any conspicuous failure to meet training standards that are reasonable in the circumstances of this airport, and the 1991 and 1993 training courses show that by September 1994 there had been a realistic attempt to rise to ICAO standards in respect of training. I certainly see in the evidence no failure in training that has been shown in the evidence or in the submissions to have contributed to, or to have caused, in any definable material way the boarding by the stowaway which occurred on 13 September 1994.

The Law

1. The Duty of Care

The plaintiffs claim that, as occupier of the airport, the defendant owed a duty of care which included a duty to provide reasonable security and protection to all users of the airport, including the plaintiffs. They rely primarily on the general duty, both at common law and under the Occupiers' Liability Act, to take care to prevent damage from danger about which the occupier knows or should know. This duty is admitted by the defendant, but the defendant pleads that, neither as occupier under the 1957 Act nor at common law nor at all, did it owe any duty to take steps to prevent damage to the property of its invitees or licensees (including aircraft operators like the plaintiffs) by lawful or unlawful acts of a third party.

The plaintiffs submit that this general duty of care included a duty to provide reasonable security and protection to users of the airport, particularly taking into account the Convention on International Aviation of 7 December 1944 ("The Chicago Convention"), s 2(2) of the Occupiers' Liability Act 1957 (UK) and Pt V of the Civil Aviation Act 1990. Reasonable security in the present case, they contend, was airport security as described in the Chicago Convention and in the defendant's own aviation security programmes. A failure by an airport occupier to provide that sort of security, in their submission, presents a self-evident and foreseeable risk of damage to aircraft, persons and property.

In particular, the plaintiffs' claims of negligence are that (1) the land-side/airside boundary was inadequate, in that the perimeter was not fully fenced with fencing of ICAO standard, there was inside the airport from close to the fence considerable scrub and long grass, and there were inadequate patrols; and that (2) the security at the airport apron was inadequate.

The defendant contends that to establish liability in negligence, the plaintiffs must show that it owed them a duty to avoid causing the type of loss alleged, that it was in breach of that duty and that the breach of duty was the cause of the loss that is alleged. It acknowledges a duty to all visitors to the airport, to take such care as in all the circumstances of the case was reasonable to see that the visitor would be reasonably safe in using the premises for the purposes of their invitation or permission to be there. However, it pleads that it had no duty to take steps to prevent damage caused to such persons by a third party. It submits that the governing principle in both England and Tonga is that:

> "In addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it just, fair and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other" (per Lord Bridge in *Caparo Industries Plc v Dickman* [1990] 2 AC 605; [1990] 1 All ER 568).

This dictum is at pp 617-8 of the reported judgement, and it is as well to pause here to continue the citation. His Lordship continued:

> "But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes."

In counsel's submission, under the law of occupiers' liability as under the law of negligence generally, an occupier owes no duty to take care to prevent third parties from causing damage, unless they come within certain identified situations. In the defendant's submission none of those situations arose in the present case. For the proposition that there is no recognised duty to prevent third parties from causing damage, the defendant relies upon *Smith v Littlewoods Organisation Ltd* [1987] AC 241; [1987] 1 All ER 710, reasoning further on that authority that this is because the common law does not normally impose liability for pure omissions, and/or because it is not easy to conclude in such cases that the damage was reasonably foreseeable, ie, was "the very kind of thing that is likely to happen" (from Lord Mackay at p 260A-261G).

The crux of the defence, as stated in counsel's opening statement, is that the defendant was obliged to take reasonable precautions, to preclude foreseeable risks. It could not however be held liable for the failure pleaded in some detail by the plaintiffs, ie, for not preventing the act of the stowaway, because he was an independent third party using its premises for a rare and unreasonable purpose. It could not be held liable, in counsel's submission, unless the plaintiffs were to show that the stowaway's act was "the very thing that [was] likely to happen".

In the defendant's submission, the relevant duty would be owed only if a reasonable person in the position of the defendant was bound to anticipate, as "the very kind of thing that was likely to happen", that a stowaway might enter a wheel

well of an aircraft in transit and thus cause a malfunction of the landing gear. Counsel for the defendant submits that the Chicago Convention itself, upon which the plaintiffs rely, adopts the same standard as the common law when it states, at paragraph 4.1.5 of Annex 17 (below) that:

> "Each Contracting State shall establish measures to safeguard aircraft on the ground when a well founded suspicion exists that aircraft may be attacked while on the ground … "

The plaintiffs in their submissions, referred to below, do not disagree with that statement by the defendant of the law, but they submit it applies to the acts of third parties. They say it entirely fits the facts of this case. They point to the evidence of an attempt at stowing away only one month previously, and the evidence of the defendant's reaction to that by ordering additional security measures. Nonetheless, they go further and contend for a wider duty of care, distinguishing the *Littlewoods* case on five grounds, which I have set out above, ie, the acknowledgement by the defendant of a duty of care, the plaintiffs' reliance upon the defendant's undertakings and performance of security services, the fact that a fee was charged, the obviousness of the risk in the circumstances and the defendant's actual knowledge of certain security inadequacies.

In respect of damage by third parties, the plaintiffs submit that both a government and a private citizen may be held liable for damage for injury caused by the criminal act of a third party in the circumstances of the present case. They claim that the defendant had a duty to take such care as in the circumstances was reasonable to prevent actions by others which were likely to cause damage to the plaintiffs. They rely upon *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004; [1970] 2 All ER 294, in which the Home Office was held liable for damage caused by detainees who had escaped from detention. It was held (per Lord Morris, at p 1039A-B) that the duty of care owed by the Home Office "was not a duty to prevent the boys from escaping or from doing damage, but a duty to take such care as in all the circumstances was reasonable in the hope of preventing the occurrence of events likely to cause damage to [the other party]". All that is required for the duty in the present case, as counsel submitted in his closing address, is the reasonableness of foreseeing damage to users of the airport, such as the plaintiffs, by persons trespassing on the airport.

Accordingly, the plaintiffs argue that the defendant's duty to prevent damage by third parties extended to provision of secure premises. In this argument, they come close to adopting the statement of the duty of care for which the defendant contends. Citing a number of interesting cases from Canada, Australia and England, counsel for the plaintiffs noted that liability to provide security for premises had been imposed by the Courts upon the occupier despite the fact that the injury complained of had been caused directly by a third party or an animal.

The cases relied on for this point included *Stansbie v Troman* [1948] 2 KB 48; [1948] 1 All ER 599 (CA). This was a case of a duty of care owed by an invitee to an occupier, which was held to arise in their contractual relationship. It is thus not on all fours but it does illustrate, in a neat judgement, that a person may negligently give occasion for mischievous activity by a stranger and still avoid liability for injury by the stranger to another; but not in the facts of a case where "the act of negligence itself consisted in the failure to take reasonable care to guard against the very thing that happened"(Tucker LJ, at p 52). Counsel for the plaintiffs pointed out that in this,

and in the other cases which he cited, the conduct of the mischievous third party/animal was not a *novus actus* which excused a liable party, but rather was the very thing that the occupier had had a duty to guard against. He cited Lord Reid in *Home Office v Dorset Yacht Co Ltd* (above) at p 1030:

> "tortious or criminal action by a third party is often the very kind of thing which is likely to happen as a result of the wrongful or careless act of the defendant".

On behalf of the defendant, counsel characterised the distinction between the parties' positions by distinguishing *Littlewoods* and the present case from *Dorset Yachts*. In the latter, in his submission, the taking of the yacht by the boys upon their escape was a foreseeable event, and with it the risk of damage; in the present case, as in *Littlewoods*, the risk of a stowaway in a wheel well, as with the risk of a fire set by intruders, was in counsel's words 'seriously implausible'.

From the authorities cited to me by both parties, it is clear that deleterious acts of third parties are included by legal principle among the things which an occupier must guard against, but only if they come within the ambit of "the very thing which is likely to happen". This duty in respect of third parties is thus narrower than the general duty of guarding against reasonably foreseeable injury or damage to visitors.

It is the plaintiffs' case that the defendant had been obliged by legal principle (reasonableness and foreseeability), and had failed, to provide as security measures, (a) a land-side/air-side boundary of a certain standard, (b) patrols at that boundary of a certain standard, and (c) patrols at the apron of a certain standard. This obligation arose in their submission because, from a failure by an airport occupier to provide reasonable security a clear risk of damage to aircraft and to property and injury to persons is 'self-evident and foreseeable'.

Both parties, in the addresses of counsel, emphasised foreseeability in arguing for and against the plaintiffs' claims. The difference between the parties, as identified by counsel for the plaintiffs in his closing address, is that the defendant focussed on the foreseeability of the stowing-away that actually occurred while the plaintiffs focussed on the foreseeability of damage or injury in general.

The defendant asked, what else could it have done, and argued that the act of the stowaway was wildly unpredictable. The plaintiffs replied that not only was it predictable; it had in a way been predicted by a recent similar event which had been acknowledged by the defendant at the time, by additional security measures.

Both parties in their submissions addressed the evidence for all the various considerations, some of which I have referred to above, eg the opinions of the expert witnesses about the foreseeability of what occurred. They addressed also some matters which I have not yet mentioned, eg, the incidence of stowing-away on international aircraft, and of stowing-away in wheel wells in particular. On that topic, there was what counsel for the plaintiffs called some anecdotal evidence from four witnesses about earlier stowings-away in Tonga, perhaps during the 60's; I did not think that amounted to much. In addition, he pointed to the 13 August incident. He pointed too, to some interesting pages from the Internet which counsel had put in, about recent stowaway cases. He reminded me of the defendant's expert witness Mr Armstrong, who said:

> "Trespass is not uncommon at the most secure of airports, as is, to a lesser degree, stowing away in various sections of a commercial aircraft. The instance of stowing away has increased over recent years mainly by oppressed people seeking refugee status out of Eastern Europe, certain parts of Africa and Asia. It is not a problem of the South East Pacific."

He relied also on his cross-examination of Mr Armstrong as establishing that fertile grounds exist in Tonga, encouraging young Tongans to stow away in order to gain overseas opportunities. I should comment now, in case it is later overlooked, that none of this evidence and none of the submissions had the effect of establishing in my mind that stowing away on aircraft was a reasonable likelihood against which positive measures need to be taken at Fua'amotu. Since the hearing, I have considered carefully all of those submissions and that evidence, and I have not changed my mind.

Counsel for the defendant relied on the evidence of the plaintiffs, who themselves gave no evidence of foreseeing what occurred as the very kind of thing that was likely to happen. The evidence which they did give on this topic, in his submission, indicates that they, and indeed other aircraft operators using Fua'amotu airport, had neither noted such a risk nor sought any precautions against it.

2. Breach of Statutory Duty

As I noted at the outset, counsel for both parties in argument dealt with the common law duties and the statutory duties as being in law the same. The plaintiff acknowledges that the distinction is not marked, although the common law claim is wider in scope.

3. The Standard of Care

The plaintiffs' contention is that the standard of the defendant's obligation to provide reasonable security and protection is the standard set out in the Chicago Convention, particularly Annex 17 of the Convention, and in the International Civil Aviation Organisation (ICAO) Security Manual, Volume III, pp l029 et seq. In their submission, the defendant's aviation security programmes purported to acknowledge this standard of care. They highlight certain parts of the Aerodrome Security Service Programme for Fua'amotu, International Airport and the Draft National Aviation Security (AVSEC) Programme.

In advancing this as the standard, counsel submits that the relevant environment for assessing the appropriate standard is the importance of security to international aviation and the significant damage which might be caused by a breach of the duty of care. They rely as well on the fact that the defendant itself has purported to adopt and apply the safety and security protocols which, they submit, are accepted internationally as the standard of care for international airport operators.

In acting as it had, counsel for the plaintiffs submits, the defendant had put itself in the same position as the landlord in *Allison v Rank City Wall Canada Ltd* (1984) 6 DLR (4th) 144; (1984) 29 CCLT 50, in which a plaintiff had been attacked and injured in her apartment carpark after the occupier had assured her that it was a safe carpark. The court in that case held that the occupier should have taken steps to prevent the assault, which had been reasonably foreseeable. Instead, the plaintiff had received no more than certain assurances which she had accepted and upon which she

had acted. The court there held that in the circumstances a high obligation had become fixed on the landlord.

Responding to a definition of the Security Manual term "unlawful interference" which was proposed in evidence by the defendant's expert witness Mr Armstrong, counsel for the plaintiff argued that it included the effect exerted by the body of the stowaway in the present case. In his submission, the interference caused to the aircraft by the body was no different from interference with the landing gear caused in any other way by the stowaway in the course of his illegal act. In this way, he argued that the ICAO standard was the one to apply, and that the defendant was in breach of it.

Much of the evidence of the plaintiffs' expert witness Mr Anderson, was directed towards establishing that, as a matter of fact, the standards of security at Fua'amotu airport were lower than the standards of the ICAO documents. The plaintiffs' case throughout is that this factual failure to meet those standards is a legal failure to meet the standards of the law of negligence, and thus a breach of duty to the plaintiffs.

In response, counsel for the defendant submits that the duty of care is not an absolute duty to prevent harm, but a duty to take reasonable precautions against foreseeable harm. The defendant contends that the plaintiffs are wrong in pleading that the defendant was in breach of a duty in "failing to prevent" what occurred, and in "failing to detect" the trespasser. The defendant's duty in its submission, was a duty to take reasonable precautions. It contends that the court must be concerned with what were the reasonable precautions required in the circumstances of this airport, to prevent damage of the type claimed, and in what respects if any the defendant failed to take those precautions. To that it adds that the court must further be concerned to enquire whether a failure by the defendant was a cause of the damages claimed.

The defendant next, through counsel, contends that the standard, ie what are reasonable security precautions, must be assessed against the level of the security threat. The key criterion, counsel submits, is reasonableness in all of the circumstances, so that the plaintiffs must show that the defendant failed to take some precaution which any ordinary competent airport operator would have taken in the circumstances of Fua'amotu airport. Counsel suggests that the level of threat at, eg London Heathrow makes it reasonable to adopt there a higher standard of security precautions than at, eg Fua'amotu. He submitted, by reference to the evidence, that this principle is illustrated all over the Pacific, where airports both international and domestic operate without full ICAO perimeter fencing and/or patrols, without any suggestion that their security is, in their circumstances, not reasonably adequate. By contrast he submits, security at that level at major international airports would clearly be inadequate. He points to the evidence that the security threat at Fua'amotu is low. By reference to *Clerk & Lindsell* 17th ed, # 17-135 & 136, he submits that the evidence of common practice at airports of low security risk may be evidence of the required standard of care, and that standards by professional and/or international bodies may also be evidence of the standard. However, he submits, promulgated standards as evidence may become equivocal if there is also evidence of common non-compliance. Thus, in the defendant's contention, the ICAO standards cannot be the decider of what was a reasonable standard of security for the defendant to adopt at Fua'amotu.

Instead, so the submission goes, reasonableness must be a relevant factor in the standard. Reasonableness, that is, in the situation of Tonga, but taking account also of

the broader scene around Tonga. Counsel pointed to the evidence of the security threat at South Pacific airports generally, and of the level of security measures taken at those airports. Common practice in similar situations must he submits be a factor. The degree of foreseeability must in his submission also be a factor. International standards are not to be left out either, in his submission, but in applying the law of negligence, the standards of the ICAO recommendations cannot be an absolute as the plaintiffs contend. In the defendant's contention, those ICAO standards can be no more than one relevant factor, the key criterion being the factor of reasonableness. Counsel cited Lord Dunedin in *Fardon v Harcourt-Rivington* (1932) 146 LT 391, as quoted in *Clerk & Lindsell* (above) at #7-127:

> "People must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities."

In summary then; for foreseeability, the plaintiffs rely upon three earlier incidents of unauthorised intrusion onto the air-side of Tongan airports, one of which resulted in damage to private property on the air-side. Two of these were said to have occurred in early 1994, but apart from an internal memorandum to the officers in charge of the Kingdom's three main aerodromes there was no evidence about them and no evidence of what occurred. The third was only a month before the present incident, and had included an attempt to enter a wheel well of a passenger aircraft. They submit that unauthorised access as a result of inadequate security at the airport, with damage caused by the intruder, was reasonably foreseeable. Not only that, they rely upon a document in which the then director of civil aviation, after the third incident, graphically foresaw some of the consequences of a wheel well stowaway.

For causation, the plaintiffs rely upon the defendant's alleged negligence in allowing the stowaway to enter the airport, and to board the aircraft, wherever these occurred. The plaintiffs have undertaken to prove that. They claim in particular that there was inadequate perimeter and air-side security, inadequate security presence at the apron, and/or an inadequate lookout by the security personnel on the apron.

The defendant says that the damage claimed is unintentional damage caused involuntarily by the stowaway. It says it took all reasonable precautions for the plaintiffs, and that it did not owe a duty to the plaintiffs to prevent what occurred. It would have had the claimed duty, it says, only if a reasonable person in its position was bound to anticipate such an event and such consequences as probable, ie as being the very kind of thing which was likely to happen. It says that the prescience of the then director of civil aviation, about the consequences for a stowaway, did not show that it was reasonable for the defendant to anticipate a stowing away and a consequent wheel malfunction.

4. Causation and 5. Damages

In closing submissions, counsel for the plaintiffs submitted that the stowaway was able to access the air-side undetected, remain undetected on the airside for at least several hours, access the apron undetected, and access the wheel well undetected. This in his submission was a natural and probable result of the defendant's failure to have any security measure in force which could have detected the stowaway at any of those points. Accordingly, he submitted, the defendant's negligence was the direct and legal cause of the plaintiffs damages. The defendant's position on this is, I think, clearly set out above.

The Decision

It needs be said that the preparation and presentation of this case by counsel for both parties, and by the people assisting them, has left nothing out. All witness statements, documents and copies of authorities relied upon have been supplied to me, most of them indexed and tabulated. Nothing remained for the court but to consider the evidence, the exhaustive range of documents, the submissions and the authorities, all of which have been provided. Presentation of both cases was succinct and the issues are made admirably clear. I was given an impressive array of information, both factual and legal. As I think is already apparent, I have not found it necessary to set out everything which counsel put before me, but all has been considered in the decision of what to omit.

The defendant's expert witness Mr RM Armstrong expressed the view that, taking into consideration the security standards of international airports in the Pacific, Fua'amotu, airport has a reasonable standard of security infrastructure and control. In his opinion, the security precautions taken generally at Fua'amotu airport are adequate, his judgement being made by the standard of the ordinary competent airport operator in the same circumstances as Tonga. It is for me to reach my own opinion; however he has pointed to the test I have to apply, as counsel for the plaintiffs agreed in his closing submissions when he addressed the topic "Regionalism".

It has seemed to me throughout, and what I have heard during this trial has, after consideration, confirmed my view, that what is reasonable in guarding against any risk must be assessed against the risk itself. The risk assessed must include not just the chances of loss or expense, but also remoteness and the value of what might be lost or spent. An example illustrates the point, even though extreme. For a bank in a major commercial city, a burglar alarm might not be a reasonable minimum precaution. Additional or better precautions may reasonably be required if reasonably assessed risk, including both the chances of loss and the value of what might be lost, indicate that more is required. For a house on a remote Pacific island the reasonably assessed risk might indicate that even the simplest burglar alarm is not needed.

1. MY Factual Conclusions

So far as the facts are concerned, the plaintiffs' case is that the stowaway boarded the aircraft as a result of the defendant's failure to provide proper security. I make the following finding. The factual contentions of the plaintiffs about an insufficient standard of security as a cause of the boarding by the stowaway, are not substantiated by the evidence that I heard.

I can begin with a summary of my major findings of fact. I have decided:

(1) that the state of the perimeter fence was not a contributing cause to the boarding by the stowaway, and was thus for the purposes of this action, not material. For completeness, that it was in any event reasonable compliance with the ICAO recommended standards, in that it was being constructed according to those standards and developed as resources allowed in accordance with ICAO guidelines.

(2) that the patrols of the perimeter fence were not a contributing cause to the boarding by the stowaway, and

were thus for the purposes of this action, not material. For completeness, that they were in any event carried out frequently as part of general surveillance of the airport without clear evidence of how often.

(3) that the state of the growth on the airport was not a contributing cause to the boarding by the stowaway, except inasmuch as it may have allowed him to shelter in a 'hide', but the evidence about that is inconclusive. In any event, most probably the stowaway did not use the 'hide' or the growth for concealment in aid of his boarding the aircraft, because he was acting under cover of darkness.

(4) that no deficiency in training is shown to have contributed in any material way or caused the boarding by the stowaway. For completeness, that the training of the security officers up to September 1994 was in the circumstances reasonable.

(5) that the stowaway most probably boarded the aircraft at the airport apron.

(6) that, if so, the time of the boarding was the period of 12 or so minutes immediately before the aircraft began to taxi.

(7) that the parties shared responsibility for security of the aircraft during the turn-around, with the defendant having primary responsibility by providing the physical security surveillance.

(8) that there were up to five security guards who had the aircraft and the apron under general surveillance during the period of the turn-around, two of them being singly on the apron at different times specifically for apron surveillance.

(9) that the lookout kept by the security guards was on the evidence adequate and reasonable.

(10) that there were as well on the apron other persons employed by the plaintiffs, who were engaged in the tasks of their employment, but who had a residual responsibility through the plaintiffs' own security programme for the security of the aircraft. Of these persons, the station manager Mr Karalus in particular was aware and vigilant.

2. The Duty of Care, Breach of Statutory Duty, and The Standard of Care

The principles for the claim of breach of statutory duty are included in what I shall say about the duty of care, and for the present purposes, the standard of care is included here as well.

From the time that the hearing of this action finished, I have given the issues, particularly the claims and submissions about the duty of care, careful consideration. On the topics of the duty of care and the standard of care I have read counsels' submissions and many of the authorities upon which each party relies, many times.

The outcome of the legal argument advanced by the parties is governed by the authorities to which counsel referred me. I remind myself that negligence in the law of torts and in cases under the Occupiers' Liability Act 1957 has three elements: duty, breach and resultant loss. The law in relation to negligence is a growing body of principle, not a fixed and mathematical rule. For that reason alone, it is necessary that one read not merely the dicta cited as authoritative principles, but the whole context of those dicta.

The parties distinguish and rely severally upon *Smith v Littlewoods Organisation Ltd* [1987] AC 241; [1987] 1 All ER 710 and *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004; [1970] 2 All ER 294, (inter alia). Yet it should be said that these two cases are part of the attempt by the Courts to develop one unified body of law. It is the facts that cause the differences. As invited by counsels' submissions, by reference to the authorities which they cited, I have traced the recent utterances by the relevant courts of high authority that bear upon the facts of the present case. There is much that could be said, from and about those dicta, but for present purposes it can, I hope, be reduced. From among the cases referred to by counsel, it seems to me that the developing line of authority that governs this case might commence with the judgments of the House of Lords in *Bolton v Stone* [1951] AC 850; [1951] 1 All ER 1078. That is the case where a cricket ball was hit out of a cricket ground and severely injured a person standing on the roadway. In that case Lord Reid said (at pp 864-5) that statements of the law of negligence must be read in the light of the facts of the particular case. He also said:

> "This case therefore sharply raises the question what is the nature and extent of the duty of a person who promotes on his land operations which may cause damage to persons on an adjoining highway? Is it that he must not carry out or permit an operation which he knows or ought to know clearly can cause such damage, however improbable that result may be, or is it that he is only bound to take into account the possibility of such damage if such damage is a likely or probable consequence of what he does or permits, or if the risk of damage is such that a reasonable man; careful of the safety of his neighbour, would regard that risk as material?
>
> … I think that reasonable men do in fact take into account the degree of risk and do not act on a bare possibility as they would if the risk were more substantial …

And at p 866:

> … Once a ball has been driven onto a road … there is clearly a risk that another will follow … (and) that someone may be injured. On the theory that it is foreseeability alone that matters it would be irrelevant to consider how often a ball might be expected to land in the road and it would not matter whether the road was the busiest street, or the, quietest country lane; the only difference between these cases is in the degree of risk.

And at p 867:

> … In my judgment the test to be applied here is whether the risk of damage to a person on the road was so small that a reasonable man in the position of the appellants, considering the matter from the point of view of safety, would have thought it right to refrain from taking steps to prevent the danger.
>
> In considering that matter I think it would be right to take into account not only how remote is the chance that a person might be struck, but also how serious the consequences are likely to be if a person is struck; but I do not think that it would be right to take into account the difficulty of remedial measures …"

Sixteen years later, the Privy Council decided *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty (The Wagon Mound No 2)* [1967] 1 AC 617; [1966] 2 All ER 709 (PC). That was a case where oil was ignited when that was known to be an extremely unlikely thing, shown however by the events to be not impossible. Lord Reid had occasion to comment upon the *Bolton* case. There is much in the judgment of Lord Reid that is of interest for the present case, but I restrict myself. About *Bolton*, he said (at pp 642-3):

> "What that decision did was to recognise and give effect to the qualification that it is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it."

He then went on to say, in the circumstances of the case being decided, (at pp 643-4), that:

> "If a real risk is one which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as far-fetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage and required no expense."

And at p 644:

> "If it is clear that the reasonable man would have realised or foreseen and prevented the risk, then it must follow that the appellant is liable in damages."

Three years later, Lord Reid again commented on this topic in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004; [1970] 2 All ER 294. In that case, borstal trainees escaped from their mentors and caused damage to the respondents' yacht. The judgment was on a preliminary issue of whether the Home Office or its Borstal officers owed any duty of care to the respondents which was capable of giving rise to a liability in damages. Lord Reid mentioned, at p 1026-7, the steady trend in the

previous years towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should not ask whether it is covered by authority but whether recognised principles apply to it. This is the approach that I have adopted. Lord Reid said further at p 1027:

> "… here the ground of liability is not responsibility for the acts of [others who were not the appellant's servants or persons acting on its behalf]; it is liability for damage caused by the carelessness of [the appellant's] officers in the knowledge that their carelessness would probably result in the trainees causing damage of this kind. So the question is really one of remoteness of damage …

His Lordship then considered to what extent the law regards the acts of another person as breaking the chain of causation, and concluded, at p 1030:

> These cases show that where human action forms one of the links between the original wrongdoing of the defendant and the loss suffered by the plaintiff, that action must at least have been something very likely to happen if it is not to be regarded as novus actus breaking the chain of causation. I do not think that a mere foreseeable possibility is or should be sufficient, for then the intervening human action can more properly be regarded as a new cause than as a consequence of the original wrongdoing. But if the intervening action was likely to happen I do not think that it can matter whether that action was innocent or tortious or criminal. Unfortunately, tortious or criminal action by a third party is often the 'very kind of thing' which is likely to happen as a result of the wrongful or careless act of the defendant. And in the present case, … I think that the taking of a boat by the escaping trainees and their unskilful navigation leading to damage to another vessel were the very kind of thing that these Borstal officers ought to have seen to be likely.
>
> … in the present case … there would in my view be no novus actus when the trainees damaged the respondents' property and I would therefore hold that damage to have been caused by the Borstal officers' negligence."

After holding that the carelessness of the officers was the cause of the respondents' loss, Lord Reid went on to reject all the arguments that had been raised in attempts to justify a view that they had had no duty to take care.

In 1987, the House of Lords decided *Smith v Littlewoods Organisation Ltd* [1987] AC 241; [1987] 1 All ER 710. In this case, the respondent was the new owner of a cinema building which was vacant, not inspected, not fully secure and intended for demolition. Vandals entered the building and set a fire which burned down the building and seriously damaged neighbouring buildings. From among the cases cited to me, the speeches in this case, together with the opinions of their Lordships (particularly Lord Bridge of Harwich) in *Caparo Industries Plc v Dickman* [1990] 2 AC 605; [1990] 1 All ER 568, express the developed state of the law about the duty of care as it applies to the present case. In the former case, the two leading speeches

are those of Lord Mackay of Clashfern and Lord Goff of Chieveley. They are rich in concepts useful for the present case. Dicta to cite from all the speeches are plentiful, the difficulty is deciding what to omit. However, among those which are influential for me, I commence with the succinct comments of Lord Brandon of Oakbrook (at p 249):

> "[I]t is axiomatic that the question of whether there has been negligence in any particular case must depend on the particular circumstances of that case. That being so, I do not think that these appeals can be determined by reference to other reported cases in which the particular circumstances were different, even though some degree of analogy between such other cases and the present one can legitimately be drawn. Nor do I think that it is possible, however helpful it might otherwise be, to lay down any general principle designed to apply to all cases in which the negligence alleged against a person involves the unauthorised acts of independent third parties on premises owned or occupied by that person."

Lord Brandon then went on to suggest that there were only two questions which determined the appeals. First, what was the general duty owed by the cinema owners to the owners or occupiers of nearby buildings, and second, whether that general duty encompassed a specific duty to exercise reasonable care to prevent the events that had occurred. On the facts, Littlewoods did not know of the activities of the vandals, and in his opinion the events that occurred were not reasonably foreseeable by Littlewoods. He concluded that therefore the general duty of care owed by Littlewoods to the appellants did not encompass the specific duty claimed.

Lord Griffiths also was succinct. He saw the appeals as an application of a well established duty and standard of care to the particular facts of the case. The duty of care, in his opinion, was to take reasonable care that the condition of the occupied premises was not a source of danger to neighbouring property. The standard of care had been stated generally and more particularly in previous opinions of the House of Lords. He concluded with the following words:

> "I doubt myself if any search will reveal a touchstone that can be applied as a universal test to decide when an occupier is to be held liable for a danger created on his property by the act of a trespasser for whom he is not responsible. I agree that mere foreseeability of damage is certainly not a sufficient basis to found liability. But with this warning I doubt that more can be done than to leave it to the good sense of the judges to apply realistic standards in conformity with generally accepted patterns of behaviour to determine whether in the particular circumstances of a given case there has been a breach of duty sounding in negligence."

Relevantly, for present purposes, Lord Mackay of Cashfern said (at pp 257-8):

> "A duty of care to prevent this damage is the only duty alleged to be incumbent upon Littlewoods relevant to this case. From this it

> follows that unless Littlewoods were bound reasonably to anticipate and guard against this danger, they had no duty of care, relevant to this case, requiring them to inspect their premises. Unless, therefore, Littlewoods, on taking control of these premises without any knowledge of the subsequent history of the property after they assumed control, ought reasonably to have anticipated that they would be set on fire and thus or otherwise create a substantial risk of damage to neighbouring properties if they did not take precautions, the claims must fail."

Lord Mackay continued from there to say (at p 258) that the question whether a reasonable person in the position of Littlewoods was bound to anticipate as probable, if he took no action to keep the premises locked, the event which occurred, was a question of fact. He went on to say that while such a consequence may be a possibility, the extent to which it is probable must depend on the circumstances of the case.

He pointed out (at pp 258-9) what he called a telling point in favour of Littlewoods, that no one had made any protest to them about the state of the premises, or indicated to them any concern that, unless they took some action, neighbouring premises were at risk. He said that, if in the light of common knowledge in the neighbourhood it had been anticipated that the cinema might be set on fire, he would have thought that the persons concerned with the safety of the adjoining premises would have communicated their anxieties to Littlewoods.

What he had said to that point was sufficient in Lord Mackay's view to determine the appeals. There is much more besides in his speech and in that of Lord Goff to which I would have resort, but, for the sake of brevity only, I will not cite further. It is sufficient in my view to take the opinions he expressed to that point and apply them to the present case, because they show the way to the proper determination of the case.

Before doing so however, I pause to refer to the speech of Lord Bridge in *Caparo Industries Plc v Dickman* (above). I have set out above, among counsels' submissions, a passage relied upon by counsel for the defendant, and the passage that followed it. There is much more that is relevant for present purposes, particularly that part of His Lordship's speech on pages 616-623, where he traces a history of the law's efforts in "determining the existence and scope of the duty of care which one person may owe to another in the infinitely varied circumstances of human relationships" (p 616). It should be borne in mind throughout that the case before the House involved economic loss, and much that was said outside that history was specific to economic loss. However, for present purposes, the following general comment (at p 627) seems apposite:

> "It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless. 'The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it': see *Sutherland Shire*

> *Council v Heyman* (1985) 60 ALR 1 at 48; 59 ALJR 564, per Brennan L"

I turn now to decide the legal issue. The cause of the plaintiffs' losses, as summarised in counsel's closing address, was the boarding by the stowaway which, in the plaintiffs' submission, was a natural and probable result of the defendant's complacent and inadequate attitude to security. In my concluded view, those claims of breach of duty and of causation are difficult to sustain.

First, I put aside for now the ICAO Convention and its associated documents. They were not relied upon for the primary contention that there was a duty of care, and, in my opinion, correctly so, for they do not bear upon that question.

Second, I must ask what is the actual nature of the damage suffered, because it is a duty to prevent that damage which the plaintiffs must establish. That is easily answered, the damage which is identified by the plaintiffs, under four headings, I have summarised at the beginning, under the topic "The Claimed Heads of Damage".

Next, I must isolate factually how it is that the plaintiffs claim that the defendant failed in its duty of care. They suffered losses. These occurred because the right engine of their aircraft was damaged. The cause of the damage was a landing on that engine after the right main landing gear failed to extend. The cause of that was the presence in the wheel well of a dead human body which obstructed the movement of the wheel. The cause of that was lack of oxygen at high altitudes, which caused hypoxia in the stowaway, and his death. The cause of that was the stowaway's action in positioning himself in the wheel well, which lacked proper breathing air, for it was not intended for carriage of passengers. What caused him to do that is unknown, and his intention is a matter of conjecture only. However, what enabled him to do it was that he evaded the defendant's security cordon round the aircraft. In particular, he entered the airport without being detected, he remained on the airport without being detected after that until the time when, again without being detected, he entered the wheel well.

In what way is the defendant said to have caused the plaintiffs' losses? It is said (by Counsel in opening) that, as the occupier of the airport, the defendant owed a duty of care to all visitors to the airport including the plaintiffs. The plaintiffs claim that the defendant had an obligation to provide reasonable security and protection to all users of the airport, which arose (1) under a common law rule that a visitor is entitled to expect that an occupier will use reasonable care to prevent damage from danger of which the occupier knows or should know, which rule was reinforced by the ICAO Convention, and (2) under s 2(2) of the Occupiers' Liability Act 1957 (UK), and (3) under Pt V of the Civil Aviation Act 1990. All three sources are acknowledged as the same in principle, for present purposes.

So, what is the common law principle that applies to the facts that I have found? It exists in the cases, including those I have referred to above. It once was foreseeability, but now it is reasonable foreseeability, of the particular damage that the plaintiffs claim they suffered. I have considered all of the major cases to which counsel referred me, and I have read another which with the knowledge of both parties was sent to me after the hearing. This latter case was heard and decided after the present hearing finished, *Jolley v Sutton London Borough Council* [1998] 1 WLR 1546; [1998] 3 All ER 559 (CA). I have not relied upon this case, and thus have not found it necessary to trouble counsel for further submissions upon it. There are

distinctions between that case and the present, and the authority relied on by the Court of Appeal was *Hughes v Lord Advocate* [1963] AC 837; [1963] 1 All ER 705, which was an authority not prominent in the argument before me. Indeed the judgment of Lord Woolf MR comments once again that other cases which can provide illustrations of what the court has decided in other particular circumstances have a limited contribution. Nonetheless, I should say in passing that the principle applied seems to be the one that I have determined must be applied in the present case. The damage claimed was horrendous physical injury, and was not questioned. Consequently the question which the court in that case held it must ask was, was the accident that caused the damage one of a different type and kind from anything that a defendant could have foreseen?

In the present case also, the damage claimed needs little consideration. It can be taken at face value as pleaded. Subject to what might be said about causation and remoteness, it is in general terms financial loss said to have been suffered by the plaintiffs in their commercial operation. It was in the course of the commercial operation that the incident occurred.

What was the cause of that financial loss in the present case? It was a damaged engine. What caused that? The contact between engine and runway when the aircraft slid along the runway at Faleolo on that engine. In passing, it needs be said that the landing itself was, by the evidence and in the opinion of at least one of the expert witnesses, an example of very skilful flying and a credit to both pilots, particularly to the pilot in command. The defendant was at pains to show, in respect of quantum of damages, that the engine itself suffered less damage than might in the circumstances be expected, and in my view from the evidence that is correct.

What caused the contact between engine and runway? It was the obstruction of the free movement of the wheel by the stowaway's dead body. This point was taken by counsel for the defendant, who submitted that this was not a reasonably foreseeable danger against which the defendant could be held bound to take steps. He did not rely upon *novus actus*, but he did submit that the dead body did raise a different question. He relied upon case authority generally for the proposition that an occupier of property, say a building or a tree or a train platform, cannot normally be held responsible for the resultant damage suffered by a neighbour if a third party chooses to take a suicidal leap from the building or the tree or the platform. I would agree cautiously — normally so. In my opinion, by the principles which I deduce from the authorities above, the results caused by a dead body of a suicide may in the particular circumstances of any particular case be of a type and kind that an occupier could have foreseen. That is a matter of fact in any case. But in the present case I agree. A dead body in a wheel well is, by the evidence and by ordinary experience, something which is not normally taken into account by people assessing the risks to aircraft and passengers in normal commercial operations. A dead body that somehow descends and jams the wheel as the photographs showed happened in this case is something that the evidence shows is rare indeed. If these were the only facts I would hold that there was no duty of care that required the defendant to take preventative action against them.

But I must go further. What caused the stowaway's death? It was his presence in the wheel well at high altitude. The central question posed by the plaintiffs' pleadings is whether that fact was something that the defendant had a duty to prevent.

So, was the presence of the stowaway in the wheel well something of a different type and kind from anything that a reasonable defendant in the position of the present defendant could have foreseen? I think the answer to that is no. First, should the defendant reasonably have foreseen that a person who had gained unauthorised access to the airport might get into the wheel well of the plaintiffs' aircraft during turn-around? Second, should the defendant reasonably have foreseen that damage such as the losses claimed could result to the plaintiffs if it allowed such a thing to happen?

As to the first, the facts produced in evidence about the incidence of stowing-way were relied upon by each party to show that stowing away in a wheel well was (a) common enough to have put the defendant reasonably on notice that it could occur at Fua'amotu, and (b) so rare that, particularly in Tonga, it was too small a risk to guard against. I am bound to say that, on the evidence before me, I find it factually was too unlikely an event for the defendant, as operator of the airport at Fua'amotu, to foresee reasonably as a probable event at Fua'amotu. Apart from that, it cannot be said on the evidence that I heard that the defendant had any reason to expect that any unauthorised person would get into the wheel well of the plaintiffs' aircraft. The previous incident of entering a wheel well one month previously was a foolish act, without any possibility of completion. The seriousness of that event centres round the lax security in the terminal at the passenger entry point. On the apron there were lights, which always till then had seemed adequate to all concerned. There were security guards, fire officers, a refueller and the plaintiffs' ground staff including its station manager. If the boarding had been at the threshold, that was not only rare, but it was difficult, particularly on a rolling start.

As to the second, I am able to find that the defendant was bound reasonably to foresee that, if an unauthorised person did stow away in a wheel well, he or she would probably die. After that, however, on the evidence adduced, there was nothing to show that it was reasonable to expect that, before or after death, his or her body would come to be in a position that blocked the descent of a wheel. It is a more remote probability that, having jammed the wheel, the body would cause the aircraft to sustain engine damage. Beyond that engine damage, the further types and kinds of damage which the plaintiffs claim to have suffered seem to me to be even more remote from contemplation by a reasonable and prudent airport operator.

I am required to go further. The plaintiffs plead that the defendant was in breach of its general duty of care to them by not having the perimeter fence completed. I have dealt with the factual aspects of this claim. Dealing briefly with the legal aspect, it should be said that the plaintiffs and the defendant were in a special relationship, both being subscribers to the ICAO concepts for secure operations during aircraft turn-arounds. There thus might be room for argument that the defendant may have had to the plaintiffs for that reason, a duty of care that included a duty to comply with ICAO recommendations. I do not believe that argument could establish the claimed duty in the present case. This is primarily because the ICAO documents do not impose on any party to them a duty or obligation to another party to them of full and complete compliance. The perimeter fence, so far as ICAO recommendations are concerned, has always been a matter for compliance by the defendant, as resources permit, so long as construction spreads out from the areas of greatest use. The overriding duty, in my opinion, is always the duty to prevent, by whatever means are best suited, damage to users of the airport that would be reasonably foreseeable to a

reasonable person in the defendant's position. The ICAO perimeter fence is only one means to that end.

The same may be said of patrols, and of static security guards. At common law and under the statutes upon which the plaintiffs rely, these are only preventative measures which the defendant takes in compliance with its general duty of care. In certain circumstances an airport operator may be justified at law in taking measures below the ICAO recommended standards. In other circumstances it may be that mere compliance with those standards will be held to be inadequate.

About the scrub on the airport, I have held that the circumstances inferable from what evidence there is, were that the stowaway came onto the airport and moved about the airport by night. For those purposes the scrub was not helpful to him. Clearly if it was he who used the 'hide', it was some help to him in giving him cover near the threshold, but there is no evidence how long he was there except conjecture by the person who discovered the 'hide'. If he did leave from there to board (which is not established), it seems he moved under cover of night, and without help from the scrub.

Putting all the findings aside however, was the presence of the scrub a neglect by the defendant of its duty of care to the plaintiffs? Remembering Lord Mackay's 'telling point' in *Smith v Littlewoods* (above), I note at the outset that if the plaintiffs had foreseen that the scrub might provide concealment for a person who might attempt to stow away on one of their aircraft, they had not conveyed that to the defendant. Certainly, the scrub was a potential hiding place for a person on the airport without authority, but it was perceived as a risk rather for fires and for bird strikes. The possibility of a stowaway hiding in the scrub was not foreseen at all by any person, so far as the evidence reveals, even after the attempt on 13 August 1994. It was not raised after the events in question on 13/14 September until the defendant raised it, after the 'hide' was discovered.

3. Conclusion

I may perhaps conclude with the words of Lord Radcliffe in *Bolton v Stone* (above). Neither party relied on fairness for its case, and rightly so, for their cases rested properly on the test of culpability. As Lord Radcliffe said (at p 868), the law of negligence is concerned less with what is fair than with what is culpable and, like Lord Radcliffe in that case, "I cannot persuade myself that the [defendant has] been guilty of any culpable act or omission in this case."

It. remains for me now to state that, for the reasons I have given, the plaintiffs' action is dismissed. For full determination of all issues I should discuss and determine causation and damages, but to go into those matters, while it may prove helpful, is not necessary. It seems to me that the judgment should issue now so that the outcome is not further delayed. I invite counsel to settle costs if they can, otherwise costs are to be taxed.

Filipe v R

Supreme Court, Nuku'alofa
Finnigan J
Cr 1259/98

20 October 1998; 22 October 1998

Criminal procedure — non-appearance of defendant before Magistrate

The appellant was charged with travelling at 52 kilometers per hour. The magistrate made an order requiring the appearance in court of the appellant in an undefended traffic summons. The appellant appealed against that order.

Held:

1. A charge of travelling at 52 kms per hour was not one that would clearly warrant a term of imprisonment, so it may not warrant arresting an absent defendant who is represented by a lawyer, just to have him before the court.
2. Pursuant to ss 74 and 80 of the Magistrates' Courts Act (Cap 11) the matter was remitted to the Magistrate so that he could consider again, with reasons, the decision whether to hear and determine the charge in the absence of the defendant.

Statutes considered:
Magistrates' Courts Act Cap 11
Traffic Act Cap 156

Counsel for appellant : Mr Hola
Counsel for respondent : Ms Tupou

Judgment

This is an appeal against a Magistrate's order requiring the appearance in court of a defendant in an undefended traffic summons. The order was made under s 21(1) of the Magistrates' Courts Act Cap 11. While considering s 21, it is important to be aware of s 20, which provides that in summary jurisdiction criminal cases, "[b]oth the complainant and the defendant shall be entitled to conduct their cases in person or by a law practitioner [as amended by No 24/1990]". The relevant part of s 21 is as follows:

> 21. (1) If on the date for the hearing specified in the summons the defendant does not appear before the Court when his name is called the magistrate may either:
>
> (a) adjourn the hearing of the case to a later date; or
> (b) after proof of service of the summons, hear and determine the case in the absence of the defendant; or
> (c) after proof of service of the summons, issue a warrant for the arrest of the defendant and adjourn the hearing.
>
> (2) When the defendant is arrested under any such warrant as aforesaid he shall be brought forthwith before a magistrate who may either admit him to bail or order him to be remanded in custody until the next sitting of the Court.

That is the statutory prescribed procedure to be followed in summary jurisdiction criminal cases "… on non-appearance of defendant" (marginal note). It is appropriate to mention also ss 22 and 23, which are the prescribed procedures for non-appearance of the complainant and non-appearance of both parties, respectively, in summary jurisdiction criminal cases.

There is as well s 24, which prescribes the procedure for the court to follow where both parties appear. It includes the provisions at subs (2) and (3):

> (2) At the outset of the hearing the magistrate shall state to the defendant the offence charged in the summons and shall ask him whether he is guilty or not guilty.
> (3) If the defendant says that he is guilty the magistrate shall make such order against him as the justice of the case requires.

It is fundamental that the court may require any person who is liable to imprisonment to be present in court at the time of sentence, so that the person may be taken into custody if the court should pronounce a sentence of imprisonment. That is the reason for providing a power to issue a warrant of arrest (after proof of service of the summons) at s 21(1)(c) (above). However, the power is discretionary, because another option is provided. Section 21(1)(b) allows the court, after proof of service, to hear and determine the case in the absence of the defendant.

This summary procedure in criminal cases contrasts with the procedure provided for the civil jurisdiction at ss 64 to 66 of Cap 11. There, the procedure commences (at s 64) by providing, in almost the same words as s 20, that "[b]oth the plaintiff and the defendant shall be entitled to conduct their case in person or by a licensed lawyer". Both s 65 and s 66 make provision for where a party may be "absent and unrepresented by a lawyer" (s 65), or may "appear either personally or by a lawyer" (s 66).

It seems clear from these civil provisions that the legislature intended that parties in civil cases may be absent but represented, and may appear by having a lawyer appear for them. From the criminal provisions it is clear that the legislature intended to require that defendants in criminal cases tried summarily will be present when charges against them are called before a Magistrate. But not always, because the legislature also clearly intended to permit a Magistrate to proceed with a case,

"after proof of service of the summons … in the absence of the defendant." (s 21(1)(b)).

Both Mr Hola and Ms Tupou made excellent submissions to me. This is clearly a matter of some importance in disposal of cases in the Magistrates' Courts. I shall not refer to these submissions in detail, but they have been of great help to me in reaching my decision. I shall mention specifically only one. Ms Tupou submitted that the appellant had not complied with the new procedure established by the legislature in1990 when it enacted amendments to the Magistrates' Courts Act Cap 11 and allowed "Pleas of Guilty in Absence". However, I find that procedure does not apply in the present case, because it is for offences under the Traffic Act "… which do not carry a sentence of imprisonment …"(s 20A(1)), and the appellant in the present case was charged under s 41(2) which provides for imprisonment up to one year.

In s 21(1)(b) the legislature enacted a power that is intended to be used. This means there must be cases where the court is entitled to "hear and determine the case in the absence of the defendant". Mr Hola's submission in this regard is correct. The court is provided with two distinct powers to use when a defendant "does not appear before the court"(s 21(1)), and "after proof of service of the summons". It must choose one, at its discretion. Its discretion must be exercised according to principle and according to justice. According to principle, it must act openly, with reasons, and with the purpose of justly disposing of its cases with reasonable speed. It must not require more of complainant or defendant than the statute empowers it to require. According to justice, it must be seen openly treating both sides fairly. The ultimate decision is for the individual Magistrate, but there must certainly be times when principle and justice require the Magistrate to proceed under s 21(1)(b) and hear the case without the defendant being present.

In the present case, the Magistrate misdirected himself in the law. He said (in translation), "It is not right to do the case without the presence of the defendant." That is clearly contrary to s 21(1), which says that it is right to hear and determine the case in the absence of the defendant. He said, "You are putting down this court. You should have an understanding with the prosecution before you made that request … the defendant should come to the prosecution because there is a form to fill in and to sign, that he pleads guilty and consents for counsel to represent him, and the prosecution should bring that to court before the court starts." That judgment is wrong in law, because the defendant was entitled to employ a lawyer to come before the court without advising the prosecution and submit that his case came within s 21(1)(b). The reference to a form, if it was a reference to S20A, was incorrect because that procedure applies only to charges that do not carry sentence of imprisonment.

The Magistrate in the present case must turn his mind to the question put before him by counsel, and decide that question according to justice and to principle. In that way he is exercising correctly the discretion given to him by s 21(1). He must decide, on firm grounds, whether to proceed without the presence of the defendant or whether to issue a warrant for his arrest and, if so, adjourn the hearing. The discretion to issue a warrant of arrest must itself rest on firm reasons that justify an arrest. The history of a particular defendant's appearances before the court may be a factor. The penalty provided for the offence charged, and the likely penalties for the particular defendant, are important factors. Prima facie, a charge of travelling at 52 kilometers per hour, as in the present case, is not one that would clearly warrant a term of imprisonment, so it

may not warrant arresting an absent defendant who is represented by a lawyer, just to have him before the court.

Pursuant to ss 74 and 80 of the Magistrates' Courts Act I remit this matter to the Magistrate so that he may consider again, with reasons, the decision whether to hear and determine the charge in the absence of the defendant.

Taufa v R

Supreme Court, Nuku'alofa
Finnigan J
Cr 1390/98

23 October 1998; 23 October 1998

Criminal procedure — bail — requirement to release

The appellant faced 11 charges relating to theft of firearms and of providing a firearm to an unlicensed person. The magistrate remanded the appellant in custody for one week. The appellant appealed against the refusal of bail by the magistrate.

Held:

1. In assessing whether or not to grant bail, there are five main matters and seven in all which a Magistrate can consider. They are alternatives, but one or more must be shown to the satisfaction of the Magistrate before the mandatory requirement to release on bail is negatived.
2. Primarily, the matters are the seriousness of the offence (coupled with the probable method of dealing with the defendant), a defendant's criminal record, his record of complying with bail terms in the past and the strength of the prosecutor's evidence.
3. If a Magistrate in refusing bail relies upon a ground then he must show why.
4. The appeal was allowed.

Statutes considered:
Bail Act 1990
Magistrates' Courts Act Cap 11

Counsel for appellant : Mr Fifita
Counsel for Crown : Mr Kefu

Judgment

This is an appeal against refusal of bail by a Magistrate pending hearing. On 20 October the defendant appeared before the Magistrate in answer to 11 summonses, and on his behalf Mr Fifita requested an adjournment for one week till next Tuesday, 27 October. The defendant wishes to plead not guilty to all 11 charges, all within the Magistrate's jurisdiction, 6 of theft of a firearm and 5 of providing a firearm to an unlicensed person.

The prosecutor applied for a custodial remand, submitting that the charges are for serious offences involving theft of 7 firearms and providing firearms without a licence. Mr Fifita replied by seeking bail, saying that the defendant is a police officer.

The Magistrate responded that, first, he believed these are very serious offences, and that it is very dangerous to release the defendant on bail because death had occurred here in Tonga as a result of shooting with a gun; and, second, that the pressure of the offences on the defendant is very high and he might do something which could be worse. He thereupon remanded the defendant in custody for one week till next Tuesday, 27 October.

In support of the appeal, Mr Fifita relies on s 46 of the Magistrates' Courts Act Cap 11, and submits that the defendant is entitled to bail as of right. He advances other grounds also, one of which is that three of the summonses were served in the courtroom while he was there, but without notice to him. This was contrary in his submission to s 14 of Cap 11, which provides for service 7 days before hearing. No objection is taken in the appeal to service in the courtroom. I pause to comment that it seems the 7 days will elapse before the defendant is required to plead to those charges. There was nothing that the Magistrate did, and there can be no appeal on this ground.

Mr Fifita submits also, as a separate ground, that the Magistrate had shown bias by making comments to the defendant about the quality of his counsel. He said the defendant had instructed him that the Magistrate had spoken to him outside the courtroom before the court sitting began, and had enquired who was his counsel. Upon being told that counsel was Mr Fifita, the Magistrate is said to have told the defendant that he had made a wrong choice, and that his counsel might mislead him. In Mr Fifita's submission, this resulted in the Magistrate's treating the defendant unfairly, by taking into account his opinion of the defendant's counsel, even though he did not say so in court.

I pause to compliment and thank Mr Kefu who appeared at short notice on behalf of the Crown. Like Mr Fifita, he was aware of this hearing only late yesterday, but in the time available he made adequate preparation, without the advantage of the police file. His submissions have been very helpful, both on a matter that I now need only mention briefly, and on the merits of the appeal. That other matter was one that I raised myself as a question, and which I am satisfied, after hearing from both counsel, need not trouble the court in this appeal.

On the merits, Mr Kefu points out the provisions in s 4 of the Bail Act, No 27/1990. He submitted that this Act had repealed s 46 of the Magistrates' Courts Act, but in the absence of express repeal I find that is not so. To the contrary, I find that s 3 of the Bail Act is in harmony with s 46, and only to the extent that the latter statute provides and limits a discretion about granting bail, and thus may conflict with s 46, is that earlier provision superseded. In practical terms, there can be no need now to refer to s 46.

What the Bail Act has done is require that Magistrates in cases like the present must exercise a discretion, and provide guidelines which must be followed. Mr Kefu submits that the Magistrate did exercise the discretion and follow the guidelines. In particular, he submitted, the Magistrate applied s 4(1)(i)(b) — when he held there was a likelihood of further offending — and s 4(2)(a) — when he held that the offences charged are serious. However, s 4(1)(i)(b) provides:

A person who is arrested or charged with an offence punishable with imprisonment shall be granted bail unless the Court … is satisfied that:

(i) there are substantial grounds for believing that, if released on bail (whether or nor subject to conditions) he will
  (a) …
  (b) commit an offence while on bail;
  (c) …

(ii) …

(iii) …

(iv) …

(v) …

There are five main matters and seven in all which the Magistrate can consider. These are clearly alternatives, but one or more must be shown to the satisfaction of the Magistrate before the mandatory requirement to release on bail is negatived. To be satisfied that the defendant will commit an offence while on bail, he must be "satisfied that … there are substantial grounds for believing" that he will. For the Magistrate to be satisfied about any of the guidelines in s 4(1), he must have facts. Certain facts which must be taken into account are provided in s 4(2). Primarily, these are the seriousness of the offence (coupled with the probable method of dealing with the defendant), a defendant's criminal record, his record of complying with bail terms in the past and the strength of the prosecutor's evidence.

These facts may come from evidence or submissions. The prosecutor may advise the court of matters within those 5 guidelines. The facts may come also from something that is public knowledge and may properly be taken into account, such as a criminal record.

In the present case, the prosecutor gave no information to the court except a statement that the charges were serious. He must have assumed that the facts upon which he relied for a remand in custody were obvious. The Magistrate proceeded as if they were obvious, and in my view did not exercise the discretion properly. Although he was right to say he believed the offences were very serious, he went on to say that to grant bail to this defendant was very dangerous because deaths have occurred from shootings. There was nothing said in court by any party to show how the Magistrate connected the defendant with any other shootings that may or may not have occurred. He went on to say that the pressure of the offences on the defendant was very high, and that he might do something worse. If there was a basis in fact for that conclusion, it is not apparent in what was said in court by any party. If a Magistrate in refusing bail relies upon that ground he must show why. In the present case, there may actually be a presumption to the contrary, ie, that the accused will not commit further offences, because the charges all relate to a time in 1997, and the prosecutor did not allege that the defendant had committed any offences in the meantime. Further to that, the defendant, I am advised from the bar, came to the court in answer to a summons, and the Magistrate was given no reason to suppose he would not come back if released on a bail bond.

The appeal must be allowed. Pursuant to s 80(1) of Cap 11, I reverse the decision of the learned Magistrate and release the defendant on bail. I am told he is presently on bail to appear in the Magistrates' Court on 11 November 1998, on some

other charges. The terms of that bail bond will bind him on these 11 charges also until 27 October, when he will again come before the Magistrate on these charges. On that day the question of his bail on these charges will again be before the Magistrate for decision in the ordinary way.

In addition, at the request of the Crown, I stipulate that the defendant shall not, while on bail on these charges until 27 October, obtain or use a passport.

Before finishing, I have to say one more thing. The defendant told his counsel that the Magistrate spoke to him outside the courtroom before the court sitting. I have made no judgment about what may or may not have happened, whether it did or not. But because the matter has been mentioned I am bound to say this. If there is discussion about a case outside the courtroom between any Magistrate or any Judge and a defendant, that Magistrate or Judge must clearly disqualify himself and have nothing further to do with the case. Every part of the case must be in the courtroom only. This is so that justice will be seen to be done. The courts must always show the public that they are being fair. They must avoid bias, but not only bias, they must avoid even the perception of the possibility of bias.

Cocker v R

Supreme Court, Nuku'alofa
Finnigan J
Cr 1252/98

29 October 1998; 30 October 1998

Criminal procedure — summary jurisdiction of Magistrate — sentence is nullity

The appellant was charged with arson. The magistrate imposed a sentence of three years imprisonment from which the appellant appealed. Arson carries a maximum sentence of five years imprisonment. The magistrate's jurisdiction extends to hear and determine all criminal cases in which the punishment provided by law does not exceed $1000 or three years imprisonment.

Held:

1. The Magistrate was without jurisdiction to deal with the accused because the penalty for the charge of arson placed the charge outside the Magistrate's summary jurisdiction.
2. The Magistrate had power only to hold a preliminary inquiry, and he had jurisdiction during that inquiry (in certain circumstances) to proceed to deal with the case summarily, but that jurisdiction was not being exercised.
3. The appeal was allowed; the sentence was a nullity.
4. The appellant was ordered to be re-arraigned.

Statutes considered:
Criminal Offences Act Cap 18
Magistrates' Courts Act Cap 11

Counsel for appellant : Mrs Vaihu
Counsel for respondent : Mr Kefu

Judgment

The appellant has appealed against a sentence of 3 years imprisonment for arson which was imposed on him by a Magistrate. On 29 October 1998 I allowed the appeal and reserved my reasoning for this written judgment.

The crime of arson is created and its penalty established in s 177 of the Criminal Offences Act Cap 18:

> 177. (1) Arson is the offence of wilfully and without lawful justification setting fire to any building of any kind belonging to another person or (not relevant) …
>
> (2) Every person who commits the offence of arson shall be liable to imprisonment for any period not exceeding 5 years.
>
> (3) (Not relevant) …

The Magistrate's jurisdiction to deal with charges of criminal offending is created and limited by Part II and Part III of the Magistrates' Courts Act Cap 11. Part II sets out the summary jurisdiction. This is the jurisdiction to state to an accused person the substance of what is charged against him and ask whether he pleads guilty or not guilty, thereafter to record a plea of guilty or to hear evidence and to enter a conviction or to dismiss the charge. It includes the power to impose any sentence up to the statutory maximum penalty for the offence charged. This jurisdiction is created and limited by the first section in Part II, s 11.

As amended by Act no 24/1990, s 11 provides that, subject to s 35 (about which more later), every magistrate shall have jurisdiction to hear and determine all criminal cases in which the punishment provided by law does not exceed $1000 or 3 years imprisonment, "and also all criminal cases … which the magistrate is by any law expressly empowered to hear and determine". The following sections in Part II then set out the procedures by which the summary jurisdiction is to be exercised.

The first section in Part III, s 32, then creates and limits the jurisdiction for preliminary inquiries. A magistrate may issue a summons or warrant to compel the appearance before him of an accused person for the purposes of a preliminary inquiry where a person is accused of an offence triable before the Supreme court or the Chief Police Magistrate. The following sections then set out the procedures, ie, how that jurisdiction is to be exercised.

At s 35 there is provision for a Magistrate, in certain circumstances, to deal summarily with a person who is charged with an offence triable before the Supreme Court. This provision is that, if it appears to the Magistrate at any time during a preliminary inquiry, (after taking certain representations and other factors into account), that the punishment the Magistrate has power to inflict would be adequate, then the Magistrate may proceed to deal with the case summarily. The steps for him to take are set out there, and the procedure to be adopted in dealing with the case summarily is the s 24 procedure, where both parties appear, in Part II. There is power, in s 35(3), for the magistrate if he convicts the accused after a summary trial, then learns more about the character and antecedents of the accused, to commit the accused to the Supreme Court for sentence.

There is no power in Parts II and III, or elsewhere in the Act, for an accused person to choose in the Magistrates' Court that he will be dealt with summarily on an indictable offence. There is no power either for a Magistrate to deal summarily with indictable offences, other than the power given to the Magistrate in s 35.

In the case before me, the appellant was brought before the court charged with an indictable offence, ie, an offence triable in the Supreme Court. The learned Magistrate told the appellant that, and the transcript shows that he made strong efforts to impress upon the appellant the seriousness of what he faced. He tried hard to persuade the appellant to take legal advice. The appellant however insisted upon the

Magistrate dealing with him, and insisted upon declining the opportunity of legal advice. Even the police prosecutor had advised him that he could have access to a lawyer because his case was very serious, and he had declined that advice too. He told the Magistrate that he would consent to any order or punishment that the Magistrate would impose. The learned Magistrate thereupon embarked on a full consideration of the matter. Then he imposed sentence, and against that sentence the appellant lodged this appeal.

I have not considered the merits of the sentence, though I have heard submissions from both parties on the merits. In my opinion the learned Magistrate was without jurisdiction to deal with the accused because the penalty for the charge of arson placed the charge outside the Magistrate's summary jurisdiction. The Magistrate had power only to hold a preliminary inquiry, and he had jurisdiction during that inquiry (in certain circumstances) to proceed to deal with the case summarily, but that jurisdiction was not being exercised. Mr Kefu on behalf of the respondent made a strong submission that it was, but I have been unable to agree, for the following reasons. First, the Magistrate was not acting "during a preliminary inquiry into the offence" as he was required to be for exercise of that jurisdiction. He was not following the procedure set out for preliminary inquiries in s 34. Second, the Magistrate did not act for the reasons that are set out in s 35(1) as necessary conditions precedent to the exercise of the jurisdiction. Third, the Magistrate did not give the accused the option that he was bound by s 35(2) to offer him, nor seek his consent, nor explain to him what is meant by being tried summarily.

Thus, the magistrate in my opinion was without jurisdiction to impose the sentence which he imposed, and that sentence is a nullity.

For these reasons, which I stated briefly at the time and which I now state more fully, I allowed the appeal. I released the appellant on a bail bond to be executed in this court. He will appear again in this court next Tuesday 3 November 1998 at 9.30am, by which time the Solicitor General will have acted ex officio to prepare and serve on the appellant an indictment charging arson. The appellant will be arraigned and his election and plea will be heard then.

Faleola v Kingdom of Tonga

Supreme Court, Vava'u
Finnigan J
C 646/98

18 November 1998; 20 November 1998

Practice and procedure — claim for judicial review — previously refused — claim struck out

The plaintiff was dismissed from his employment and claimed that the dismissal was wrongful and bad in law. He sought a declaration that his dismissal was invalid and that he was entitled to certain salary and remuneration payments and damages under three separate heads. He had filed a previous application for judicial review which had been refused. Relying on that refusal, the defendant moved the court pursuant to Order 8 Rule 6 of the Supreme Court Rules for an order setting aside the writ and/or striking out the statement of claim and/or dismissing the claim. The plaintiff contended that the action was a claim in tort which was quite distinct from the application for judicial review. The key to whether the action would be allowed to continue or not was whether it was a new and different cause of action?

Held:

1. The new statement of claim was an expanded statement of the earlier claim. It still sought judicial review of administrative actions. Leave to bring such a claim had already been refused.
2. The claim was, accordingly, struck out.

Statutes considered:
Evidence Act Cap 15

Rules considered:
Supreme Court Rules 1991

Counsel for appellant : Mr Cauchi
Counsel for respondent : Mr Paasi

Judgment

The plaintiff has filed an action against the defendant, suing the defendant "in respect of the acts and omissions of the Civil Servants employed by the Ministry of Finance and elsewhere in the Government of Tonga". The defendant has moved to

strike it out. The plaintiff in his statement of claim states that he was dismissed from his employment with the Government Civil Service on 5 September 1995. He claims that his dismissal was wrongful and bad in law. He seeks a declaration that his dismissal was invalid, a further declaration that he is entitled to certain salary and remuneration payments and damages under three separate heads.

His statement of claim, though lengthy, is no more precise than that. He does not specify whether he sues in contract or tort or otherwise.

It happens that he has sought remedies of a similar kind before. On 31 July 1997 he filed an application for leave to apply out of time for Judicial Review (C668/97). The proposed statement of claim sought as relief a declaration that the cabinet decision by which the plaintiff had been dismissed was invalid, and damages. The application for leave involved two separate applications, the one for leave extending the time and the other for the necessary leave to seek that remedy. A hearing took place and both parties were heard. On 11 August 1997 the court issued an order refusing both applications. No separate judgment was issued, the order itself contained the detailed reasons. It is necessary to set out the order in full, it is as follows:

> "Having Heard Counsel (Mr Tu'utafaiva : Mr Cauchi)
>
> IT IS ORDERED THAT - Applications to extend time and to then apply for leave for judicial review both be refused as:
>
> 1. Primary requirement is for application to be made promptly (O 27 r 2(2)), and that not done here;
> 2. Secondary provision is to apply in any event within 3 months (from 5 September 1995) (O 27 r 2(2)) and that not done here (papers first filed in this Court on 31/7/97);
> 3. No 'good reason' shown for extending the 3 months period (O 27 r 2(2)) given (a) plaintiff made contact with lawyers on 19 September 1995; (b) at latest his lawyers had full instructions by 29 August 1996, but no action was taken until 31 July 1997; (c) to grant an extension could create substantial prejudice to and/or would be detrimental to the good administration of the civil service of the Kingdom; (d) there was and is undue delay by the Plaintiff and a substantial part of that is unexplained and/or unsatisfactorily explained; (e) there are no reasonable excuses for that unexplained delay; and in any event; (f) even on the plaintiff's own affidavit (paras 6 and 7) and proposed statement of claim (paras 8, 9 and 11) it is apparent that the allegations were put to the plaintiff and he was given the opportunity to, and did, reply."

In reliance on that order, the defendant now moves the Court pursuant to Order 8 Rule 6 of the Supreme Court Rules for an order to set aside the writ and/or strike out the statement of claim and/or dismiss the claim in the present action. It does so on four grounds:

(i) that the statement of claim discloses no reasonable cause of action;

(ii) that the statement of claim is scandalous, frivolous, or vexatious;

(iii) that the action is an abuse of the process of the court; and

(iv) the grounds set out in counsel's own affidavit, which are to the effect that the present statement of claim is substantially the same as the proposed statement of claim which was attached to the earlier application for leave.

Submissions were made to me by counsel for both parties. Without referring to them specifically, I state that they are the guidance for the decision I am about to set out.

One must start by considering the nature of judicial review. Application for that remedy is governed in the law of Tonga by the Supreme Court Rules, O27. As far as O27 goes, it reflects the law of England. The remedy is a supervisory remedy in administrative law, it touches the proceedings and decisions of (inter alia) bodies charged with the performance of public acts and duties. It is normal to seek specific relief in the application, such as a declaration of legal rights and damages. It is a necessary pre-condition of an application that the leave of the Court be first obtained. Delay alone may be a sufficient reason for refusing leave. In civil proceedings such as the present, where the Judge refuses leave after a hearing, the application for leave may not be renewed. [Halsbury, 4th ed Vol 37, 567-571].

So, the plaintiff applied for a remedy in administrative law. In doing so he chose a path with two substantial obstacles and, if leave were refused, a dead end. He went down that path, and carne to the dead end.

He has now started a new action. He is prevented from renewing his application for leave and is no longer seeking judicial review. Prima facie, the only preliminary obstacle to his filing a new action is s 16(1)(c) of the Evidence Act Cap 15, the 5-year limitation period, and he is well within that.

Because of the defendant's objections, it is now necessary to study his new action, in order to ascertain whether it is in fact a new action, or whether it is the same application. If it is a new action, ie, has a new cause of action, then there is jurisdiction for it. The Court has concurrent jurisdiction to grant the relief of declaration and damages. It may do so either in judicial review proceedings, or in actions begun by writ or originating summons. However, if the plaintiff is merely renewing his application for judicial review in the guise of an action, or if he is suing in an action for relief at law when the proper course for him to choose is judicial review, then the court is not able to let him continue. [Halsbury #577].

So, what is the nature of the new action? Mr Cauchi for the defendant submits that it is a renewed application for the same remedies, and does not disclose any cause of action different from the one that the Court has refused to entertain. That is his first ground. The other three grounds are essentially one ground, ie, that the Court is prevented by several principles from opening up a matter which it has conclusively determined. Mr Paasi on the other hand points to the distinction between applications for judicial review, which are governed by O27, and civil actions in tort. In his submission the plaintiff is exercising his right in s 16 of Cap 10 to commence a civil action for damages within 5 years of his dismissal.

Mr Cauchi relies on the doctrine of res judicata, ie, issue estoppel in its broad form.

The key to whether the present action should continue or not is the question, is it a new and different cause of action? It is certainly not a claim in contract, there is no claim of an employment or service contract and no claim of breach of contract. The declaration claimed is not a declaration of contractual rights. Mr Paasi has said it is a claim in tort. The key to the claim is in paragraphs 17 and 18 of the statement of claim, which are as follows:

> "17. Individually and collectively, the improper grounds for allegations against the plaintiff, the failure to afford the plaintiff an opportunity to comment on the Auditor's Report, the delay in deciding the plaintiff case, deciding it on improper grounds, and threating and demanding the plaintiff resignation amounted to irregularities, constituted improper grounds for the dismissal of the plaintiff.
>
> 18. That the plaintiff's dismissal was wrongful and bad in law."

The claim in paragraph 18 is that the dismissal was wrongful and bad in law. It rests on the claims in paragraph 17 of failures in procedural fairness. There is no claim of breach of a duty owed to the plaintiff, no claim of entitlement to procedural fairness. The claim rests on entitlement to natural justice. This is not a claim in tort. It is a claim in administrative law. The new statement of claim is an expanded statement of the earlier claim. It still seeks judicial review of administrative actions. Leave to bring such a claim has already been refused, and I am bound to take only one course, and strike it out. I do so accordingly.

I agree with Mr Paasi, that all action filed within five years and based on a claim of tort, or a claim of contractual breach, would avoid the obstacle of the previous refusal of leave.

In respect of costs, after hearing submissions from counsel in chambers, I direct that each party pay its own costs on this application.

Kilifi v Heimuli

Supreme Court, Nuku'alofa
Ward CJ
L 945/96

27 November 1998; 8 December 1998

Land — succession — where chain ends
Crown land — no heir to allotments — reverts to Crown

A town allotment and a tax allotment were both held by Siosiua Makafana Kilifi. He died and the question of succession arose. The first defendant and the plaintiff were his nephews through his oldest and second oldest brothers respectively. The son of the deceased oldest brother, Misieli, did not take the allotments because he already had allotments of his own and the plaintiff urged the Court to rule that the succession should then pass to him, as the eldest son of the deceased's second oldest brother.

Held:

1. Only if the eldest brother is dead without leaving a lawful heir does the succession pass to the next brother.
2. The chain of succession under that section ended with Viliami's son, Misieli, and, as he was not permitted to succeed as heir and the allotments were on Crown Land, they reverted to the Crown.

Cases considered:
Ma'afu v Minister of Lands (1959) II TLR 119

Statutes considered:
Land Act Cap 132

Counsel for plaintiff	:	Ms Tonga
Counsel for first defendant	:	Mr Niu
Counsel for second defendant	:	Mr Malolo

Judgment

Following a number of steps previously taken in this action the details of which do not need to be recited at this stage, the Court has been asked to determine a single question of law relating to the interpretation of section 82 of the Land Act (Cap 132).

The principal action concerns a town allotment known as Nailili and a tax allotment called Konga-'o-Nualei both of which were held by Siosiua Makafana

Kilifi who has died. The first defendant and the plaintiff are his nephews through his oldest and second oldest brothers respectively and the family relationships relevant to the question now before the court have been agreed as follows:

1. Siosiua Makafana Kilifi (herein called "Siosiua") had a town allotment called "Nailili" and a tax allotment called "Konga 'o Nualei".
2. Siosiua had no legitimate son or grandson by his first wife, Olieti, or by his second wife, Mele.
3. Siosiua had legitimate brothers, namely Viliami, Mesui and Vaini. Viliami and Mesui predeceased Siosiua but both leaving legitimate sons surviving, the eldest of whom are Misieli and the Plaintiff respectively.
4. Siosiua died in 1980 leaving his second wife as widow, who died in 1994.
5. Misieli has a town allotment and tax allotment. The plaintiff has neither.
6. Both "Nailili" and "Konga 'o Nualei" are in the estate of the Crown.

The point upon which a ruling is sought is whether the plaintiff can succeed to these allotments as the heir of the deceased holder. Once that has been determined, the matter will be referred back to the Minister to decide on the devolution of the allotments in question.

The rules relating to the devolution of allotments are set out in Division VII of the Land Act (Cap 132) and, subject to the life estate of a widow, succession follows the order set out in section 82. The provisions of paragraphs (a) to (d) do not need to be considered save to say that they cover the succession where the deceased holder leaves legitimate sons or only unmarried daughters. The remaining paragraphs read:

"e) in default of any unmarried daughter of the deceased holder an allotment shall descend to the deceased holder's brother or if such brother be dead to the eldest male heir of the body of such brother. If the deceased holder's eldest brother be dead without leaving any male heir of his body then the holder's next eldest brother shall succeed or if he be dead the eldest male heir of his body and so on taking the deceased holder's brothers in succession in order of their ages;

f) if the holder dies without leaving any brother or heir male of the body of a brother him surviving the inheritance shall go to the eldest brother of the deceased holder's father or if such brother be dead to the eldest male heir of the body of such brother. If the eldest brother of the deceased holder's father be dead leaving no male heir of his body then the next eldest brother of the deceased holder's father shall succeed or if he be dead the eldest male heir of his body and so on taking the brothers of the

deceased holder's father in succession in the order of their respective seniority;

g) in default of brothers of the deceased holder's father or male heir of the body of such a brother the allotment if situate on Crown Land shall revert to the Crown and if situate on an hereditary estate shall revert to the holder thereof."

As Siosiua had no legitimate offspring when he died, the land would have passed to his eldest brother, Viliami. However, Viliami had predeceased him and so it then passed to Viliami's eldest son, Misieli. He did not take the allotments because he already had allotments of his own and the plaintiff urges the court to rule that the succession should, therefore, pass to the next oldest brother of the deceased, Mesui. He also predeceased Siosiua and so it should pass to the plaintiff as Mesui's eldest male heir.

Miss Tonga, for the plaintiff, seeks support for her contention from the wording of paragraph (f) where she suggests the reference to "a brother" in the first sentence gives an unconditional right of succession to the heir of any brother where that heir has no land of his own and the deceased's older brothers and their heirs already have allotments.

Whilst the court can feel some sympathy with such an arrangement, it is not what paragraph (f) provides. That paragraph simply states that the succession does not pass to the brothers of the deceased holder's father if there are any brothers of the deceased or their lawful heirs who are entitled to succeed.

The hurdle at which the plaintiff falls is paragraph (e). The whole of section 82 is serial in its application and, therefore, when the succession is resolved by a particular provision, that is the end of the succession. There is nothing in the section that allows it to be revived by some subsequent provision once the succession has been resolved on a surviving heir.

In the present case, there were no legitimate offspring of Siosiua and so the allotments would have descended to the deceased holder's eldest brother, Viliami, had he been alive at that time. He was not and the paragraph sets out that, in such a situation, it passes to the eldest male heir of the body of Viliami. The next sentence sets the answer to Miss Tonga's submission. *If* the deceased's oldest brother is dead *without leaving any male heir, then* the deceased holder's next brother takes his place in the line or his heir if he is dead. There is no provision for the deceased's next brother to succeed where the oldest brother has left a male heir. The paragraph concludes; "and so on taking the deceased holder's brothers in succession in order of their ages". It is noteworthy that those concluding words make no mention of the heirs of the brothers.

Bearing that and the serial nature of the section in mind, it is clear that it is only if the eldest brother is dead without leaving a lawful heir that the succession passes to the next brother. Where the eldest brother or his lawful heir is entitled to succeed to the allotment, the succession is complete. It does not depend on the brother or his heir exercising his right to succeed nor does it affect the succession if, as here, he is precluded, under section 84, from taking the allotment because he already has one. The right to succeed attaches to him as a result of his status as the eldest brother or his lawful heir.

Miss Tonga cited section 84 in support of her contention that, as Misieli could not take the allotments, the succession passed to the next eldest of Siosiua's brothers. Again, I consider that the precision of the words makes it clear her interpretation is not correct. The prohibition in that section states that, subject to the special rules applying to a son or grandson, no person who already holds an allotment "shall be permitted to succeed as heir" to another allotment of the same kind. It does not, as Miss Tonga's submission would require, remove his status as an heir, only his right as such to succeed. Similarly, he may not choose between an allotment already held by him and "one to which he becomes entitled as heir" — a provision that clearly accepts his entitlement as an heir but prevents him succeeding.

This was the basis of the decision in the long established case of *Ma'afu v Minister of Lands* (1959) II TLR 119 in which Hunter J ruled that the prohibition on an heir, 'Ilavalu, (the son of the deceased landholder's deceased eldest brother) succeeding to an allotment because he already had one, concluded the chain of succession to the exclusion of his own son and heir;

> "As 'Ilavalu could not succeed it goes without saying that his son … has no claim and the allotment reverts to the Crown."

The same conclusion was reached by Hampton CJ in an earlier ruling in relation to the land now under consideration (Amalgamated Land cases 193/95 and 575/95). He too terminated the chain at Misieli. He refers to section 82(e) and continues:

> "If I apply that to the situation here that would mean that the allotments here should descend to, in order, Viliami as that eldest brother but as he was deceased then to the eldest male heir of Viliami. That eldest male heir is [Misieli]. As I read the clear words of this paragraph, the chain within paragraph (e) down to other brothers can only continue if that eldest brother, Viliami, does not leave any heir male of this body; then the succession would go on to the next brother. That of course would be Mesui in this case. But here the eldest brother, Viliami, did leave a male heir of his body. The scheme or the chain stops there. The fact that Viliami's son … is disqualified under section 84 does not make a difference to the operation of paragraph (e)."

I have considered the terms of the section afresh in relation to this case and I am satisfied that the plaintiff has no entitlement to this land under the rules of succession in Division VII of the Act. I am fortified in that opinion by the cases quoted above.

I rule that the terms of section 82(e) preclude the plaintiff from succeeding to the town allotment, Nailili, or the tax allotment, Konga-'o-Nualei" as an heir of Siosiua Makafana Kilifi. The chain of succession under that section ended with Viliami's son, Misieli, and, as he is not permitted to succeed as heir and the allotments are on Crown Land, they revert to the Crown.

Practice Direction No 3/1998

Re: Directions Hearings - Draft Minutes of Order

1. In all Chambers directions hearing Counsel must provide the Judge with a draft Minute of Order.

2. The Judge will then settle the Order and Counsel will have the settled order prepare for sealing.

(CJ Lewis)

NUKU'ALOFA, 18 March, 1998 CHIEF JUSTICE