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

NO.C45.97

BETWEEN	:	WILLIAM CLIVE EDWARDS *of Nuku'alofa*	-	**Plaintiff;**
AND	:	KALAFI MOALA *trading as the Taimi 'o Tonga at Kolomotu'a, Nuku'alofa.*	-	**Defendant.**

Counsel appearing: Plaintiff in person,
Mr S Tu'utafaiva and Mrs P. Taufaeteau for Defendant

Dates of hearing: 2,3,5,6,November 1998
Date of Judgment: 4 February, 1999

JUDGMENT OF FINNIGAN J

William Clive Edwards the plaintiff is the Minister of Police, Prisons and Fire Services. Kalafi Moala the defendant is the owner, publisher and editor of a weekly newspaper called Taimi 'o Tonga ("the Taimi"). The newspaper is produced in New Zealand and is widely distributed throughout Tonga, New Zealand, Australia and the United States of America. In this action the plaintiff seeks damages for defamation. The damages claimed are $100,000 as general damages and $40,000 as exemplary damages.

On 1 January 1997 the defendant published in the Taimi an article which he had written. With it he published photographs of people prominent in the article including one of the plaintiff, and a caption. The language throughout was Tongan, but I shall set out the words in English. The translations are agreed, or if not, are given as [alternatives].

The caption of the photograph was:

> Above, Minister of Police Clive Edwards, foremost opponent of democracy.

The article was a major article in that issue of the paper, and was titled "Roundup for 1996 And Expectations in 1997". After an introduction it was partitioned by headings, "Political", "Economical", "Social" and "Sport". Under the heading "Political" the article said in particular the following words, to which the plaintiff has taken objection:

(a) And it was the new Minister, Clive Edwards, who was in the forefront in leading the Government side in all the controversy and political persecutions of 1996.

(b) One of the first acts of this Minister [to his Department] was to make it known to his Department that any police who is a democrat [Democrat] must resign. And thereafter he continued to become the leader in the opposition and persecution of democracy and those who supported it [became the leader of opposition and persecution of the Pro-Democracy Movement and its supporters].

(c) In February the Assistant Editor of the Taimi 'o Tonga, Filo 'Akau'ola, together with Filini Sikuea and Vaha'akolo Fonofehi were imprisoned for angering the

Minister with letters to the Editor. There was a court case [This trial took place] and Filo and Filini were convicted but the sentences were suspended [convicted and sentenced to probation]. An appeal [in this trial] is still proceeding.

(d) The police forcibly executed a search of the office of the Taimi 'o Tonga in February under a letter of authorisation from Police Magistrate Palavi Tapueluelu concerning the same.

(e) In preparing their travel to Vava'u in April the Democracy Committee received from the Office of the Minister of Police a letter of warning and threatened each one of them in connection with their proposed travel. The trip still proceeded to Vava'u notwithstanding that two police followed them everywhere they visited. The leaders also travelled to Ha'apai and 'Eua.

(f) The Taimi 'o Tonga became the target of his criticism and verbal attack. It became clear/obvious from his conduct that here was a Minister whose principal work objective/pursuit is to stop Democracy and the Taimi 'o Tonga [It was clear from this kind of conduct of the Minister that one of his main work objectives is to stop the Pro-Democracy Movement and the Taimi 'o Tonga].

(g) In August the Annual General Meeting of the Pacific Islands News Media Association (PINA) was held in Tonga and politics became an issue in its deliberations. The Minister of Police who is in charge of immigration had stopped Mike Field a well known New Zealand news reporter from attending the conference.

(h) In September this Minister was the leader in persuading the Legislative Assembly to subject the two editors of the Taimi 'o Tonga, Kalafi Moala and Filo 'Akau'ola also 'Akilisi Pohiva to trial for contempt.

(i) In the early part of November the police imprisoned Teisina Fuko and 'Akilisi Pohiva as a result of statements they made and appeared in the Taimi 'o Tonga and Kele'a. They were accused of sedition because of statements they made that the King should release his power to the people.

(j) In the political roundup of 1996 this year can be counted as the year with the biggest discord/controversy that has happened during the past 10 years. This has been caused by the strong attack by the Minister of Police and his supporters and this has resulted in increased and strong support for democracy. The happenings of 1996 has increased overseas attentions and criticism of Tonga and its present system of authority.

THE CLAIM

The plaintiff claims that these published words about him are false in material respects, malicious and defamatory of him. In particularised pleadings, he says that each of these statements is false either in whole or in part and that in addition, some of them are malicious. He claims that the words are defamatory in their normal meaning, and that they are further calculated or capable of being understood by their readers to have all or any of the following meanings (i.e. innuendoes) in respect of him:

(i) that he is an unfair person and one not fit to hold office,

(ii) that he persecutes people particularly those who espouse democratic principles or believers thereof,

(iii) that he prosecutes people wrongly for political reasons and not for breaking the law,

(iv) that his main target and preoccupation is to persecute the Taimi 'o Tonga and to stop it from operating as a newspaper,

(v) that he is an evil person or corrupt,

(vi) that he is responsible for all the bad things that happened in Tonga and the cause of them, and

(vii) that he is the cause of Tonga's bad image overseas and for the criticism of this country and its leaders.

He claims that the publication of those words has had and does have the effect of lowering his reputation before the public, and has placed him in public hatred and odium and has caused him to be ridiculed by the public. He claims that he has suffered great pain distress and anguish over the publication of the words, and difficulties in performing his role as Minister of Police.

On 6 January 1997 the plaintiff wrote to the defendant in New Zealand, responding in detail, and in some heat, to specific statements in the article. He said that he would sue the defendant and the newspaper for $100,000, but that if the defendant apologised or retracted his false allegations it would stop the plaintiff from suing. The defendant's reply was a strongly worded refusal. It came, by fax, to police headquarters, the following day. In the reply, the defendant made, inter alia, the following remarks to which the plaintiff in his claim takes further objection:

(k) There is nothing that surprises me and I wish to refer to it, there is too much darkness in your mind, respect to you. Your explanations and reasoning are most unreliable and you have become the man who is the biggest liar I have ever met. You have inverted the truth so often that the truth has become falsified and the untruth has become the truth.

(l) Your self importance and your darkness (of mind) has blinded you from what is normal thing for any newspaper to do. Every explanation set out in the Roundup of 1996 shall stand and nothing will change it. You sue and claim and I will sue and claim.

These remarks were read by at least one police officer who gave evidence, Lola Baker Koloamatangi, a staff officer to the plaintiff, before she passed the message to the plaintiff. He claims that these words also are defamatory in their ordinary meaning, and aggravated the defamation set out above. He seeks exemplary damages.

THE DEFENCE

The defendant in his statement of defence makes certain admissions, which I have reflected in the narrative so far. Then in general he denies the main claims of the plaintiff, and thus has put the plaintiff to proof of those claims. He pleads that what he said about the plaintiff is true. As well, he pleads in the alternative two affirmative defences, the onus of proof of which is on him. These are:

(1) That the publication complained of, read as a whole, is a fair comment based on true facts on a matter of public interest and made without malice, and

(2) That the statements complained of, and set out above as (a) to (j), are true and justified in the public interest.

In pleading these defences, the defendant makes in his statement of defence several positive factual affirmations to which the plaintiff takes further objection. To a substantial degree they are repetitions of the ten statements from the article, which are quoted above. Two of them in particular, in

paragraph 27 of the statement of defence, were selected at the hearing by the plaintiff as untrue, unproved and compounding the defamation complained of, therefore further supporting his claim for exemplary damages. They are as follows:

> 27 (i).... The plaintiff was a leading figure in controversy and political persecution during 1996. Since he became Minister of Police he has stirred up more controversy and persecution politically than anyone else previously as in the persecution of Filokalafi 'Akau'ola, Siosifa Filini Sikuea and Vaha'akolo Fonofehi for angering an Officer in the service of the Government; statements he made in the Tonga Chronicle and interviews with the news media overseas. The comment [i.e. (a) above, that the plaintiff was in the forefront of the government side in all the controversy and political persecutions of 1996] was based on observation of the political climate of 1996.
>
> 27 (viii).... The defendant says that as each year over the past 10 years in Tonga, 1996 was definitely a unique year politically – an election, political persecution using courts to discredit Pro-Democracy Movement, roadblocks to press freedom, imprisonments and consequently more reaction from overseas media than any other year over the past 10 years. Amnesty International even reacted, and over 200 journalists from Australia signed a petition, plus reaction from the International Federation of Journalists (over 400,000 members). One does not have to be in the know to name the plaintiff as the leading persecutor. People in Tonga talked about it and therefore 9 (i) of the claim is denied. [Paragraph 9 (i) is the plaintiff's claim that the defendant's statement above, that in the political roundup of 1996 the year could be counted as the year of biggest discord during the previous ten, because of the strong attack by the plaintiff and his supporters, is false and malicious.]

The plaintiff includes these pleadings in his claim for exemplary damages. He submits that in these statements, the defendant has not only emphasised the falsity of his allegations, by repeating and failing to prove them, but has compounded his error by adding further false claims not previously made and, at the end of the trial, also still unproven.

THE EVIDENCE

The defendant did not attend the trial. The plaintiff called 14 witnesses and 5 gave evidence on behalf of the defendant.

The evidence of all 19 witnesses produces a clear whole picture of the facts that underlie the defendant's ten allegations. The part of the article complained of is, as the quoted statement (j) above says, a political roundup of the year 1996. It commences with 17 January 1996, which the evidence shows to be the date of a Routine Order (No. 4/1996) issued by the plaintiff to all members of the police force.

This document was the cause of the defendant's allegation, (b) above, that the plaintiff required any police officer who was a democrat to resign. Whether or not the defendant had read it before writing the article was not shown by the evidence. Nor was there any evidence supporting his claim at paragraph 27(ii) of the statement of defence that "a number of officers told of the threat to 'turn in their uniform' if any was in support of Pro-Democracy". It is necessary to set out that document in full:

Ref:ADM/2/1A/1996 - 4 — 17th January, 1996

TONGA POLICE FORCE
ROUTINE ORDER
PART ONE
NO.4/1996

By

Honourable Clive Edwards, Minister of Police, Prison and Fire Services

1. I am forwarding this directive to remind all members of the Police of our principal duty to uphold the Constitution and all the laws of the country and to protect His Majesty the King.

2. During the present parliamentary election campaign, two changes have become apparent.
   a) The moves and desire of certain candidates to bring about electoral reform within the confinement of the Law.
   b) The other is to remove the King's power, repeal the constitution and to describe everything that this government has done as useless and meaningless, abolish Parliament and to encourage the people to take the laws into their hands to effect those changes and to take command of the country.

   The advocates of the letter change are Futa Helu, 'Akilisi Pohiva and Filini Sikuea. They openly stated this at two meetings held at Basilica Nuku'alofa on Saturday 30th December, 1995 and Monday 8th January, 1996.

3. No member of the Police Force is allowed to be actively involved in politics and should refrain from doing so. Such involvement will bring you into conflict with your oath of office to uphold the law. Because I am aware that some members of the Police Force support the political changes now being advocated by Futa Helu, 'Akilisi Pohiva and Filini Sikuea, I will require immediate resignations from those officers submitted to my office no later than 1600hrs Monday 22nd January, 1996.

   If you enjoy the privileges and the rights guaranteed to you by the Constitution and the benefits you are entitled to under the present system, I expect all members of the Force to be loyal to their sworn tasks. You cannot be loyal to that task if you subscribe to the belief of unconstitutional changes.

   Because you enjoy existing privileges under the present system and you are guaranteed freedom under the Constitution, you are free to make your own decision, but I expect you to tender your resignation and I subsequently discover your involvement, I regret to inform you that I shall institute immediate dismissal procedure.

   This memorandum is confidential to the Police Force only. Should this document be copied and released outside the Force, I shall regard it as grave misconduct by the person concerned.

   This directive must be treated with utmost urgency and I shall require all commissioned officers to report back to me by 1600hrs Monday 22nd January 1996.

(Signed)
Clive Edwards
MINISTER OF POLICE, PRISON AND FIRE SERVICE

Distribution:

All Branches of the Force

It was the plaintiff's case at the trial that the Routine Order did no more than reinforce the duty imposed on police officers by s 19 of the Police Act cap35. It is no major leap in legal reasoning to relate the statements in that document to s 19 which is as follows:

"19. (1) No police officer shall -
   (a) engage in any employment or office whatsoever other than in accordance with his duties under the provisions of the Act; or
   (b) take any active part in any political organisation or electoral campaign or engage in any other activity which is likely to

interfere with the impartial discharge of his duties under the provisions of the Act.

(2) Any police officer who contravenes this section shall be liable to be dismissed from the Force by the Minister of Police or to such other punishment as may, by this Act, be imposed:

Provided that, in the event of dismissal, the dismissal shall be first confirmed by Cabinet."

It was the plaintiff's evidence, and the evidence of the then deputy police commander 'Eleni 'Aho, and there was no evidence to counter it, that the police had reason to believe some police officers were sympathetic to certain strong political statements made by some candidates during the then-current election campaign. The plaintiff himself had initially been a candidate, and until his appointment a week previously, on 12 January 1996, had attended political meetings. He gave evidence of what he himself had heard from some candidates and other advocates of political change. He said that while he was campaigning some people had been openly campaigning and advocating actions outside the law in order to achieve political change. He gave examples of things he said he heard. He said that he heard discussions of means to remove the King or harm him and/or to take away his constitutional powers. He said that two of the people present at one much discussion, Filini Sikuea and Vaha'akolo Fonofehi, were subsequently prosecuted. When, later in the trial, he put some of these statements to some of the defendant's witnesses who had been present during the campaign, none were willing to deny that they had been said.

The plaintiff then gave evidence that shortly after being appointed Minister, in the second week, he was alarmed by reports that came to him as Minister, including two alleged incidents of conspiracy to harm the person of the King. He said it was not for him to deal personally with such matters, investigations and police action were in the hands of the police special branch and the CID. He said they did not call for direction or advice from him. However, he said that he heard that some police officers had been attending political meetings, and that this prompted him to check the law about that. He said it was his function to command the police force, and as a new Minister he had to be sure of the loyalty of the police officers.

A witness Lola Baker Koloamatangi, who is a senior police officer and was the plaintiff's staff officer at the time, gave evidence that it was part of her duty to handle all the correspondence for the Minister, written and verbal. She said that at this time there were a lot of reports and questions about the loyalty of police officers.

The plaintiff gave evidence also about his opinion, which he had expressed while he was a candidate and which his police advisers had reinforced upon his appointment. His opinion had been that what some candidates and other speakers advocated as a way to achieve change in the political system was disruption of public order. As an example he mentioned exchanges during the campaign between himself and 'Akilisi Pohiva. He said 'Akilisi advocated taking the issue of political change to the people, so the people can decide, but his opinion was that the issue should be decided in the legislative assembly because under the Constitution the people cannot decide. That being so, he knew that the police should be alert to avert any breach of public disorder that might occur. That is their stated function under s6 of the Police Act cap 35. By reference to s 19, it is clearly the duty of every police officer, in any event, to remain aloof from political organisations and electoral campaigns.

The then acting police commander, 'Eleni 'Aho, gave evidence that the Routine Order procedure is a normal procedure in police life. These documents are issued, she said, about once each month, reminding the police officers as required of particular duties. She said they cover the whole span of police duties.

There was, as it turned out, no evidence put before the court by the defendant to rebut or reduce what the plaintiff had said about police officers attending campaign meetings. To the contrary, in questioning the plaintiff in cross-examination, counsel for the defendant suggested to him that two

police officers had joined a political organisation, the pro-democracy movement. There was no evidence called to explain why the routine order should be interpreted as persecuting certain police officers by requiring them to resign. There was no evidence that in fact any police officer had been influenced to resign or had resigned as a result of this routine order. The plaintiff's evidence, unchallenged, was that nobody resigned.

From the evidence of some of the defendant's witnesses, particularly but not only Mr Sikuea, and from the answers of the plaintiff to questions in cross-examination, I have no doubt that statements advocating and tending to incite breaches of public order were made publicly during the election campaign. Examples of these were given in the evidence and included a comment said to have been made by Filini Sikuea about the King, "cut off his head and blood will come out of it".

I turn now to the first sentence in (b) above, which is as follows:

> (b) One of the first acts of this Minister [to his Department] was to make it known to his Department that any police who is a democrat [Democrat] must resign.

The plaintiff had set out his purpose in paragraph 1 of the Routine Order. It was to remind all police officers of their function, (which is set out in s6 of the Police Act). Then in paragraph 2(b) he specified certain proposals for change which he said were being advocated by Futa Helu, 'Akilisi Pohiva and Filini Sikuea. Then at paragraph 3 he said he required immediate resignations from ".... members of the Police Force [who] support the political changes now being advocated by Futa Helu, 'Akilisi Pohiva and Filini Sikuea". Reference to ss47 and 48 of the Criminal Offences Act cap 18 shows that those political proposals, if made, were seditious. I imagine that any police officer actively engaged in advocating such proposals would find dismissal only the first of the steps taken against him/her. From the evidence I know that the three men named were active in the democracy movement, but the evidence does not show whether or not the seditious political proposals were put forward by the democracy movement. If they were not, then to say the Minister by his words required resignations from police officers who were democracy (or democracy movement) supporters was changing his words to import a false meaning.

If those proposals were those of the democracy movement, then the words are true. If any movement was advocating those proposals then surely it was breaking the law and the police force was duty bound to oppose it. In that case it would have been false to imply that the Minister was persecuting such people.

I am bound to hold that the first sentence in statement (b) is not true. The remaining sentence of (b) depends on more general evidence and I shall include my findings about it in my general findings.

The next-in-time allegation complained of, (c) above, is that in February the plaintiff caused Filo 'Akau'ola, Filini Sikuea and Vaha'akolo Fonofehi to be imprisoned for angering the plaintiff with Letters to the Editor. I was told that there is an offence of angering a public servant, created by s 57 of the Criminal Offences Act cap 18. Those words do not appear in the English form of that section, but I was told at the hearing that the Tongan words include that meaning. S 57 is as follows:

> "57. Every person who uses threatening, abusive or insulting language or behaviour towards any officer in the service of the Government shall be liable on conviction to imprisonment for any period not exceeding 12 months, or to a fine not exceeding $250, or to both such fine and imprisonment. *(Amendment by Acts 23 of 1950, 20 of 1966 and 9 of 1987.)*

Each of the three persons named gave evidence about the events. Filokalafi 'Akau'ola was assistant editor of Taimi 'o Tonga. He said that what he did was accept a letter to the editor which was subsequently published. He said that the police charged him with an offence on a complaint by the plaintiff. He said he was taken to the police station and kept there for up to 26 hours. He said he was interviewed, but only at the last moment before he was released. He said he was convicted of the offence charged, but ultimately acquitted.

Filini Sikuea gave evidence. He said that he had written a letter and taken it to the Taimi and they had published it. He said the police informed him the Minister had complained about his letter, and that they needed to take a written statement. He said he went with them to the central police station. He said he answered all their questions. He said he then told them he was not happy with what they had done and they put him in the prison. He said he was detained there for 6 or 7 days and during that time the police did no other work with him. A police officer had taken him to the Magistrates' Court and had asked for an order for his detention, and then at the end of that time he was taken to the court again and upon his return to the police station he was released. He said he was charged with the angering offence. He said he was unhappy because he had given his statement and had done his part, but had then been detained and prevented from doing his part as father to his children. He was convicted on the angering charge but later acquitted.

Vaha'akolo Fonofehi gave evidence that he took a letter to the Taimi, and it was published. He said the police took him to the police station, and cautioned him for the offence of angering, and he then made a statement. He said he was kept there for 24 hours, then brought with another person to be detained for eight days at the police station. I understand that to mean he was taken to court and an order was made by a Magistrate. He was then detained another 8 days. He said he went for trial on the angering charge and was found not guilty.

All three were tried for offences under s57 in the Magistrates' Court. Two of them were convicted and appealed. The police sought suspended sentences, and the plaintiff said this was at his request. No imprisonment sentences were imposed. The convictions were later quashed because of a defect in the lower court proceedings.

It was the plaintiff's evidence that when he read the letters, he thought the writers had gone too far. He complained to the police, and the police prosecuted them. After he made his complaint he had left Tonga. He said the three people had been arrested, and the Taimi offices had been searched, after he left. He said he did not know how long they had been detained, but they had been released by the time he had returned.

On this evidence, it is difficult to assign to the plaintiff's role in these events any significance after the initial complaint. Only one of the defendant's witnesses gave evidence about the plaintiff's role. When asked in cross-examination about that, the witness Filini Sikuea said it was his firm belief that "you [the plaintiff] were undoubtedly the mastermind behind all these, I have no doubt you are the captain and the commander in it". He said he has no doubts that the plaintiff is engaged in trying to catch him, and was leading the persecutions up to the time that the witness went to gaol. He said the Minister of Police is clearly the captain of the "other side", i.e. the King, Ministers and Nobles. He said that the intention of the custody had been political, and that his release by the Magistrate after the police had asked for a further 11 days' detention was political.

That evidence of those three persons raises serious concern about the use of police detention. For the present case however, the question is, has the plaintiff established that the statement (c) above defamed him, and/or has the defendant shown that the statement was either true or otherwise justified. For convenience, the statement is:

> (c) In February the Assistant Editor of the Taimi 'o Tonga, Filo 'Akau'ola, together with Filini Sikuea and Vaha'akolo Fonofehi were imprisoned for angering the Minister with letters to the Editor. There was a court case [This trial took place] and Filo and Filini were convicted but the sentences were suspended [convicted and sentenced to probation]. An appeal [in this trial] is still proceeding.

This statement clearly excludes imprisonment by the court as punishment. It means imprisoned by the police, i.e. by the plaintiff or under his orders. It was given as an example of actions allegedly taken by the plaintiff as "the leader in the opposition and persecution of democracy and those who supported it" [or] "the leader of opposition and persecution of the Pro-Democracy Movement and its

supporters". From the evidence however, I find that these intended meanings are without support from the facts proven in the evidence. I must find that the statement is untrue.

The next specific allegation also related to February. This was (d) above, that the police forcibly executed a search of the offices of Taimi 'o Tonga, under a search warrant issued in the Magistrates' Court. The suggestion of force seems to arise from the fact that the police had a search warrant, as if it were a weapon. There was no evidence from any of the defendant's witnesses, who included the deputy editor Filokalafi 'Akau'ola, that the police search was conducted forcibly. Filokalafi 'Akau'ola's evidence was that the police read the search warrant to him, and that they were looking for a copy of a letter by Filini Sikuea and Vaha'akolo about the Minister of Police. Neither could the defendant's witnesses say that the police retained any of the documents taken for examination. Filokalafi 'Akau'ola's evidence was that they returned the letters they took. There was no evidence about how the police behaved, certainly no suggestion that they used force. There was no suggestion by the defendant, and no evidence from his witnesses, that the police acted wrongly in getting the court to grant a search warrant. Nor is there a claim that the court had acted wrongly in issuing the search warrant. The purpose of a search warrant is to prevent infringements by the police of private rights. The search warrant procedure puts the judiciary between the police and the citizen, to ensure that rights are protected.

The defendant's claim, in the context of the whole article, was that the Taimi was subjected to force, and that it was the plaintiff who used the force. The plaintiff's evidence, in respect of the allegation that he was responsible for the search and that he was persecuting the newspaper, is that he was unaware of this specific search. It was his evidence that he did not concern himself with day-to-day policing, and was not consulted by police officers in the conduct of their day-to-day enquiries. The defendant produced no evidence to challenge this assertion, and instead relies specifically upon the plaintiff's ultimate responsibility for the actions of his department.

What the plaintiff said about that in evidence is that he does not suggest to the police what work they should do and how to do it. He said he is briefed after the work is done. He said he takes responsibility as head of the Ministry, but must leave the police free at all times to investigate a crime and search for evidence as they will. He said that a search warrant in the course of an investigation is for their discretion, not his. Ultimately the discretion is exercised by the Magistrate.

I can reach no conclusion on the evidence other than a finding that the claim of imprisonment by the plaintiff is unfounded and untrue.

Next in time, (e) above), is the defendant's allegation that in April the Democracy Committee received from the office of the Minister of Police, i.e. from the plaintiff, a warning and threatening letter about a proposed trip to Vava'u, and that in Vava'u the three members of the committee who went were followed everywhere by two police officers.

The plaintiff produced the letter in evidence. In its English translation it is as follows:

25th March 1996

S. 'Akilisi Pohiva.
Falisi Tupou.
Siale Fihaki.

We are writing this letter to warn all of you that we have information that you and others are intending to travel to Vava'u tomorrow, Tuesday 26th March to preach about changing the present Government.

We have previous information stating that yourself, Filini Sikuea and Keta from Pea will travel to preach in all the villages at Vava'u, about democracy, followed by Ha'apai, 'Eua and then

Tongatapu, where a march to the Royal Palace with a petition letter to change the present Government within this year.

In your travel, you will be trying to excite people of the land to be disaffectionate against the King, Parliament and the Government, thus laying foundation for a petition to dissolve the present system of Government.

There are freedom provided by the Constitution to Tongan male and female including visitors to this land, it also includes freedom to speak, write or publish their thoughts and there will be no laws to prohibit this freedom forever.

The freedom referred to under section 7 of the Constitution does not permit anyone to defame another so as to violate the laws with which protects the King and Royal family.

According to Part VII Section 47 and 48 of the Criminal Offence Act:-

"A sedition intention is an intention to do any of the following matters:

a) to excite disaffection against the King of Tonga or against the Parliament or Government of Tonga.

b) -

c) to procure otherwise then by lawful means the alterations of any matter affecting the Constitution, Laws or Government of the Kingdom.

The intention of your travel, it is believed will violate the laws, that is, you will excite the people to show disaffection against the present Government, Constitution and Parliament which protects the King of Tonga and Royal Family. On the basis of the information conveyed to this Ministry regarding the activities you are about to carryout; do not complain if you will be investigated by police in relation to those activities.

The purpose of this letter is to create an understanding. You 'Akilisi Pohiva is the repersentative of the people of Tongatapu; why are you involved with affairs at Vava'u, Ha'apai and 'Eua.

Whilst you are all under the protection of the present Government you rise up to form a new Government.

There are matters relating to change that will instigate disorder and disaffection against the present Government. It could be better discussing it in Parliament, rather then inciting people, like you did unlawfully in the last election.

There are concerns regarding peace and order in the land and it is likely that there will be disorder as a result of your proposed travel.

With Respects.

.....
Signed 'E. 'Aho
Acting Police Commander.

It is worth pausing at this stage to add s48 of the Criminal Offences Act cap 18, which was referred to in the letter:

"48. A seditious intention is an intention to do any of the following matters -

(a) to excite disaffection against the King of Tonga or against the Parliament or Government of Tonga ;

(b) to excite such hostility or ill-will between different classes of the inhabitants of the Kingdom as may be injurious to the public welfare;

(c) to incite, encourage or procure violence, disorder or resistance to law or lawlessness in the Kingdom;

(d) to procure otherwise than by lawful means the alteration of any matter affecting the Constitution, Laws or Government of the Kingdom. *(Amended by Act 13 of 1978.)*

This letter was sent on the letterhead of the "Office of the Minister of Police". The plaintiff's evidence was that the practice of sending letters from the Ministry on that letterhead survived as at March 1996 from the time of his predecessor, and he had since then tried to change it, though so far without success. He said that the letter was routine police work, sent as advice after an amicable meeting which had not involved or concerned him. He said that he had had no interest in it.

It was the then acting police commander, 'Eleni 'Aho, who wrote the letter. She said in evidence that the police at that time had some reason to believe that some activities planned for the election campaign, including the campaign in Vava'u, might have been seditious, and there were implications of some possible harm to the person of the King. She said that was the reason that "we", that being the police officers concerned, wrote the letter. She said she wrote it after consulting the Minister and senior police officers. She said that after receiving it, 'Akilisi Pohiva came to see her, and that after talking with him she had felt more comfortable. In cross-examination, she repeated that the information received by the police had been sufficient to cause the letter, and she gave some details of the allegations that had been made to the police about what the campaigners might do. In the view of the police, she said, these allegations involving the person of the King, would be seditious if they came to pass and would cause trouble. She denied that the information had been incorrect, saying that instead the people who received the letter co-operated with the police and gave undertakings to abide by the law.

Of the three recipients of the letter, two gave evidence. 'Akilisi Pohiva said that he saw the letter as a letter of warning, based on the belief of the writer, that they were going to breach the law in Vava'u and that further they were going to incite people to disaffection with the present government. He said that he felt the content of the letter was way out from their purpose, and replied to the letter. He did not recall meeting 'Eleni 'Aho, but her evidence of his reaction and his evidence are in essence the same. He said that the Vava'u tour went ahead, and the public welcomed in essence them there, but he noticed that two police officers followed them everywhere. He felt the campaigners were not free to express fully their objectives to the public for that reason.

Falisi Tupou said in evidence that he understood the letter to be discouragement from the Ministry of Police for the proposed travel, and an attempt to frighten them. He himself however felt very encouraged that what they were doing was in line with the law. He said that on arrival in Vava'u, at about 4am, they were met by two police officers who took him and Siale Fihaki to the police station to meet the chief inspector. The conversations were about the purpose of their proposed tour in Vava'u. From his evidence and that of the then chief inspector, Maile Pasili, the conversations seemed amicable enough. The chief inspector had one of the police officers bring them a cup of tea. At the end, he said, he told the chief inspector that if he was not satisfied, the group would be very happy to have two police officers with them everywhere they went. He said the chief inspector asked for a copy of their programme, and he gave him one. Nonetheless, he still felt at the end that the group had lost their rights under the Constitution, and he asked himself, what is the Ministry of Police doing, trying to stop the work they were doing for democracy.

All the witnesses were agreed, the group did travel after Vava'u to Ha'apai, there was no evidence of police presence there.

The statement was:

(e) In preparing their travel to Vava'u in April the Democracy Committee received from the Office of the Minister of Police a letter of warning and

threatened each one of them in connection with their proposed travel. The trip still proceeded to Vava'u notwithstanding that two police followed them everywhere they visited. The leaders also travelled to Ha'apai and 'Eua.

This is largely true, except for the claim that the three men were threatened. The letter alone and certainly the evidence of the witnesses, shows that it is not true to say that they were threatened. Without that reference the statement is bland enough in my view to be unexceptional. The addressees were warned to keep within the law. One of them invited the police to accompany them. There was to be a series of political campaign meetings with an element of political controversy. However, the false mention of threat is one of two factors that give the statement a defamatory character. The letter itself says that its purpose was to create an understanding, and was consistent with that purpose. There is no threat expressed or implied. The second factor is that the statement was said to be another example of how the plaintiff "continued to become the leader in the opposition and persecution of democracy and those who supported it" [or "continued to become the leader of opposition and persecution of the Pro-Democracy Movement and its supporters]. In both of those respects the statement is in my opinion false.

The next specific allegation, (g) above, is that in August the plaintiff, as a political action, prevented a journalist from entering Tonga to attend the annual general meeting of the Pacific Islands News Media Association. The essence of the comment is that the plaintiff exercised his power to achieve a political objective. In context, the claimed objective is clear, hindrance of the pro-democracy movement. The witnesses for the defendant gave no evidence in support of that claim, and the defendant relies on the weight of the circumstances.

The facts of the matter as stated in evidence by the plaintiff are that the journalist applied on 12 June 1996 for permission to enter Tonga for the purpose of attending the PINA convention. On 16 July 1996 the deputy police commander on his behalf had sent a reply. The reply, a copy of which was produced in evidence, stated that the application had been "carefully considered and declined". On 22 July the honorary secretary of the Commonwealth Press Union ("the CPU") had written to him expressing the concern and regret of the CPU that he had seen fit to deny the journalist a visa. He said the matter was, in their view, "very concerning from the point of view of press freedom and freedom of speech". He expressed the hope that the refusal "[would] not constitute what we would consider to be a dangerous precedent for press freedom in Tonga".

On 23 July the plaintiff had replied, at some length, and in his letter he spoke of events which commenced in October 1987 and extended to the previous Friday, 19 July 1996. These events, he said, "clearly establishe[d] that he possesses....very strong and irresponsible anti views against the Tongan Government and its leaders". He said that on receiving the visa application he had reviewed the case carefully and re-read the collection of newspaper clippings which contained the journalist's articles, some of which he said he had read before, together with correspondence about them. He said that since making the decision he had received submissions from PINA and had met its Tongan representative to discuss the case. He said the representative had expressed similar concerns to those of the honorary secretary. He concluded the letter by regretting he could not accede to the honorary secretary' request, saying:

> "There is no special law for journalists to impugn anyone at any time whenever they feel like it. They must act fairly and responsibly. Unfortunately Mr. Field does not fit this criteria and that's where we part company on the issue of a visa for him."

There was a difference of opinion between the plaintiff and PINA about the visa for the journalist, and the plaintiff's prevailed, because the decision was his. That, according to the evidence, is where the matter rested, until the defendant published the comments above about the matter. I shall set those comments out again here:

> (g) In August the Annual General Meeting of the Pacific Islands News Media Association (PINA) was held in Tonga and politics became an issue in its deliberations. The Minister of Police who is in charge of immigration had

stopped Mike Field a well known New Zealand news reporter from attending the conference.

It is clear that the plaintiff in his capacity of Minister in charge of immigration did refuse a visa to a journalist named Mike Field, and thus prevented him from attending the conference. The statement is prima facie true. The evidence did not reveal whether politics became an issue in the deliberations of the conference, and if so, whether that had any significance in the refusal of the visa. Read out of context the statement seems innocuous. Its context however gives it, and was intended to give it, an added meaning. The plaintiff pleaded that the comments complained of were calculated to or capable of carrying additional meanings or innuendoes, some of which he claimed were:

(i) that he is an unfair person and one not fit to hold office,

(ii) that he persecutes people particularly those who espouse democratic principles or believers thereof,

(v) that he is an evil person or corrupt,

(vii) that he is the cause of Tonga's bad image overseas and for the criticism of this country and its leaders.

The context included statements about the plaintiff such as:

(a) And it was the new Minister, Clive Edwards, who was in the forefront in leading the Government side in all the controversy and political persecutions of 1996; and

(j) In the political roundup of 1996 this year can be counted as the year with the biggest discord/controversy that has happened during the past 10 years. This has been caused by the strong attack by the Minister of Police and his supporters and this has resulted in increased and strong support for democracy. The happenings of 1996 has increased overseas attentions and criticism of Tonga and its present system of authority.

It seems to me that, in its context, the statement was indeed calculated to convey those pleaded innuendoes. In its facts it did not support those innuendoes. Therefore, in the final analysis it is untrue.

The next specific allegation, (h) above, related to September. The defendant in his article alleged that the plaintiff was the leader in persuading the Legislative assembly to put the two editors of Taimi 'o Tonga on trial, along with 'Akilisi Pohiva a member of the Legislative Assembly, for contempt of the Assembly. This was shown in the evidence to be a reference to the case in which the Legislative Assembly committed the three named persons to prison for contempt, which action was later reversed. Both Filokalafi 'Akau'ola and 'Akilisi Pohiva gave evidence about the events in the Legislative Assembly. Each answered the questions of counsel for the defendant and of the plaintiff in a controlled and objective way. Clearly both felt aggrieved at the treatment they had suffered, but it was not they who had claimed that it was the plaintiff who had been the leader in persuading the Legislative Assembly to do what it had done, and they did not claim that in evidence.

Evidence about what had occurred was given also by the plaintiff and by Fatai Hala'api'api, the chief clerk of the Legislative Assembly ("the Clerk of the House"). The latter witness told the Court that it was the Minister of Justice who had made the original complaint to the House. She said that the Minister of Police, who was also chair of the Standing Committee on Bills, or Law Committee, was asked by the House to formulate a procedure which could be used pursuant to Standing Orders and give the three persons a fair trial. She said that the Standing Committee worked on it and a procedure was put forward by the Minister of Police, and that the House approved the procedure which he formulated, but did not approve it for use in the case before them. She said it was 'Akilisi

Pohiva who had proposed that they do not use that procedure this time, and that the House had voted to agree, while making it part of Standing Orders, for use on future occasions.

The House proceedings then continued, and the witness stated that the Minister of Police had said that before any person is accused he should be given a chance to be interviewed, and asked questions, before the House made any decisions, that they should be given a fair trial before they were told they had done wrong. She said that the Minister of Police voted in favour of the motion that the three were liable for contempt. The witness said that after the vote had been taken on the motion to impeach the three persons, the Minister of Police had then stood and suggested to the house that, in justice, the three should be given a chance to state anything they disagreed with. She said the House did not agree, on a motion of the Minister of Justice. There was then a vote on the punishment to be inflicted, and there were two abstentions, the Minister of Police and one other.

'Akilisi's evidence was that first he had been given a chance to make his submissions, then the other two had been brought before the House and the questioning continued. He said when that was finished, all three were told to wait outside while the House deliberated. Then, at about 1am, the Clerk of the House came out and told them they were all guilty. He said that the Minister of Police and the Speaker drafted a letter telling them they were guilty and that there was a penalty. The penalty was 30 days' gaol. Filokalafi 'Akau'ola agreed in evidence that all three had been given a chance to say anything at all that they wished to say, and were asked questions, then all were told to wait outside while the House deliberated. He said that during the questioning there had been a dispute between the third accused, who is the defendant in the present case, and the Minister who is now plaintiff, about whether the summons to appear before the house had been served. He said the dispute seemed to him to become an argument.

That is the evidence. It is utterly lacking in support for the defendant's claim that the plaintiff had been the leader in persuading the House to try the defendant and the other two persons for contempt. The defendant's claim is not true.

The next allegation complained of is as follows:

> (i) In the early part of November the police imprisoned Teisina Fuko and 'Akilisi Pohiva as a result of statements they made and appeared in the Taimi 'o Tonga and Kele'a. They were accused of sedition because of statements they made that the King should release his power to the people.

Teisina Fuko and 'Akilisi Pohiva were questioned about 15 November by the police in relation to certain statements said to have been made about the safety of His Majesty the King. 'Akilisi Pohiva gave evidence about what had occurred. 'Akilisi said that one day in the early part of November about 7 or 8pm two police officers came to his home and took him to the police station to be interviewed. He was interviewed and put in gaol for the night. He said that the interview was about his response in Kele'a to remarks made by His Majesty about himself and the representatives of the people. He said that the police allegations were that he had defamed His Majesty, and another he could not recall. He said he was kept in custody till between 4pm and 5pm the following day. He said he had not appeared in court over this allegation and felt there was great injustice in what had happened. He said he had read to the police from his article and that there was nothing wrong in it. He said he thought his fundamental rights had been protected by the Constitution, but had been violated.

Teisina Fuko did not give evidence. The plaintiff adduced evidence from 'Eleni 'Aho, who was at the time deputy police commander. She said that there had been statements by the two men, which she thought bordered on sedition because they were about the King. She said she referred the matter to the Attorney-General, and on his advice she had the two men brought for questioning on their statements, to determine whether their intention had been seditious or not. She said she thought the statements were seditious, but that under the law it was for the Attorney-General to decide what to do. She said she sought his instruction and that was what he directed. She said she instructed Chief

Superintendent Faletau to carry out the operation and heard nothing about what had happened after that, because she had left Tonga in the December, returning at the beginning of 1998.

Taniela Faletau now deputy police commander gave evidence that he had conducted the investigation with other police officers. He said statements were taken from the two men at the police station on the night of 15 November and that the men were released the following day. He said the file was then sent to the previous witness for transmission to the Attorney-General's office for charges to be laid. He pointed out that such charges were the Attorney-General's responsibility under the Defamation Act.

In cross-examination this witness said the two men were brought in for the purpose of confirming the police suspicions, and to carry out police duties and to take their statements. He did not have any opinion on whether they could have made their statements at home, and he said the men were never arrested, only detained for a period less than the 24 hours, which he said the law allowed. In re-examination he said that until the two were questioned, the police did not know whether it had been they who had made the statements.

The plaintiff for his part made it plain that allegations of seditious behaviour were outside his jurisdiction, and that he took no part in fact in the decision to question the two suspects, nor in the questioning, nor in any decision to seek their remand in custody for questioning. These matters he said are by law the exclusive province of the Minister of Justice and Attorney-General.

The relevant provision in the Defamation Act cap 33 is s8, which provides that all criminal proceedings under ss3,4,5 or 6 of that Act shall be at the instance of the Attorney-General, who, if the accused is committed for trial in the Supreme Court, must prosecute in person or through his deputy. The matters which the police were investigating were, as 'Akilisi said in evidence, allegations of defamation of the King. They were proceedings under s3 et seq, and were thus under the control of the Attorney-General. Such allegations are serious, although a balanced view would take into account the maximum penalty, which is a fine of $2000. Only in default of payment can the Court sentence to imprisonment. That being so, it is difficult to see any role for the plaintiff to play. It is just as difficult to find any justification at all for the police action in keeping the two men in custody overnight and through the following day. Nothing substantial eventuated about sedition charges. The police need good cause for keeping in custody citizens whose freedom is guaranteed by the Constitution. If they detain without good cause, they act unlawfully. On the evidence that I heard it was not necessary to detain these men in order to question them. In any event, once their statements had been taken there was on this evidence no cause to detain them. 'Akilisi Pohiva's complaint about injustice and breach of his constitutional rights seems on the evidence well founded.

But what part did the plaintiff play in that? On the evidence, clearly none. Did the defendant claim that he had played a part? Not directly, although clearly he inferred that the plaintiff, as Minister, was responsible. On the evidence, I should hesitate to find the defendant justified in that assertion. The Minister must take responsibility for the acts of his departmental officers, because that is what the Constitution cap 2 provides at s 52. The plaintiff said in evidence that he accepts that responsibility. But to justify asserting in the context created by the article that the plaintiff was responsible for the unjustified detention of these two men, the defendant must show that he was personally responsible. There is no evidence that he was directly involved, or even personally aware of what the police officers conducting the investigation were doing in the investigation.

In respect of this part of the article, I find, again, that the evidence of the facts does not support the defendant's claim. I find that the claim is untrue.

In addition to those seven specific, time-related allegations, there were in the article another three, (a) (f) and (j) above. There is also the general comment in the second part of (b), to which I have not yet referred. The first three are general allegations that the plaintiff was at the forefront on the government side in all the controversy and political persecutions of 1996, that he clearly had the principal work objective of stopping democracy and the Taimi 'o Tonga, and that the strong attack by

the plaintiff and his supporters had caused (inter alia) the biggest discord of the previous 10 years. The last was that the plaintiff was the leader in the opposition to and persecution of democracy.

Some of the witnesses for the defendant were asked in cross-examination to elaborate on the words "the government side", and to say in what respect there was a government side. Filini Sikuea in particular was adamant that there is a government side. He identified it, as noted above, as being the King the Ministers and the Nobles. Some of these witnesses also were asked to identify who were the plaintiff's supporters on the government side, but were not able to be specific. Of the defendant's witnesses, it was Filini Sikuea who came closest to expressing the views that were expressed in the defendant's article. During the exchanges between this witness and the plaintiff I observed deep passion in the witness about the topics in the article. He said he saw his detention in police custody, even when sanctioned by the Magistrates' Court, as political. He said his acquittal on the angering charge after his appeal was political.

It needs to be said, however, that all the witnesses even including the assistant editor Filokalafi 'Akau'ola, were witnesses independent of the acts and words complained of by the plaintiff. Although they were giving evidence on the defendant's behalf, they were called as witnesses primarily to give balance to the evidence of fact given by the plaintiff's witnesses. It was not they who wrote the words complained of. It is not they who have to defend them, or justify them. They were not called as witnesses to adopt or to justify what the defendant had said. Each of them, it seems, was courageously prepared to do so, and under cross-examination to attempt to justify the words complained of as being reasonable opinion based on truly stated facts. However, their evidence is relevant primarily for the parts they played in the events that were the subject of the defendant's article.

Insofar as their evidence is relevant to the general allegations (a) (f) (j) and (b), none of them had anything specific to tell the court which could help factually justify those allegations. Some of those witnesses repeated those allegations, and seem to believe them, but I can find in their evidence no events, no acts of the plaintiff and no factual reasons by which the court or any reasonable person should conclude that they are true in fact.

As for the effect of the published words on the plaintiff's reputation, six witnesses gave evidence. They were Pohiva Tu'i'onetoa, Lola Baker Koloamatangi, Sione Liava'a, 'Etuati Tatola, Steven Clayton Edwards and 'Ulafala Solasi.

Pohiva Tu'i'onetoa, who was Auditor-General from 1983, and is presently Acting Auditor-General, gave evidence that he had known the plaintiff very well for many years, both in New Zealand and in Tonga. He said he had known him as a good lawyer, and had referred cases to him. He said he and others had trusted him as a lawyer. He said he read the article in the Taimi shortly after it was published. He said he did not like the procedures that the paper reported the plaintiff had adopted, and felt hatred towards him from that time till the present. He said that the article had changed his thinking about the plaintiff. He said his grandfather had been sent from Tonga as a result of persecution, and the thought of persecution made him fear that the same things might happen again. He believed now that members of the public who had committed no offences had been persecuted, and that the plaintiff was dangerous and should resign.

The second of these witnesses is the staff officer to the Minister. It was her evidence that the reply by the defendant on 7 January 1997 was received on the fax machine in the Minister's office. One of the staff brought it to her, open as they always were, and she read it before taking it in to the Minister. She said that her trust in the Minister as head of department was affected and influenced, particularly by a part of the letter in the second paragraph. That paragraph is the one set out above, as (k). She said that ranking and discipline are very strong in the police force, and these words did influence her thinking about the Minister. Asked in cross-examination about the way she had been influenced, she replied that she still trusts the Minister but the degree of her trust has been influenced and affected, particularly by the above words. I am not sure what the witness meant by this.

Sione Liava'a is a former high-ranking civil servant who retired when elected as a people's representative in the Legislative Assembly in 1993. He gave evidence in detail of the effect that the defendant's article had upon him. He said he has no proof of what is in the article, but he believes it, and he believes the Minister is not doing his duties well towards the public because he in enslaving them, taking their rights and freedom. He said that he is particularly upset that it is the Minister's objective to stop the public from joining and believing in democracy. He said that such a person as the one described is of the nature of a dictator, and not suitable to be a Minister of Police, because that official has the constitutional power which is meant to uphold the peace and order of the public.

He said he had known the plaintiff for some time, both in Tonga and in New Zealand. He had been very happy when the King appointed him Minister of Police. He had known him as a good and loving man, and had felt he was the proper person to hold that office. He said that after reading the article, he had heard with his own ears some of the public stating their hatred toward Clive Edwards, and saying they did not like him because of what they had heard of him at kava parties and similar gatherings. He said that what he had been told by these people is that they hate the Minister of police because they believe the article which was in the Taimi. He said that it is so unfortunate now that his belief and trust in this Minister have been influenced because now he knows that the Minister has a dangerous nature he said he now lives in fright of this dangerous person, because "these things have happened in other parts of the world". Cross-examined about these statements, he said he does not feel he can interfere or tell the Minister he does not agree with what he is said to be doing. He said he leaves it for the man himself to solve the situation in his own thinking. He said that unless matters are proved to be otherwise than what he believes he thinks that this person should not be a Minister. It is not for him to remove him, he said, because the matter will determine itself.

'Etuati Tatola is a former town officer and district officer. He said that he had known "Nettie", the plaintiff, well since 1958. He said he knew him when he returned from school in New Zealand, and when Nettie returned as a lawyer he gave him a case. He said he had known him as a very good person, trustworthy and hard working. He said he was very disappointed to read that he had stopped a senior journalist from coming to Tonga, and that he had been persecuting the work of the Taimi, which was a newspaper he sold in his shop, and loved to read. What was stated in the Taimi he said had made him very upset, and after reading it he had been inclined to lose his confidence in the man. He felt the things alleged against him were very bad, particularly that he took away people's rights. He said that he was upset to learn form the article that the plaintiff had imprisoned Vaha'akolo from his village, his cousin and his neighbour. This to him was bad news. Cross-examined, he said that for most of 1996 he was overseas, and he now has doubts in his heart, whether the plaintiff is suitable to be Minister, and these doubts are from what he read in the article. He said that he now understands after reading the article, that there is a side working with the people who wrote that article, which is known as the democratic side. This side he thinks includes the workers of the Taimi and the No I people's representative for Tongatapu, 'Akilisi Pohiva. He believes now that, in accordance with the article, the plaintiff should be dismissed.

Steven Clayton Edwards is the younger brother of the plaintiff. He said that he read the article with disbelief, but did nothing because he believed his brother could handle it in his own way, until members of the family called him. They, he said, expressed anger and disbelief. He said his sister called to see if he could tell them whether it was true or not. He said in evidence that he could not believe that his brother had done what was said, because of their association in New Zealand when his brother was fighting for individual rights as well as human rights, particularly on the issue of overstayers in New Zealand. He said that at the end of January 1996 their eldest sister and eldest brother asked him to arrange a meeting of the family in New Zealand, where most of the family live, with their children. The main topic was what they had all read in the Taimi. At the end it was left to him to see if the article was correct, and if it were, he was to ask the plaintiff to resign as the Minister, because the faith that had been put in him had "become negative to what it should have been". He said that the family members at the meeting were angry. They did not know if the article was true or not, but they thought it could not have been written if it were not true, and if it was true then there should be action taken. In cross-examination he said that he felt sadness and disbelief because this was not the man he knew. He said the plaintiff had been a lawyer in New Zealand and a city councillor, and, at the request of the King, had set up a society in New Zealand for Tongans in

New Zealand, to further the vision of Queen Salote. He said the family had been very proud of that, and wanted to know if these new allegations were true.

'Ulafala Solasi is a town officer. He said he had read the article, and it seemed to him from what he read that Clive Edwards is not a god man. He said that in his opinion if the Minister of Police is persecuting people, making police resign if they are pro-democracy and imprisoning Teisina Fuko and others, then he is not doing his duty to uphold the law. He said the Minister should be taking such people to the court to settle things, and that he does not trust him any more.

The bona fides of each of these witnesses was fully tested in cross-examination. From the evidence of these witnesses, I am bound to find that there has been detriment caused to the plaintiff, first in the eyes of some members of the public, and second in the eyes of his extended family. All of these witnesses expressed to a greater or lesser degree a measure of substantial doubt about the plaintiff's fitness for holding the office of Minister of Police and fitness for dealing with the activities of the people represented by the defendant's witnesses. I find that a substantial cause of these doubts is the article published by the defendant.

I find from the evidence that the assertions of fact about the plaintiff in the article are by their nature defamatory, and intended to be so. I find that they are not shown by the defendant either in the article or in evidence to be true.

After reading the pleadings, the article, and the correspondence between the plaintiff and the defendant, and after hearing the evidence that the parties put before me, my clear impression is as follows. The defendant in his correspondence and in his article and in his statement of defence passionately expresses a political point of view, namely that Tonga should adopt a democratic form of government. From reasoning about police actions in respect of people who support him and his newspaper in that view, he concluded that the plaintiff set himself to obstruct the achievement of the defendant's political goal. The evidence for his reasoning he has set out in those writings. Unfortunately for both him and for the plaintiff, the facts, as they appear in the evidence put before me, do not justify his expressed beliefs about the plaintiff.

The defendant in the things he has written, referred to above, and at least one of the witnesses Mr Sikuea, expressed a strong belief that the plaintiff was an implacable opponent of the democracy movement and of the Taimi. I am required by the pleadings to find whether or not that is so. So far as the evidence before me discloses, some of the actions criticised by the defendant were not actions of the plaintiff, and the actions of the plaintiff which the defendant claimed were in opposition to the efforts of the pro-democracy movement were actions directed at enforcing public order.

THE SUBMISSIONS

In the face of substantial failure by the witnesses to provide evidence that supported the positive assertions of fact in both the article and the statement of defence, Mr Tu'utafaiva based his case on the defendant's pleadings. In his strong submission, the plaintiff had failed to prove his claims.

He took as his authority the judgment of Webster J in this court in *Manu & Haidas v The Editors of the Tonga Chronicle*, reported at [1990] TLR 7. He submitted that the first issue is whether the words used were defamatory, and suggested that the plaintiff was unfair in claiming seven separate possible meanings. Having done so, he submitted, the plaintiff is now required to prove all seven to establish his case. He submitted that the standard for judgment is that of the ordinary man, and suggested that the six witnesses who gave evidence of having taken prejudicial meanings from the article were not representative. In his submission, these witnesses are awaiting the outcome of this case before making up their minds about the plaintiff, and did not prove damage to his character or reputation. He submitted that the words used must be given their ordinary meanings.

Mr Tu'utafaiva referred to the judgment in *Manu* at p 10, and stated the question, are the words true? This, he said is the defendant's defence. He submitted that the plaintiff relies on a lack of evidence from the defendant tending to show that the article is the truth. In his submission however

the whole of the evidence shows that it is true in material particulars. This in his submission is sufficient at law to justify judgment in the defendant's favour. He analysed each of the defendant's allegations in turn and argued that the evidence showed each was substantially true if carefully considered.

From this analysis, Mr Tu'utafaiva concluded that the whole article itself, considered in toto, was thus substantially true. On that footing, he submitted that the two positive defences of fair comment and justification are open to the defendant.

He placed some weight on a submission that the plaintiff in his letterhead supplied the fax number, which the defendant had used to send the reply that was read by at least one police officer. In his submission it is not open to the plaintiff to complain about publication, or to seek exemplary damages, since in fact he invited a public form of reply. I should deal with this submission now. It must fail in my view for the reason advanced by the plaintiff - the defendant was welcome to communicate by any public means he chose, but if he chose to reply in defamatory terms then the use of a public means was at his peril.

In respect of quantum of damages, Mr Tu'utafaiva submitted, again on the authority of *Manu*, that damages at best could be assessed only to compensate proved injury, and only for injury suffered by the plaintiff. Finally in his submission, the damages must be measured against the plaintiff's own conduct.

The submission of the plaintiff was that the whole case has been confined in a narrow factual area. His complaint is about the statements of the defendant that he has set out in paragraphs 7 and 14 of the statement of claim. The defendant, he points out, pleads, at paragraphs 22 and 26 of the statement of defence, that these statements are true, then at paragraph 27 goes further, and in paragraph 27 makes new abrasive defamatory assertions which, at the end of the hearing, remain unproved. He submitted that at the hearing there was no attempt to prove them. About the two affirmative defences pleaded, his submission was that they are simple assertions, made without qualification and not proved by any evidence. The statement of defence in his submission, rather than state defences, stated accusations.

In his submission, all of the statements complained of in the published article and in the fax to his office, and the new unproved assertions in the statement of defence constitute an attack upon a holder of a sensitive office, which has had its bad effect as witnesses showed. In his submission it hinders the administration of the police role in society, and amounts to intimidation through the press, which has the effect of putting the police off their legitimate work. This action in his submission provokes hatred distrust and fear of those who hold office; it has had that effect in his case, he submits, because the role of the police is unpleasant and unpopular.

His summary of the plaintiff's case was that he has shown he is not what the defendant has said he is, and that he should not be recorded for history as a persecutor. A persecutor in his submission is a person who acts with hate against another without regard to that person's rights in order to quash them. He submits that the defendant has claimed that, and is shown to have claimed it wrongly, and has not succeeded in proving that it was right. Further, he submits, the defendant has nonetheless continued to assert positively that his claims are true, and compounded his error by making that further positive assertion, which also he has failed to prove. The defendant confounds his error even further, in the plaintiff's submission, by asserting that he will not change. There is, in his summary, no evidence adduced to show that he is a political persecutor but there is ample evidence that this unfounded assertion has harmed his reputation.

The plaintiff relies on s16 of the Defamation Act cap 33, which provides that in the circumstances of this case it is not necessary for him to prove special damages, in the form of monetary or other actual loss. In respect of his claim in general damages however, he submitted that actual damage to his reputation, and actual exposure to hatred, contempt or ridicule have been proved. He submitted that the damages claim of $100,000, is conservative, put forward as a reasonable amount in the circumstances and not an amount inflated in the hope that a satisfactory portion will be awarded.

The claim for exemplary damages at $40,000 is, in his submission well supported by the defendant's defence, which is to admit all the allegations, claim they are true, fail to prove that, and not only persist nonetheless till the end of the hearing but continue to refuse any retraction.

In respect of the two pleaded special defences, fair comment and justification, he submitted that both are affirmative defences, depending on proof which has not come forward. Both in his submission are pleaded without foundation and must fail.

DECISION

Neither party wished me to take account of recent overseas developments in the law of defamation of public officials. The plaintiff says the issues are simple and factual, the defendant agrees and both rely on the principles in the Defamation Act cap 33. For application of the principles, the defendant refers me to *Manu's* case (above). I am aware of the decision of the New Zealand Court of Appeal in *Lange v Atkinson* (unreported, Court of Appeal, CA52/97, 25 May 1998), and of the English Court of Appeal in *Reynolds v Times Newspapers* (unreported, Court of Appeal(Civil Division) 97/0149 and 1752/1, 8 July 1998). I have also generally in mind other cases of political comment such as *Stephens & Ors v West Australian Newspapers Ltd* HC of A 1993-1994, 182 CLR 211, *Theophanous v The Herald & Weekly Times Ltd & Anor* HC of A 1993-1994 183 CLR 106. It is not necessary to refer to these cases, but at some future time the Court may be invited to consider what application they may have, if any, in the unique context of the Tongan political system.

For present purposes the guidance of *Manu's* case is sufficient for the parties, and is adopted by the Court. I have had recourse also for general guidance to *Kingdom of Tonga and Editor of the Chronicle v Mataele* [1974-1980] TLR 34. That 1978 decision of the Privy Council has some background similarity to the present case.

There are also parts of the Act, cap 33, which have to be taken into account in assessing the defences. The first of these is s2, which defines defamation (in well known terms that I do not set out). The next is s14, which provides that if defamatory matter is true, that is a complete defence.

The Defamation Act cap 33 is not a complete code for Tonga, that excludes the application of other principles not expressly provided in the Act. I have had recourse also to *Halsbury*, 4th ed., Vol. 28, Libel and Slander, particularly #16 Falsity and Malice, #18 Damages in Libel and #20 & 55 on disparaging official and professional reputation.

The defendant did not plead or argue that the words complained of are not defamatory. The defence is that they were true. For consideration of the elements of the case, I shall apply to the pleadings in the present case and to the Defamation Act the approach that the Court adopted in *Manu's* case.

(1) Are the words complained of defamatory? This means, in terms of s2 and the statement of claim, do they damage the plaintiff's reputation or expose him to hatred contempt or ridicule, or cause him to be shunned? The pleadings do not raise this as an issue. I think the evidence answers the question. The plaintiff is the Minister of Police. The mood of the times was, according to the evidence, a mood of tension between some advocates of political action and the police force. In that environment the description of the plaintiff as being "....in the forefront in leading the government side in all the controversy and political persecutions of 1996" was likely to expose him to hatred and contempt. To say that the plaintiff, as one of his first acts after appointment, notified his department that any police officer who is a democrat must resign, and thereafter continued to be the leader in the persecution of democracy exposed him to hatred and contempt. His reputation among members of the public, whom the defendant was addressing, depended to a degree on what was publicly said about him. People must have relied upon these words and the rest of the article for forming their view of the relatively new Minister of Police in January 1997. The article and all the other published words complained of potentially have all three of the effects in the definition. According to the evidence they have had the effects of damaging his reputation with the

public and in the police force and in his extended family. According to the evidence they have also had the effect of exposing him to hatred and contempt.

(2) In case I am wrong in this, because the plaintiff has pleaded innuendo, was there additionally or alternatively an innuendo, i.e. a secondary meaning as pleaded by the plaintiff depending on special facts and circumstances extrinsic to the words, or relating to a special meaning? The plaintiff pleaded seven particular innuendoes. The law as to innuendo is set out in *Mataele's* case (above) at pp37-38. I find without difficulty that, in the particular factual context of this case, all of the pleaded innuendoes existed as secondary meanings of the words of the article, and of the fax, and of the statement of defence.

(3) Are the words complained of true? It is not necessary for the plaintiff to establish falsity (or malice). Since I have found the words defamatory, the law presumes they are false and it is for the defendant to prove they are true. From the evidence I find that the defendant has failed, almost entirely, to show that the words he used were true, in their ordinary meanings, and I find that he has failed entirely to show that the words are true in their pleaded secondary meanings. In their primary and secondary meanings they, almost entirely, state as facts matters that are proven not to be facts or state conclusions that are not based on the facts.

As for malice, the malice pleaded by the plaintiff is presumed also by the law from the fact of publication of defamatory words. Express malice has not been pleaded and the plaintiff has not sought to prove it.

(4) Was the publication true and justified in the public interest? I have found that the words published were not true, therefore no finding that they are in the public interest is possible. Inasmuch as they were not true and damaged the plaintiff's reputation and exposed the plaintiff in his public office to hatred and contempt, they were contrary to the public interest.

(5) Was the publication fair comment? This defence was considered in *Mataele's* case (above) at pp38-39. For the defence to succeed, the words published must be comment, not assertion of fact. Then they must comply with s 12 of cap 33, i.e. they must be (i) published without malice, and (ii) be in a periodical published at intervals not exceeding one month, and (iii) be comment upon facts truly stated. As well, (iv) the defendant must show that he did not fail or neglect to comply with a request, if made, to publish a contradiction or explanation. It was for the defendant to establish the facts upon which this defence must rest. I have not been told the publication interval of the Taimi, and I have not been given any evidence directed to negating malice. The statements I have found to be generally not true, and it is an uncontested fact that the defendant refused to publish a contradiction or explanation. I have no hesitation in holding that this defence fails to meet those criteria.

The defences are (1) that the statements made are true in fact, and, alternatively, (2) that the publication complained of, read as a whole, is a fair comment based on true facts on a matter of public interest and made without malice, and (3) that the statements complained of are true and justified in the public interest. Each of these defences amounts to a plea of justification, and it was for the defendant to establish justification. I am bound by my findings of fact to hold that none of these defences has found support in the evidence. Each of them fails.

I am bound by my findings of fact to hold that the plaintiff has established his claims in liability.

I turn now to the issues of damages. I have considered the submissions of the parties that I have set out above. In my opinion, the defamatory statements of the defendant have had, as they were intended, a substantial detrimental effect on the reputation of the plaintiff, and on his standing in his public office. That in itself has had wider effects. To the extent that he has been exposed to hatred and contempt in the eyes of the public, his effectiveness in his occupation as Minister of Police has been reduced. This can only have been to the detriment of the citizens of the Kingdom generally. The publication caused as well, an element of doubt about his reputation among some members of

his wider family. However, in considering those wider implications, I must take a restrictive view, being careful to see that it is only injury suffered by the plaintiff that may be solaced by damages in these proceedings.

A good reputation is a right, and therefore once an unjustified defamation has been proved, general damage to reputation is presumed. The amount of an award in general damages is "at large", and depends on what damage a plaintiff proves, and is an assessment of fact. Such award is intended to compensate a plaintiff for the injury to his reputation and the hurt to his feelings, as well as social disadvantages that have resulted or may be thought likely to result. aggravating factors, such as high-handed, oppressive, insulting or contumelious behaviour that increases the mental pain and suffering caused by the defamation can be taken into account. If so, that element of an award may be called aggravated damages, but these are included in the award in general damages. Exemplary damages, such claimed separately in the present case, introduce the element of punishment of the defendant, which is otherwise not present in a damages award. Damages of this kind are generally not available in defamation unless the defendant has cynically published a statement knowing it to be untrue, or not caring, with the object of making a profit greater than whatever damages might be awarded to the person defamed. Thus, in the present case, there is no evidence on which to base an award in exemplary damages. All of the damages sought by the plaintiff, although claimed under two heads are claimable only under the one head of general damages, with aggravated damages included and taken into account.

The reputation injury for which damages may be awarded must be injury to the plaintiff's own personal reputation. This includes his reputation as a public official, and a plaintiff may recover damages if defamation is proved to have disparaged him in his profession or public office. Such a defamation is actionable per se if the words were published of the plaintiff, as they were in the present case, in the way of his public office and in relation to his conduct in and imputed unfitness for that office.

The effects on his reputation among the public are serious in my view and merit a serious award in general damages. The events and the damage caused are in the public arena, and that factor seems to me to make a substantial award appropriate, rather than a nominal award. The plaintiff's good reputation is of importance to him not only personally but also in the conduct of his office. The plaintiff has urged me to accept $100,000 as the realistic yardstick, and not as a notional outer limit. He has submitted that an award at that level is realistic in view of the damage done. The defendant has advanced no information about his ability to pay any damages. Neither party gave me examples of awards made in other defamation cases in Tonga. It is difficult to be precise, but the amount must be sufficient to solace a substantial injury to the reputation of a pivotal public official. I must take into account the damage to reputation ,itself, the hurt to feelings, the damage to the public confidence and the reduction that may have resulted from that in the plaintiff's ability to carry out his public function. The $100,000 claimed seems very high in the Tongan context. The defendant however appears to live work and earn his income in New Zealand. The amount I fix in general damages is $25,000.

In the present case, the plaintiff has argued for exemplary damages. Exemplary damages are not available to him, but aggravated damages are. He submitted that after inflicting the injury to his reputation, the defendant went further. In particular, he submitted that when he protested to the defendant, the defendant replied, and published his reply by faxing it, that he would not accept the plaintiff's rebuke, and would not change. Then after that, when the plaintiff commenced proceedings, he submitted, the defendant compounded the error of his actions by including not only his false allegations in his pleadings, but also fresh public accusations of the type complained of. Then, the plaintiff submitted, he failed to bring evidence directed at proving either the original allegations or the fresh accusations.

On this topic, Mr Tu'utafaiva made no submissions. I am inclined to accept fully the validity of the plaintiff's submissions. To use the pleadings of the statement of defence as merely another platform for continued unfounded criticism of the plaintiff was to compound the defamation. To go to trial without evidence in support of those criticisms does indeed turn a defendant's actions into

contumelious conduct. Passionate the defendant's view may be, but unless he has or knows he can obtain evidence supporting his pleadings of fact, to include them in his pleadings is to aggravate the injury. What is pleaded not only becomes the material for the Court's considerations, it becomes also public property. Pleadings are not a platform. The allegations in a statement of defence (i) should be intended for proof and are taken into consideration as such by the Court, (ii) are themselves published as soon as filed, and (iii) require a plaintiff to prepare a case to meet them. The defendant's action in filing the particular pleadings set out above and in not being able to prove them, in my view merits an award of aggravated damages.

I take into account those considerations, along with the publication by the defendant of his faxed contumelious refusal to compromise. The award of aggravated damages that reflects the seriousness of the aggravation should be substantial, but not as high as the $40,000 that the plaintiff has claimed. I fix the amount at $15,000.

The plaintiff sought costs. Costs are awarded to the plaintiff. If not agreed, they are to be taxed pursuant to O29 of the Supreme Court Rules.

NUKU'ALOFA: 4th February 1999

JUDGE