SUPREME COURT OF TONGA

Nuku'alofa Registry

Civil Case 145/91

KINI 'UHILA -v- KINGDOM OF TONGA

DALGETY J

Foliaki for the Plaintiff
Williams for the Defendants

Hearing : 28th, 29th and 30th September 1992
Judgment : 19th October 1992

JUDGMENT

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1 : Kini 'Uhila ("the Plaintiff") is a nine year old schoolboy. He presently attends Nuku'alofa Primary School where he is a pupil in Primary 4. Last year he was a pupil in Primary 3 at the Government Primary School in the village of Holonga. The Defendants in this action are the Kingdom of Tonga.

2 : On 20th November 1991 the Plaintiff was required to undergo a written test at school in the Tongan Language. His class teacher Heamasi Taiala had instructed his class 3 pupils, including the Plaintiff, to bring an exercise book with them in which to record their answers to the test. The Plaintiff came to school without his exercise book. He claims that he brought money with him to purchase a new exercise book as he had only one spare page left in his existing exercise book, but that he arrived at school too late on the day of the test to enable him to purchase a new jotter. He did not tell his teacher he had no exercise

book. He did not even ask for sheets of paper upon which to write his answers. Instead he remained silent. His fellow pupils sat the test. He did not. With disarming frankness, in cross-examination he admitted that he did not like Tongan tests, did not want to sit the test, "so I did not bring (my exercise) book to school." He says he knew that the teacher would chastise him corporally when he realised that he had not participated in the test. He deliberately elected not to sit the test and was prepared for the punishment which he knew would follow. Not unsurprisingly Taiala discovered that the Plaintiff had not participated in the test.

3 : Taiala was teaching a Primary 3 and 4 composite class of some 41 pupils aged eight and nine years old. Both the size of the class and its composite nature necessitated a firm disciplinary regime if, in the words of counsel for the Defendants, "anarchy" was to be avoided. The teacher certainly was in a very difficult situation having to educate that number of pupils and at two separate academic levels. The Plaintiff cannot be described as a model pupil. In the six months Taiala had been teaching him between June and November 1991 he had three complaints about the Plaintiff, namely that:-

(a) he was noisy, and would not stop making a none when told to do so;

(b) he sometimes failed to attend to his assigned homework; and

(c) on about two or three occasions prior to 20th November 1991 he had failed to participate in tests assigned to class 3 pupils.

The teacher's evidence was that he "paid much attention to (the Plaintiff) as he is quite disobedient". I have no difficulty in accepting this evidence as truthful and the Plaintiff's own protestations of innocence as unreliable. Even the child's own mother found him a handful and was want to punish him by the barbaric application of

a Tongan broom to the soles of his feet. She said she had done this only once, though her husband believed it was more often than that. The Plaintiff was however the only one of her family of five children that she saw fit to chastise in this way.

4 : In the circumstances the teacher decided to adminsiter corporal punishment to the Plaintiff for his failure to sit the 20th November 1991 test in the Tongan language. This he did, he said to help the child to learn obedience, to try and stop him being disobedient, to try and "put him right" so he would do as he was told. His previous attempts to eradicate the child's tendency to disobedience by "preaching" at him has not been successful. Nor had the Plaintiff responded positively to the frequent warnings administered to him by Taiala in what he said was the common Tongan form, namely be "flicking" his ears. That practice was not the subject of complaint in this case and I shall reserve judgment thereon for the time being: however I must say I have some difficulty comprehending how the infliction of pain can possible be categorised merely as a "warning."

5 : The punishment was administered by the teacher before the class at the end of the test. According to the Plaintiff in examination-in-chief the punishment was in three parts -

(1) many strokes on his back and buttocks with a green manioke stick;

(2) two strokes on the hand with a piece of timber some 2 feet in length and 1 inch thick; and

(3) six strokes on the back with that timber.

In cross-examination he denied that he had been hit on the hand at all by his teacher. This is consistent with the evidence of Doctor Tatola who on 22nd November 1991 discerned no evidence of recent injury to the Plaintiff's hand. The injuries he recorded in his report (Document

1) were to the buttocks and left thigh only. Taiala openly admitted that he hit the Plaintiff, but only -

(i) six times on the buttocks with a manioke stick, and when the stick broke into pieces, a further

(ii) four times on the buttocks with the flat side of a piece of timber he used as a blackboard ruler, a piece of timber some two feet in length, two inches broad by one inch in depth.

In virtually all respects I have no hesitation in prefering the evidence of the teacher. However he went on to say at the end of cross-examination that all his strokes hit the Plaintiff's buttocks, and that none were administered to the thighs. I cannot accept that. The medical evidence demonstrates beyond peradventure that as well as lineal bruising on the buttocks (four lines of elongated bruises) there was also bruising two-thirds of the way down the left thigh, a black mark 2 1/2 inches wide by 1 foot in length. That mark was consistent with being hit in that area by said piece of wood and in my opinion that is how this injury came to pass. By the 26th November 1991 that injury to the thigh had developed into an "abcess and sepic sores" for which injections of pencillin were required to eliminate the infection in this wound. The abcess and the sores the doctor believed to be due to the "trauma" inflicted on the 20th November 1991. I have no reason to doubt his evidence in this regard. Much play was made by the Plaintiff of a boil which he had on his thigh on the 20th November when he was punished. At one stage in his evidence he asserted that the teacher knew of this growth before he commenced the said punishment: however, he redeemed himself by retracting this serious complaint and stating that the teacher did not know until afterwards. This also was the teacher's evidence. In any event this particular boil is a diversion. The doctor noticed no such blemish when he examined the Plaintiff on 20th November 1990. When the Plaintiff was asked in Court to demonstrate the site of this boil he indicated the inside of his <u>right</u> thigh about three inches above the knee-cap, just above the hem of his school short trousers. The

abcess and sores recorded by the doctor was to the left thigh. On the evidence I am not persuaded that there is any casual link between these injuries and the boil. On the other hand I am satisfied that there is a natural and direct link between these injures and the caning of the Plaintiff's left thigh with said piece of wood. The Plaintiff did not cry when chastised. It is not exactly clear when he returned to school, but it seems most likely that he returned on Monday 25th November 1992 although it might have been later that week. The teacher had recorded his absence the previous Thursday and Friday (21st and 22nd November) and the Plaintiff's own evidence was that he returned to school before his second visit to the doctor on 26th November. Thereafter he confused the issue by saying the 26th November was a Thursday when in fact it was a Tuesday; and, that his leg had healed before he returned to school which, of course, conflicts with the doctor's findings. But return to school he did, and to Taiala's class where he remained until the end of the 1991 Session at Chistmas. He walked to and from school in that period and was able to participate in games.

6 : Mr Foliaki for the Plaintiff urged me to declare the chastisement meted out to the Plaintiff, UNCONSTITUTIONAL, UNLAWFUL, WRONGFUL and EXCESSIVE. No authority was quoted to me in support of the proposition that Corporal Punishment is unconstitutional: there is nothing in the Act of the Constitution of Tonga (cap. 2) which proscribes corporal punishment. In my opinion there is no constitutional objection or barrier to corporal punishment. As at October 1990 the legal position throughout the United Kingdom was that ill-treatment of a child in a manner likely to cause the child unnecessary suffering or injury to health was a criminal offence : see Section 1 of the Children and Young Persons Act 1933 and Section 12 of the Children and Young Persons (Scotland) Act 1937. Section 1(7) of the 1933 Act provides that -

> "Nothing in this section shall be construed as affecting the right of any parent, teacher, or other person having the lawful control or

> charge of a child ... to adminsiter punishment to him."

The causing of unnecessary suffering to a child is also a criminal offence in Tonga: section 115(1) of the Criminal Offences Act (cap. 18). There is however no exact parallel of Section 1(7) of the 1933 Act. The implications of that are not a proper subject for comment in this judgment. At Common Law in the United Kingdom a parent has a right to inflict reasonable corporal punishment on his or her child and this parental power forms part of the law of Tonga by virtue of section 4 of the Civil Law Act (cap. 25). Teachers are specifically provided for in Tonga by the Primary School Regulations 1928. Regulation 31 exhorts teachers to do all in their power to secure good order and discipline without recourse to corporal punishment, but Regulation 32 authorities the use of corporal punishment in certain circumstances -

> "Corporal punishment should only be inflicted for offences agaisnt morality, for gross impertinence or disobedience, or for wilful and persistent misconduct. It must not be inflicted for failure or inability to learn or for trivial breaches of school discipline."

In the case of the Plaintiff I am satisfied that he was being chastised for gross disobedience as also for wilful and persistent misconduct. His punishment therefore was not unlawful. The Chief Education Officer for Primary Schools, Tuna Fielakepa gave evidence that the Minsitry of Education has a policy of actively discouraging corporal punishment. That policy has never been reduced to writing whether in the form of Guidelines or Instructions; is apparently communicated orally to teachers (and there was no evidence the Plaintiff knew of this policy); and, in any event, is inconsistent with the provisions of the law in force in Tonga!

7 : I turn now to consider whether the punishment was wrongful and excessive. On the facts of the case I am in no doubt that the Plaintiff merited

punishment of a corporal nature. In Tonga there is no approved instrument of punishment nor approved seat of chastisement. Mrs Fielakepa stated that teachers just used whatever object came to hand, wooden rulers being an obvious weapon because of their availability. There is always the potential for serious injury when a solid object such as a two foot length of timber is used as the vehicle of punishment in the event that the blow, if aimed at the buttocks, lands off target. And the nature of the injuries sustained by the child are an obvious factor to be considered in determining whether the punishment was wrongful or not. In Ryan v Fildes (1938) 3 All E.R. 517 even a moderate slap on the ear by a teacher on a 10 year old male child was regarded, not as reasonable and lawful correction, but as a civil wrong, sounding in damages in respect of the boy's resulting deafness. Smacking a child of six with a wooden spoon was regarded as evidence of child abuse by the mother by the High Court in the recent East Sussex County Council case: "The Times", 27th February 1990. In Tonga the Courts are entitled in certain circumstances to inflict corporal punishment. In the case of a child aged at least 7 years and under the age of 15 years, upon conviction for a criminal offence, the Magistrate may elect to have the child whipped in lieu of any other available punishment. In such circumstances the maximum sentence is 20 strokes with a "light rod or cane composed of several tamarind or other twigs," subject to a maximum of 10 strokes at any one session: Section 30 of the Magistrates' Court Act (cap. 11). Given these statutory provisions I am unable to conclude that 10 strokes inflicted upon a nine year old boy for gross disobedience and wilful and persistent misconduct is excessive. It might be abroad, but not in Tonga! As to the mode of chastisement I do not feel able to rule in this case that there was anything objectionable to the use of a manioke stick. The Plaintiff gave inadequate evidence for ~~me to determine whether the stick was of the nature of a light for~~ me to determine whether the stick was of the nature of a light cane or more of the nature of a solid branch with knobbly protrusions. The fact that the stick broke after six strokes suggests that it was of the former variety. I have grave reservations about the propriety of

using a solid piece of timber to chastise a child. If a wooden spoon can be treated by the Courts as an instrument of abuse (see East Sussex County Council case), then the use of timber of the dimensions already noted is all the more objectionable, even if each blow was of moderate strength and applied to the buttocks: c.f. Mansell v Griffin (1908) 1. K.B. 947. Accordingly I do not consider that the four blows which the teacher admitted administering with the piece of timber were reasonable and moderate punishment. Solid objects of this type are inappropriate implements for punishing a child. Insofar as these blows landed on the Plaintiff's buttocks there is insufficient evidence that they were any more painful than the strokes with the manioke stick. Whether or not this was because they were light blows is not clear. The Plaintiff's punishment was undoubtedly painful but he did not isolate any excess of pain as the product of the stroking of his buttocks with the timber. Corporal punishment of necessity involves the inflicting of some pain upon the subject, just as the product of such punishment will invariable be visible on the buttocks for some days. In the foregoing circumstances although I am satisfied that the strokes to the Plaintiff's buttocks were not reasonable chastisement I do not consider that any injuries sounding in damages resulted therefrom.

8 : The blow to the thighs is another matter altogether. Taiala did not take reasonable care to ensure that all his strokes landed on the Plaintiff's buttocks. To hit a child on the thighs with a solid object, as he did, whether deliberately or negligently, is an actionable civil wrong if measurable injury results. It did in this case, to the extent already described. The Plaintiff is entitled to an award of Damages in his favour. In all the circumstances I consider an award of 250 pa'anga to be adequate and proper compensation.
The Defendants admit in their pleadings that if the teacher Taiala committed a wrongful act in punishing the Plaintiff they qua employers are vicariously liable therefor. In this case there is no justification whatsoever for an award of exemplary damages.

9 : Accordingly, I shall pronounce an ORDER in the following terms:

IT IS ORDERED AND ADJUDGED THAT the Defendants do pay general damages of 250 pa'anga to the Plaintiff together with interest thereon at the rate of 10 per centum per annum from 20th November 1991 until payment to follow hereon: and, the said sum be paid in Court to be applied for the benefit of the child-Plaintiff as may be directed by the Court.

SUPREME COURT TONGA

Ramsay R Dalgety

NUKU'ALOFA, 19th October 1992.