

“All the people have the right to expect that the government will protect their life liberty and property and therefore it is a right for all the people to support and contribute to the government according to law.”

- [4] The Plaintiff also refers to Section 6 of the Police Act (Cap 35) which was in force at the date of the matters complained of and which stated:

“The [Tonga Police] Force shall be employed in and throughout the Kingdom for the maintenance of law and order, the preservation of the peace, the protection of life and property, the prevention and detection of crime and the enforcement of laws

- [5] As is clear from paragraph 6 of the Statement of Claim, the Plaintiff's claim is essentially syllogistic : The Plaintiff had a constitutional right to the protection of its' property – the property was damaged – therefore the Plaintiff has a right to compensation. The inclusion of reference to the Police Act and the claims that:

Paragraph 9(b) “the Building was not able to be saved by any of the public services operated by the Defendant” and

Paragraph 9(c) “the Police was not able to maintain law and order on the few critical moments of the afternoon 16th November 2006 which led to the burning down of the Tungi Arcade”

does not introduce any second cause of action. In particular it will be noted that it is not pleaded that the police were negligent in the performance of their duties, rather that they were "helpless" (paragraph 9(d)).

[6] The Plaintiff seeks compensation in the amount of \$700,000 plus "exemplary damages to be assessed".

[7] In his written application Mr Kefu suggested:-

- (a) that clause 18 of the Constitution and Section 6 of the Police Act 1968 were "general aspirational provisions";
- (b) that the existence and breach of a duty of care were not pleaded;
- (c) that the claim that the state should be required to compensate the Plaintiff was, in the circumstances of the case, unreasonable; and
- (d) in conflict with established (and cited) principles of law.

[8] In my opinion the meaning and effect of the first sentence of Clause 18 of the Constitution is, as contended by Mr Kefu, "aspirational". It recognises that the safety and welfare of the people is the primary responsibility of Government. It does not however condescend to particulars and does not impose a strict liability upon Government to protect all life, all liberty and all property in each and every circumstance. It would be wholly unreasonable to expect Government to compensate all those who have lost their lives, liberty or property in any and all circumstances. Like any other Government, the Government of Tonga only has those funds to disburse which are

voted to it by Parliament. These funds will not be sufficient to secure against every eventuality, whether foreseen or not. Priorities have to be identified and compromises made. To suggest that Clause 18 gives each victim the right to be indemnified, to my mind, makes no sense.

[9] This is not to say that breaches of the constitution can never result in a right to compensation. Clause 18 may be compared with the first sentence of Clause 16 which specifically prohibits the search of premises without a warrant : a breach of this provision may well attract compensation, although the question has not yet been authoritatively dealt with (see *Taione & Ors. v Kingdom of Tonga* [2005] To L.R.67, 126-127).

[10] So far as the omission of a claim of negligence is concerned, it is well established that in the absence of the assumption or existence of a specific duty of care to a particular plaintiff, the police do not, on the grounds of public policy, owe members of the public at large such a responsibility (*Hill v Chief Constable of West Yorkshire* [1989] AC 53 and *Jagroop v Soakai and Kingdom of Tonga* [2001] To. L.R. 234).

[11] In my opinion the Plaintiff's case discloses to reasonable cause of action. It is therefore struck out.

DATED: 24 February 2012.




M.D. Scott
CHIEF JUSTICE

N. Tu'uholoaki
24/2/2012