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16/08/12

**IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY**

CV 2 of 2012

BETWEEN: SIALE TAUFA - Plaintiff

AND : KAPIOLANI FIFITA - Defendant

S.V. Fa'otusia for the Plaintiff

No appearance by the Defendant

JUDGMENT

[1] The writ was issued on 27 January 2012. The statement of claim is, so far as I know unprecedented in Tonga. The Plaintiff's case is that he was assisted to open an internet account by the Defendant who is part owner of the Info-Tech Internet Cafe at Fanga 'o Pilolevu. It is said that some time after the internet account was opened, and without the authority of the Plaintiff, the Defendant made use of his personal details to send "abusive" messages not only to third parties, including the Plaintiff's wife and children, but also to the Plaintiff's mobile phone. This conduct, it is said, was negligent and has caused the Plaintiff damage.

[2] On 31 January the Plaintiff applied ex-parte for and obtained an order against the Defendant restraining her from accessing or using his internet account. The Defendant was also ordered to delete all

messages which she had sent in the Plaintiff's name and without his authority.

- [3] No application has been made to set aside the interim order and it is not known by me whether the order has been complied with.
- [4] The Plaintiff now seeks judgment in default of defence with damages to be assessed.
- [5] When the present application came before me, I expressed some doubts about it. I wondered what cause of action the Plaintiff had and asked Mr Fa'otusia to assist with authority.
- [6] On 22 June Mr Fa'otusia filed his helpful submissions. It is argued that the Defendant owed the Plaintiff a duty of care when she set up the Plaintiff's internet account. It is further argued that by subsequently using the account in the manner alleged, that duty was breached. Finally, it is said that as a consequence the Plaintiff has suffered damage.
- [7] With the great respect, I find the claim of negligence to be misconceived. In my view, negligence will not be found where the matter complained of occurred intentionally. It is not, for example, negligence intentionally to assault someone any more than it is negligence deliberately to defame.
- [8] In the *Law of Torts in New Zealand*, Todd, 3rd Edition, there is an interesting discussion on the existence of the torts of misappropriation of personality and invasion of privacy. The law

however is far from straightforward and neither of these possible torts was pleaded.

- [9] In the present case, a repetition of the matters complained of would amount to a breach of the order made by the Court on 31 January even if judgment is not now given for the Plaintiff.
- [10] In paragraph 15 of his written submissions, Mr Fa'otusia set out the Plaintiff's claim for damages. It is clear from that paragraph that the principal sums claimed are costs, not damages and indeed it is conceded that "a moderate sum of \$200" would suffice to compensate for "shame and anguish".
- [11] What is unexplained by the Plaintiff is why he apparently was not able to mitigate the consequences of the Defendant's actions by simply closing the internet account or changing its password. In my view there is no satisfactory explanation on the papers before me for the need to commence the action or to travel to Tonga.
- [12] The fact that no defence has been entered is not ground enough to award judgment to the Plaintiff. For the reasons given I am not satisfied that the Plaintiff's claim as presently pleaded is maintainable. Accordingly, the application fails.

DATED: 29 June 2012.



M.D. Scott
M.D. Scott

CHIEF JUSTICE

N. Tu'uholoaki

29/6/2012