

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION
CIVIL ACTION NO. HBC 217 OF 2006L

NO. 51/2007

BETWEEN: VANDAN RANJIT SINGH ATODARIA daughter of Ranjit Singh also known as Vandana Ranjit Singh, of Tavua Town, Tavua, Domestic Duties, as Administratrix of the estate of PRAVIN SINGH DALPATSINH RATHOD, also known as PRAVEEN SINGH son of Dalpat Singh, deceased, Intestate, of Tavua Town, Tavua, Fiji, Member of Parliament

Plaintiff

A N D: PERMANENT SECRETARY FOR HEALTH, Government Buildings, Suva, Fiji

First Defendant

A N D: ATTORNEY GENERAL OF FIJI as representative of Ministry for Health, Government Building, Suva, Fiji and the Public Works Department

Second Defendant

Mr. V. Mishra for the plaintiff
Mr. R. Green for the defendants

Date of Hearing: 30 April 2007
Date of Ruling: 30 April 2007

EXTEMPORE RULING ON SUMMONS TO STRIKE OUT

- [1] This matter comes before the Court by way of the summons filed on behalf of the defendant to strike out the action against the Ministry of Public Works on the basis that it discloses no cause of action.

- [2] The application is made pursuant to Order 18 Rule 18(1)(a) of the High Court Rules and pursuant to the inherent jurisdiction of the Court. Order 18 Rule 18 enables the Court at any stage of the proceedings to order to be struck out or amended any pleading relevantly on the basis that it discloses no reasonable cause of action or defence.
- [3] The Rule goes on to provide that when the application is made on the basis that the pleading discloses no reasonable cause of action or defence, no evidence shall be admissible on the application, that is, it is necessary to consider the application of the pleadings alone.
- [4] The law applicable to application such as this has been considered by the Court on numerous occasions. The Fiji Court of Appeal in *Attorney General v Shiu Prasad Halka* - 18 FLR 210 said at 214:

“Though these cases indicate that in a proper case a Statement of Claim will be struck out notwithstanding that it raises a constitutional question, they do not detract, in my view, from the rule that the summary procedure under Order 18 Rule 19 is to be sparingly used and is not appropriate to cases involving difficult and complicated questions of law. The authorities on the question of the prerogative as touching the right of dismissal at will of a Crown servant are numerous and raise fine points of distinction.”

- [5] The reference to Order 18 Rule 19 is relevantly now a reference to Order 18 Rule 18.

- [6] Mr. Justice Pathik in *Hemant Kumar v Suresh Kumar & Ors* [2003] Civil Action No. 33 of 2003 when applying *Attorney General v Shiu Prasad Halka* said:

“I think it is definitely established the jurisdiction to strike out proceedings under Order 18 should be very sparingly exercised and only in exceptional cases. It should not be exercised where legal questions of importance and difficulty arise.”

- [7] Similarly the High Court of Australia when considering the issue in *Dey v Victorian Railways Commissioners* - 78 CLR 62 at 84 Latham CJ said:

“But it is argued that if a case involves any question of difficulty the summary procedure of dismissing an action as vexatious should not be applied... but if the Court is of opinion that the plaintiff cannot succeed there is every reason for protecting a defendant from vexation by the continuance of proceedings which must be useless and futile...”

- [8] The issue was also considered by Lindley MR in *Hubbuck v Wilkinson* [1899] 1 Q.B. 86 at 91 where the Master of the Roll said:

“It is only in plain and obvious cases that recourse should be had to the summary process under Order 18 Rule 18(1) of the Rules of the High Court.

- [9] It is on the basis of the principles that I have expressed, the Court is required to consider the application. The statement of claim in paragraph 3 pleads:

“The said Highway was in such a dangerous state or in such a state of mis-repair that the Deceased’s vehicle went off the Kings Road and into a gully causing him considerable and serious injuries, pain, suffering and loss. Particulars of negligence of the Public Works Department and/or the Second Defendant who is representative of the Public Works Department and/or the Government of Fiji who is responsible for the upkeep of the said Kings Highway are as follows...”

- [10] The pleading then goes on to set forth five failures alleged on the part of the defendant. These are failure to repair, failure to put any or proper warning signs, failure to block part of the road, failure to take reasonable steps to address the risk and danger to persons using the road and failure to inspect and take reasonable to ascertain the existence of latent dangers which existed.
- [11] The Court has had the benefit of written submissions and relevant authorities from the defendant/applicant and written submissions and authorities on behalf of the respondent/plaintiff.
- [12] The defendant/applicant draws the Court’s attention to the provisions of the Public Roads Act of Fiji (Cap. 175) and highlights that the relevant provisions of that Act give the Permanent Secretary of Works the right to do certain things but not the obligation.

- [13] The applicant's submissions and authorities then traverse the well known English authority of *Stovin v Wise* (1996) 3 All ER 801 and conclude with authorities in Fiji. The Court has not been referred to any authority for Fiji Court of Appeal on the issue but two decisions of Mr. Justice Fatiaki - *Eastern Express Limited v Ledua Tuitoga and Others* - Civil Action No. 0014 of 2001 Labasa. There His Lordship relied on the decision in the House of Lords in *Stovin v Wise*.
- [14] Before returning to His Lordship's decision I think it is pertinent to note that the law on the point has moved forward in England and in Australia. The House of Lords again visited the issue in *Goringe v Calderdale Metropolitan Borough Council* [2004] KHL 15, there the Court considered the earlier decision in *Stovin v Wise* together with decisions subsequent to *Stovin v Wise* and in particular *Larer v Solihull Metropolitan Borough Council* (2000) RTR 469.
- [15] When considering the principles expressed in these authorities, it is pertinent to note that the words of the relevant statute are indeed different as there have been statutory changes in the United Kingdom which have not taken place in Fiji.
- [16] At paragraph 27 of *Goringe v Calderdale* the Court said:

"The approach of the minority, in a speech by Lord Nicholls of Birkenhead was very different. He thought that the statutory powers had invested the highway authority with general responsibilities which could in appropriate circumstances give rise to a common law duty of care. He referred to a number of circumstances

which might singly or cumulatively justify the existence of a duty and he said that on the facts there had been such a duty and that council had been in breach.”

- [17] The Court of Appeal in *Larer v Solihull Metropolitan Borough Council* when considering *Stovin v Wise* said at page 475 which is quoted at paragraph 30 of *Goringe v Calderdale*:


“However, so far as section 39 of 1988 Act is concerned we would accept that there can be circumstances of an exceptional nature where common law liability can arise. For that to happen, it would have to be shown that the default of the authority falls outside the ambit of the discretion given to the authority by the section. This would happen if an authority acted wholly unreasonably... As long as any common law duty is confined in this way, there are no policy reasons which are sufficient to exclude the duty. An authority could rely on lack of resources for not taking action then it would not be in breach... These difficulties in the way of claimants mean that the existence of the residual common law duty should not give rise to a flood of litigation. On the other hand for the desirability of a duty in the exceptional case, we adopt the reasons of Lord Nicholls of Birkenhead in Stovin.

That of course was the minority judgment in Stovin v Wise.”

- [18] The authorities in my opinion do provide for there to be a common law duty on public authorities in certain circumstances. The issue then of course is whether the circumstances created by the legislation in this country and the pleadings give rise to such a duty.
- [19] Counsel for the Applicant also submitted that the action as pleaded was not justiciable and that any action against the relevant defendant should be by way of Judicial Review.
- [20] The authorities do not necessarily support this submission on the basis that if there is a common law duty of care created then of course there is a right of action against the defendant but if there is no common law duty of care created then the converse applies and that is not so.
- [21] I think traversing the authorities and the issues discloses that there are legal questions of importance and difficulty. Legal questions of importance and difficulty in this jurisdiction which in my opinion needs to be resolved. It is questionable however whether the current proceedings are the forum to resolve those issues however taking account of the authorities that I first referred to relating to matters for consideration on applications such as this, it is not without some considerable hesitation and reservation that I refuse to strike out the application and accordingly, the applicant's summons is dismissed.



At Lautoka
30 April 2007


JOHN CONNORS
JUDGE