



[2] There was some discussion between the Appellant and a police officer about whether the Appellant would bring civil proceedings. The upshot was that the police officer told him the police "would proceed and prosecute Rajan for obtaining by false pretences and to leave everything for them to do". But in reality the police did not proceed with the prosecution; instead, they returned Mr Rajan's passport and ticket to him, and allowed him to leave Tonga. That happened a little over a week after the assurance was given. No warning or information was provided to the Appellant, who lost any opportunity of proceeding against Mr Rajan before his departure, and has been unable to recover the money lost.

[3] Upon these facts, the Appellant sued the police officer, the first respondent, and the Kingdom of Tonga. Although the Statement of Claim is less than precise, he claims that they are in breach of a duty of care owed to him - in short, that they are liable in negligence. The issues have come before this Court because the Respondents moved to strike out the claim on the grounds that the relationship between the parties lacked the proximity necessary for the existence of a duty of care and that, in any event, public policy would deny the plaintiff any cause of action, in the circumstances, for breach of a duty of care. The learned judge below having acceded to these submissions and struck out his claim, the Appellant appeals to this Court.

[4] The principle upon which an application to strike out a claim may be entertained by the Court is clear. No party should have his claim denied without a hearing in the ordinary way, except where the claim is so hopeless that it cannot possibly succeed.

[5] In the present case, the learned judge thought the Appellant's claim was in conflict with the principle which protects from the imposition of a duty of care the function of the police in the investigation and prosecution of crime: see *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Alexandrou v Oxford* [1993] 4 All ER 328; *Yuen Kun-yeu v Attorney General of Hong Kong* [1987] 2

All ER 705. Even if a relationship of proximity sufficient to give rise to a duty of care could otherwise be established, his Honour considered the claim would be excluded upon grounds of public policy : Swinney v Chief Constable [1996] 3 All ER 449; Osman v Ferguson [1993] 4 All ER 344; Elgouzouli-Daf v Commissioner of Police of the Metropolis [1995] 1 All ER 833 at 840-841, per Steyn L.J., as Lord Steyn then was.

[6] It is not to be doubted that these principles apply, in general, to the investigation of crime by the police, and to their decisions concerning prosecution, in Tonga. But an important qualification was stated by Steyn L.J. in Elgouzouli-Daf at 841:

*“Putting the decision in Hill in perspective I would only add that it does not follow that the police may not be held liable in a case where there is some form of assumption of responsibility by the police.”*

[7] This dictum of Steyn LJ is reflected in the pleading in the present case, which specifically alleges that the police officer “told the Plaintiff that they, the police, would proceed and prosecute Rajan ... and to leave everything for them to do”. Evidence to that effect could well lead to a finding, at a trial, of an “assumption of responsibility by the police” which induced the Appellant to refrain from taking steps himself to ensure a recovery of the money. Even if the success of any of the steps open to him, had it been taken, may be doubtful, it could be said he has now lost a chance of success. Perhaps he could have obtained the issue of a writ of ne exeat regno or some other relief, such as arrest on mesne process (if available in Tonga). It has been held that a writ of ne exeat regno is available, although it may be hard to establish a case for it: Ramanlal & Sons Company Limited v Cater (Ward CJ, unreported, 19 March 1999). Or, if told of the change of mind on the part of the police officer, the Appellant might have been able, before it became too late, to make successful representations to a superior officer.

[8] If the Appellant has a cause of action which may possibly succeed, he is entitled to pursue it. In *Barrett v Enfield London Borough Council* [1993] 3 All ER 193, which was concerned with the question whether a claim for negligence in the taking of a decision to exercise a statutory discretion, relating to the taking of a child into care, was or was not justiciable, Lord Browne-Wilkinson said (at 197), referring to an earlier speech of his own:

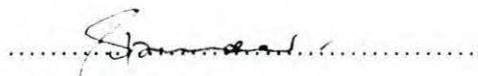
*"I pointed out that unless it was possible to give a certain answer to the question whether the plaintiff's claim would succeed, the case was inappropriate for striking out. I further said that in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out."*

[9] Applying the same approach to the present case, this Court should allow the appeal with costs; set aside the orders under appeal; and, in lieu of those orders, order that the application to strike out the statement of claim be dismissed with costs.

  
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**Burchett J**



  
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**Tompkins J**

  
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**Spender J**