IN THE HIGH COURT OF FIJI
AT LAUTOKA
WESTERN DIVISION

Civil Action HBC 119 of 2007

BETWEEN : **AMRIT PRAKASH** of Rarawai, Ba, School Teacher.

Plaintiff

AND : **THE ATTORNEY GENERAL OF FIJI**.

Defendant

Solicitors : Samuel K Ram for the Plaintiff
AG's Office for the Defendant

RULING

1. The plaintiff sues the Commissioner of Police for breach of duty. The claim for breach of duty arose from an alleged failure on the part of some police officers in Ba to:

   (i) investigate a complaint that the plaintiff had lodged.

   (ii) diligently prosecute the criminal charges that were laid as a result of the plaintiff's complaint.

PLAINTIFF'S EVIDENCE

2. The plaintiff gave sworn evidence. He related how in 1993, he desired to purchase a house for his sister and her children.

Plaintiff Meets Real Estate Agent

3. Driven by that desire to purchase a house for his sister and her children, the plaintiff then went to see some real estate agents. He eventually ended up at the shop of a real estate agent by the name of D.K Sharma.

4. Sharma was operating as a real estate agent and had an office opposite the Lautoka market. At Sharma's shop, the plaintiff was shown some photographs of houses that were listed on the market. Amongst these was a

photo of a house situated alongside Kara Punja Road in Waiyavi in Lautoka. The plaintiff really liked this house. He indicated this to Sharma. Sharma told the plaintiff that the house was being sold for $40,000.

Plaintiff Pays Money To Real Estate Agent

5. Sharma told the plaintiff that if he paid Sharma some money as well as a holding deposit, Sharma would arrange for a loan from the Fiji Development Bank. Sharma gave the breakdown of the monies to be paid as follows:

(i)	$4,000	holding deposit
(ii)	$ 500	to be paid to Haroon Ali Shah

6. The plaintiff duly paid these monies to Sharma and went away.

Real Estate Agent Deceives Plaintiff

7. A few days after paying the money, the plaintiff went back to see Sharma about the progress of the loan arrangement. Sharma informed him that the house owner was based overseas and that he was coming over to Fiji shortly to sign all the conveyancing documents. The plaintiff then went back home.
8. Towards the end of August 1993, the plaintiff went back to see Sharma only to find that Sharma's shop had been cleared out and vacated. The plaintiff then went to check the house at Kara Punja Road and was told by the sitting tenant that the house had already been sold to the new owner by another real estate agent.
9. From there, the plaintiff went to Haroon Ali Shah who then referred him to the Divisional Crime Officer West, Salwan Rajan Naicker.

Alleged Delay In Police Investigations

10. The plaintiff saw DSC Naicker on 02 September 1993. Naicker told the plaintiff that Sharma had a lot of pending complaints against him. After a week, an officer in the Criminal Investigation Department by the name of Suren took the plaintiff's statement. The plaintiff gave Suren a copy of the photograph of the house as well as copies of all receipts and evidence of withdrawals out of Westpac Bank. The police promised the plaintiff that charges would be laid by the next Monday. The plaintiff said Suren never laid charges as promised.
11. The plaintiff said he kept following up with DCO Naicker. He would call them from a card phone every afternoon and every Saturday, he would go to the Police Station in Lautoka to inquire. On every visit, he was told that the police was still investigating. The plaintiff said that by December 1993, the police could not get hold of Sharma and no charges had been laid.
12. Over the Christmas holidays, he went to Sukuna House in Suva to see the Police Department's Internal Affairs Unit where he spoke with one Mahen Prasad who promised to look into the matter.

Police Lays Charges – Delay In Court Proceedings

13. In January 1994, the Police finally laid charges against Sharma. The plaintiff said in evidence that the police only took steps to lay charges following his visit to Sukuna House.
14. The plaintiff said after charges were laid, mention dates were given. Finally, the first trial date was set for 16 June 1994. However, this was adjourned. From the copy of the Court records placed before me, it was clear that Haroon Ali Shah, who was acting for Sharma, had asked for adjournment on

that occasion. The plaintiff said he was not told why an adjournment was being sought. The case was then adjourned to 30 November 1994 and was again adjourned for reasons which were not explained to him. It was then adjourned to 01 Mach 1994 and then to 12 June 1995. In all of these occasions, he was not told the reason for the adjournment.

15. The plaintiff said he then went to see the DPO Western who advised him to write to the Director of Public Prosecutions.

16. The plaintiff said he then went to Government Buildings and personally met the then Deputy DPP, Mr. Kenneth Wilkisnon who assured him that a quick hearing date would be secured.

17. The matter was then set for hearing on 28 April 1997.

Real Estate Agent Discharged

18. The plaintiff said that on 28 April 1997, he attended court only to learn that Sharma had been discharged. On the said date, Mr. Shah gave him $2,700 and said that he would settle the balance soon.

19. The plaintiff said that at some point thereafter, he went to see ASP Chand to find out why Sharma was discharged. He said that ASP Chand assured him that Sharma would be re-charged.

Plaintiff Complains to Ombudsman, Chief Registrar & DPP

20. The plaintiff said he even went to the Ombudsman's Office and spoke with Mr. Mataitini and also Mr. Rodney Acraman. The Ombudsman then wrote a letter to the Chief Registrar and also to the Senior Court Officer in Lautoka. The DPP also instructed the police prosecution to recharge Sharma.

Real-Estate Agent Re-Charged – More Delay in Prosecution

21. In 1998, Sharma was recharged. The plaintiff said that from the time Sharma was recharged in 1998, the matter was set for trial for about eight or nine times. However, the trial was always adjourned for two reasons:

    (i) either because prosecution witnesses failed to attend or

    (ii) accused admitted to hospital on 28 August 2002

22. The plaintiff said that out of frustration, he wrote to the then Chief Magistrate, Mr. David Balram. He said CID Suren suggested to him to settle the matter with Sharma and it will be over. The plaintiff said he believes that the police did not want him to succeed in the case. He would write another letter to the then DPP Mr. Naigulevu. The DPP then directed its Lautoka Office to promptly obtain a hearing date in June 2002. He was subpoenaed to the hearing and was present in Court on the day in question. That hearing however did not proceed for some reason that was not explained to him. He was advised by the DPP though that the trial was to be set in October 2002. On the said date however, the police prosecutor Mr. Neil Eyre asked for an adjournment as the accused was in hospital.

Police Allegedly Tried To Get Plaintiff To Change Statement

23. After that adjournment, the plaintiff said he would continue to follow up with the DPP. He said that in 2002, on 09 September, a police vehicle (GM644) came to his residence to ask him to change his statement. One Jai Singh came in the said vehicle with the driver. The plaintiff said they asked him to make a fresh statement not similar to the earlier one he had given. He said he

refused to do that but told the officers that he would go and discuss this with DPO Sur Sen the next day.

24. He then went to DPP Office in Suva for assistance. He again went to the Ombudsman's Office and also to CM David Balram in 2003 and again in 2004. Mr. Balram wrote to him on 09 June 2004 and there were a series of letters written around that time which were tendered in Court and marked (**PEX 7** to **PEX 18**).

25. After he wrote all these letters, a hearing date was then set in May 2005 when Sharma's counsel was not present. The police investigating officer was not present either. It was police prosecutor Sergeant Saukat Ali who explained to him the reason for the adjournment.

Trial

26. **24 August 2004** was then set as the next date for trial. Trial did proceed. The plaintiff said he was in court and he gave evidence. Sharma was also present. Sergeant Suren also gave evidence. He said it was suggested to the Magistrate that Mr. Haroon Ali Shah be subpoenaed but the Court refused.

Death Of Accused Pending Ruling

27. The ruling was set for 30 September 2006. However, on the said date, Sharma did not turn up and a bench warrant was then issued against him. The case was then adjourned to a November date. The plaintiff said he was explained by Mr. Haroon Ali Shah that the matter was adjourned because Sharma had filed a claim against his daughter in law. The date for Ruling was then adjourned. However, as it turned out, Sharma died whilst ruling was pending. The charges were withdrawn.

28. In cross-examination, the plaintiff admitted that some two years after the charges were withdrawn, he filed a civil action against the state in 2007 suing the judiciary and also the Ministry for Education. He eventually abandoned the claim. He was not happy with the delay in police investigations which was why he had written to police internal affairs, the DPP and also to the Ombudsman.

29. The plaintiff admitted that his complaints were never put in writing. He was referred to Court records which suggest that the prosecution had expressed concern in court about the delay. The plaintiff responded by saying that the prosecution only became so concerned following pressure from the Ombudsman's Office and the DPP.

OBSERVATIONS

30. The plaintiff's claim is premised on an allegation that the police delayed in investigating the case.

31. This claim appears to me to be baseless because the police eventually did complete their investigation and in fact did file charges against Sharma.

32. The plaintiff is also aggrieved that the police delayed in their prosecution of the case.

33. This claim is also baseless given that the case was in fact tried in the Magistrates Court. The plaintiff's own evidence is that the trial was duly completed and that it was whilst the parties were awaiting ruling that Sharma passed away. The charges were then withdrawn by the police.

34. Section 17 of the old Police Act (which was then applicable) states:

> *General powers and duties of police officers*
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> 17.-(1) Every police officer shall exercise such powers and perform such duties as are by law conferred or imposed upon a police officer, and shall obey all lawful directions in

respect of the execution of his office which he may from time to time receive from his superiors in the Force or from any other police officer in the same rank as himself but senior in service.

(2) Every police officer shall be deemed to be on duty at all times and may at any time be detailed for duty in any part of Fiji.

(3) It shall be the duty of every police officer promptly to obey and execute all orders and warrants lawfully issued to him by any competent authority, to collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances, to detect and bring offenders to justice, and to apprehend all persons whom he is legally authorised to apprehend and for whose apprehension sufficient ground exists.

35. While section 17 does impose a duty on the police to, *inter alia*, promptly collect and communicate intelligence affecting the public peace and to bring offenders to justice, there is a public policy that discourages an action for damages for investigating the efficiency of the police force.

> *"while there is a general duty imposed on the **police** to enforce the criminal law, an action for damages is not an appropriate vehicle for investigating the efficiency of the **police** force. Furthermore, as a matter of public policy the **police** are ordinarily immune from actions for negligence in respect of their activities in the investigation and suppression of crime" – **James Satish Bachu v The Commissioner of Police & AG** Civil Appeal No.ABU 0020 of 2004 citing **Hill v Chief Constable of West Yorkshire** [1988] 2 All E 238; [1989] AC 54.*

36. In **Commissioner of Police v Wehrenberg** [2013] FJCA 114; ABU0024.2007 (1 November 2013), the Fiji Court of Appeal acknowledged the above policy. However, the Court held that in the circumstances of that case, the conduct of the police fell outside the realm common immunity:

> 41. The Appellants have also submitted that increasing the award based on failure to apologize which in turn was based on failure to investigate is wrong and contrary to policy and cited the principle in **Hill –v- Chief Constable of West Yorkshire** [1988] 2ALL ER 238 which was cited in **James Satish Bach –v- The Commissioner of Police & AG** Civil Appeal No. ABU 0020 of 2004 to the following effect:
>
> > *"While there is a general duty imposed on the police to enforce the criminal law, an action for damages is not an appropriate vehicle for investigating the efficiency of the **police** force. Furthermore, as a matter of public policy the police are ordinarily immune from actions for negligence in respect of their activities in the investigation and suppression of crime."*
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> 42. This argument of the Appellant is on the basis of **Police immunity** as stated in **Hill –v- Chief Constable of West Yorkshire** (supra). In the affidavit filed in defence by the Police in this case before the High Court, it had been set out that the Police had investigated into the complaints of the Respondents and had taken steps in that regard and that on certain occasions sought advice from the Director of Public Prosecutions.

> However, as pointed out above the affidavit itself did not include some of the complaints made by the Respondents and was incomplete and they had not addressed the complaints made after 2002 which was after entering into the conciliation agreement with the intervention of the Human Rights Commissioner.
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> 43. As stated above the entering into the Conciliation Agreement was an admission by the Police of their shortcomings and an undertaking to take necessary steps thereafter which too they failed to do. This conduct on the part of the Police in this case is quite different from the principle of police immunity in relation to the conduct of the Police as set out in **Hill –v- Chief Constable of West Yorkshire** (supra). In the present case it is not the position of the **Police** that they did the best they could do regarding the complaints of the Respondents to remedy their grievances, it is a case of admitting their shortcomings which as guardians of the law they were under a duty to perform in respect of the Respondents who were lawful residents on that Island. In the special circumstances of this case, the argument based on police immunity would thus fail.
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> 44. Further, the Appellants argued that increasing the award based on failure to apologise which in turn was based on a failure to investigate is wrong as it did not result in any direct breach of any of the Respondent rights under Chapter IV of the Constitution. As stated in paragraph 40 here too, the failure to investigate some of the complaints of the Respondents where they were grieved would have resulted in a situation where there were invasions of their private rights due to the inaction of the Police. The increase of the award as alleged by the Appellant for failing to apologise has been taken in the wrong context by the Appellants. It was not a case of increasing the award of damages due to the failure by the Police to comply with the Interim Judgment that was considered by the learned trial Judge but a situation where irrespective of the interim judgment that the Police had failed to take steps to implement the conciliation agreement. If there was an apology at the stage prior to the commencement of the proceedings by the Respondent it may have to some extent brought some solace to the Respondents.

37. In my view, the law must presume the police officers to perform in accordance with the law the investigation and the prosecution of the case. So, it is on the plaintiff who alleges otherwise to prove that the defendants did not carry these out in accordance with the law.

38. Has the plaintiff discharged that burden?

39. As I have said, the police did complete investigating the plaintiff's complaint. The Police also did file charges and the matter was even tried before a Resident Magistrate in Lautoka. Whilst a ruling was being awaited, the accused passed away and the charges were then withdrawn.

40. How the plaintiff has suffered as a result of all this is not clear to me. The general rule is that a plaintiff in a negligence case must prove a legally

recognized harm. This is usually in the form of physical injury to a person or to property or even economic loss in some circumstances.

41. Flemming – The Law Of Torts – 9th edition says as follows:

> Actual damage or injury is a necessary element ("the gist") of tort liability for negligence. Unlike assault and battery or defamation, where violation of a mere dignity interest like personal integrity or reputation is deemed sufficiently heinous to warrant redress, negligence is not actionable unless and until it results in damage to the plaintiff.

42. The above principle was operative in the reasoning in **Rankine v Garton Sons & Co Ltd** (1979) 2 All ER 1185. In **Rankine**, an employee had slipped on a pool of glucose in his employer's premises. The employee sued for negligence. Liability was denied by the employer. Later however, the defendant changed its stance and admitted to liability *vide* a letter to the plaintiff. In that letter, the defendant also said that they hoped to settle the matter amicably once they received the medical report. The plaintiff on the basis of the letter applied for an interlocutory judgment. The Master made the order for leave to enter judgment and for damages to be assessed. The defendants appealed. They still admitted negligence but refuted that the plaintiff's injuries resulted from their negligence. The Court of Appeal held that in an action founded on negligence, a plaintiff was not entitled to judgment unless he could prove the two necessary components of his cause of action, that is, that the defendant had been negligent and that the plaintiff had suffered damage as a result of that negligence. An admission of negligence was not necessarily an admission of liability.

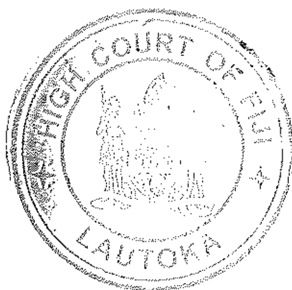
43. In **Blundell v Rimmer (1971) 1 All ER 1072**, it was held that the two elements had to be established for a cause of action in negligence to succeed. Until damage is proved, the plaintiff was not entitled to judgment on the

admission of negligence only because no claim against the defendant is established by an admission of negligence only.

44. Mr. Prakash would have been well advised to institute a civil action against Sharma if he wanted to recover the money he allegedly lost. In his evidence, he said that Sharma's lawyer, Mr. Haroon Ali Shah, had given him some money with a promise to pay more in future. Mr. Prakash did not have to wait for a ruling on the criminal trial before he could file a writ action against Sharma. In fact, he would have been well advised to file a writ claim and then await a ruling on the criminal charge(s) in order to avoid being caught under the Limitation Act.

45. In this case, even if the plaintiff's own evidence is accepted in full, there is nothing to suggest that the Police conduct had fallen beyond the scope of the **Hill v Chief Constable of West Yorkshire** immunity. And even if the police conduct had, it is hard to find that the plaintiff had suffered, as a result, a legally recognised harm

46. Accordingly, I dismiss the claim. Costs to the defendant which I summarily assess at $1,500 (one thousand and five hundred dollars only).



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Anare Tuilevuka
JUDGE
09 May 2017.