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

NO.C.1045/99

BETWEEN : *LESINI TONGA a minor,*
(and MALIANA LAUMAPE as next friend)
- *Plaintiffs;*

AND : *1. MINISTRY OF POLICE*
2. KINGDOM OF TONGA
- *Defendants.*

BEFORE THE HON JUSTICE FINNIGAN

Counsel: Mr Fifita for Plaintiff, Mr Pouono for Defendant

Dates of Hearing: 14,15 & 16 February 2000

Date of Judgment: 28 April 2000

JUDGMENT OF FINNIGAN, J

This is a claim for damages brought on behalf of a youth who claims to have been beaten by a police officer during a police enquiry. The plaintiff is said to have been 13 years old at the time of the alleged events, though he said in evidence that he was born in September 1984.

The plaintiff himself gave evidence along with another youth who was apprehended with him, as well as the person who had reported the two to the police as suspects, the plaintiff's guardian and a police officer. The police officer gave formal evidence producing the police station diary that covers the period in question. For the defendants, there was one witness, the police officer against whom the claims are made.

THE EVIDENCE, AND THE FACTS

The following findings are drawn from the evidence of all six witnesses and from the station diary. The events began with an alleged burglary and money theft in a house at Pea. The witness Fale'aka Vao reported this to a police officer who lived at Pea and he passed it on. The complaint was noted at about midnight in the diary of the central police station. The plaintiff and the other youth were suspected because of what some other children had told Fale'aka Vao, and when a police officer from the central station arrived to investigate she named the two youths.

The officer was Vilisoni Finau. He had worked the previous day from 8.30am till 4.30pm, then had returned to work at 6pm. He was still working when the complaint was recorded and at 12.05am went in a police car to Pea. He says he was the only officer in the station with an available police vehicle. According to the diary, in which the times have been altered, he was back 10 minutes later with two persons said to have been arrested in relation to the complaint.

At Pea, he met the policeman who lived there, and who had received the complaint. The policeman told him some children claimed to have seen the plaintiff and another by Fale'aka Vao's house, and that the other one ("Langoia") had told him the plaintiff had gone into the house. He also interviewed Fale'aka Vao, to ask her what she wanted done. He arrested the plaintiff for housebreaking and theft. The plaintiff denied the allegations and Finau said he asked Langoia to come to the station to make a statement. Langoia thought he had been arrested.

There is a conflict about what occurred on the way to the police station. The plaintiff's evidence was that Vilisoni said they were going to Veitongo and that by the time they got there the plaintiff would have to admit that it was he who committed the theft. On the way, he said he was in the front with Vilisoni, who was hitting him, about 50 times, sometimes with both hands and sometimes with one while the other held the steering wheel. Langoia he said was in the back with another officer. As I understand the plaintiff's evidence, he said Vilisoni put the plaintiff's head on the gear lever of the car and hit him on the back and the back of the head. They stopped at Veitongo and this continued, outside a mini market there. He said that after this they went back to Fale'aka Vao's house, and Vilisoni told her to come to the central police station. He said that when they reached the central station Vilisoni told him to roll up the car window and that while he was doing that Vilisoni hit him on the back of the head. Then they parked in the station parking area and as he got out of the car he said Vilisoni again hit him on the back of the head, so that he fell down and was unconscious.

Some of this was put to Vilisoni in cross-examination, and denied. Some of it was not referred to in his evidence. To the allegation that he beat the plaintiff while driving, he responded with a question, he said how could he do that, he might cause an accident, his hands were busy driving. Otherwise he told an account of a routine police operation.

The evidence of Langoia was generally the same as the plaintiff's, except that he added an appearance by Fale'aka Vao in the police station parking area. He said that she arrived there a short time after they did. He said it was while she was there that Vilisoni struck the plaintiff on the back of the head and the plaintiff fell down.

Fale'aka Vao was at the police station at about this time, because Vilisoni gave evidence that she was, and she made a statement of her complaint at 12.30am. It was written down and she signed it. A copy of it was produced as Exhibit 1.

Fale'aka Vao gave evidence but was not asked about events in the carpark. From her presence in the station at 12.30am and from the evidence of both youths that Vilisoni had asked her to come, I accept it as proved on the balance of probabilities that she had been asked by Vilisoni to come

to the station, and was present in the carpark. It seems reasonable to conclude that, if the plaintiff is telling the truth, he was not aware of her presence there.

This witness gave no evidence about any events up to the present point in the narrative, only about those inside the police station. I have to decide what occurred up to the present point on the evidence of the plaintiff, Langoia and Vilisoni. There is some corroboration of Langoia's account in that Fale'aka Vao was independently shown to be in the vicinity at the time when he said she was in the parking area.

From my observation of the witnesses and consideration of their evidence, I am sure beyond the balance of probabilities that the blow was delivered in the parking area as described by both youths. I am sure also that there was a deviation to Veitongo, after which the police officer returned to tell Fale'aka Vao to go to the central police station. I accept the plaintiff's account of being hit while his head was at or on the gear lever at Veitongo outside the mini market there. I was at first reluctant to accept this, and the plaintiff's account of about 50 hits on the sector between Pea and Veitongo. However, I was not impressed by the police officer's flat denial of the driving incidents and the mini market incident was not denied. I accept the plaintiff's evidence, and it is supported by the account of Langoia, which I accept.

I turn to the events inside the station. The evidence of Fale'aka Vao is crucial to resolution of the conflict about what occurred. Primarily, she was a reluctant witness. She gave her occupation as domestic work. On the day when she was to appear on summons to give evidence she went to plaintiff's counsel with a government sick leave certificate which stated that she was unfit for duty for three days with a cellulite disorder. The hearing was adjourned so that she could be informed that the court would take her evidence the following day at her home, with notice to be given in Form 16 of the Schedule to the Magistrates' Courts Act cap 11. The following day she appeared in the courtroom, and gave evidence. She was evasive from the outset, saying that she did not remember much. She said the police at the police station questioned her. She then said that the only thing she knew was that the two youths had been brought down from upstairs to apologise to her. This was later, and I shall return to that. She then remembered that a police officer told the plaintiff to tell the truth and not change his mind because the police officer might beat him. She then remembered that she saw a police officer with a stick but said she would not call what the police officer did to the plaintiff an assault. She added that the plaintiff was only pushed with that stick by the police officer and was told by the officer to tell the truth. She added further that she didn't see any beating, maybe that had been done upstairs.

At this point in her evidence I declined counsel's application to declare her hostile, but I allowed him to put some of her previous statements to her, all of which she accepted. She agreed that she had been at the court for Langoia's case [C1236/99, judgment delivered 25 February 1999]. She agreed that she had said to counsel he was wasting her time because she had seen no assault on Langoia, all she had seen was an assault with a bar on the plaintiff. Having agreed with that, she went on to say that she would not call what the police officer did to the plaintiff an assault, demonstrating as she said so a backhand movement with her right arm, and a prodding motion. She said that in that fashion the officer had waved a stick or a bar, she could not remember, and that "these officers" hit the plaintiff with this object, telling him to tell the truth, and that this

occurred at 4 o'clock in the morning. She said she has since found out that this can be an assault. She said that this occurred downstairs in the police station, she was not aware of anything upstairs. She agreed that she was angry with the plaintiff and that she had told counsel that Vilisoni had already been punished for the assault. I shall refer to that later.

She said she returned home about 4am. Perhaps she returned, for the station diary records that at 6:15 am she lodged her complaint for housebreaking and theft.

About this complaint to the police, she said in cross-examination that when she was being served with a summons to give evidence in the police case she told the police officer to withdraw the charge. This she said was because she had forgiven the two kids and felt kindness toward them, and as well the case was wasting too much of her time. Her evidence shows that she did not in fact have the grounds to be their accuser in the first place. She herself knew nothing of what had occurred.

On entry to the downstairs station office, both the plaintiff and Langoia stated, Vilisoni lifted the plaintiff off the floor then dropped him, after which he lifted a chair. The plaintiff said he was certain Vilisoni was going to hit him with it until another police officer stopped him. Both youths said the other officer told Vilisoni that he should not break the plaintiff's bones. The plaintiff said he was taken into another room of the main office where he was sat on a chair and struck by Vilisoni across the back with a piece of wood. He demonstrated a length of 18 inches to 2 feet and thickness about half to one inch.

He said he was then told to go with Vilisoni upstairs, and when they entered a room Vilisoni told him to lock the door, then to get an iron bar from inside a box in the room. He said that on hearing this he ran downstairs to the main office where there were other police officers. He said he was scared to death and crying. He said that after a while a phone rang and after an officer answered it another officer took him upstairs again to the room where he had been. He said that Vilisoni again told him to lock the door and get the iron bar and asked him why he had run. He said that he came with the bar and Vilisoni hit him with it and asked him whether he was the one who had committed the theft, and he says he answered no. He demonstrated the length of the bar at about 1 meter, about an inch or more thick, similar in thickness to a galvanised fence pole. He said the other police officer was sitting in the room, and said that he should admit it so his beating would be stopped. He said there were about 10 hits to his buttocks.

He said that at this point he owned up to the theft and the beating stopped. They went downstairs, and he said there he was accused of stealing a hair clipper from Fale'aka Vao's house. He said he denied this and that Vilisoni asked did he remember that he had just beaten him upstairs, after which Vilisoni told Langoia to fetch an iron bar, which Langoia did. He said Vilisoni then hit him about 10 times on his legs and 5 times on his stomach.

He said that then a police officer named Tauna'uta came with the key to the cells and told him to open cell 4 and get inside. He said Langoia came and locked the cell, taking the key with him. After about 5 minutes Tauna'uta came and opened the cell, saying they were going to Pea to get the hair clipper, and they went to Pea with Vilisoni and another person, a girl, though he knew there was no clipper. This he said was about 4am or 5am.

He said that when they got to his home Vilisoni stayed in the car while he went to the house with Tauna'uta. While that officer remained outside, he went through the house and left by another door.

Much of what he said occurred downstairs was told again by Langoia when he gave evidence. He said he saw the blow with the wood in the downstairs office because there was glass through which he could see, a fact mentioned also by Vilisoni in his evidence. He made no mention of any visit by the plaintiff that ended when a phone call was received, but he told of being sent for an iron bar, to the room where he had seen the plaintiff being hit with the wood. He recounted blows with the bar, about 15 in all he said, to the plaintiff's legs and stomach, demonstrating an area above the navel and below the breastbone. He gave a similar account of the plaintiff's entry to and exit from the cell, and the parts played in that by Tauna'uta, the plaintiff and himself. He said that the plaintiff and Tauna'uta then went outside and he did not see the plaintiff again that night.

The station diary records that at 3:00am Finau informed the log-keeper that the plaintiff was going to be kept in custody while the document was prepared for taking him to court. He was searched by another officer and put in cell 4. It records that at 3:40am Finau and Tauna'uta left the station in the police vehicle with the plaintiff. Tauna'uta returned at 4:35am, reporting that the plaintiff had run away.

Langoia said that when he saw the plaintiff being hit, Tauna'uta was not present, but that Fale'aka Vao was, along with a person called Vika and another girl. From the evidence of Fale'aka Vao it seems that Vika, whom she described as "still a child" is her daughter. The presence of these people was unexplained.

While trying to be brief, I have felt obliged to set down the accounts of these extraordinary events because counsel for the defendants did not challenge them. In his careful cross-examination of the plaintiff he questioned only on peripheral matters. His cross-examination of Langoia lasted two minutes.

Vilisoni Finau's account of events at the police station matches generally the sequence of the movements around the station recounted by the two youths, but omits references to any events in which physical force may have been used. His evidence matched that of Fale'aka Vao in stating that the plaintiff was brought downstairs to apologise to her. He said that while that was being done, in a room off the main office into which one can see through louvre windows, Tauna'uta arrived, and Tauna'uta was the officer in charge that night of the CID where Vilisoni was working. He said he asked Tauna'uta to drop him at his home, but Tauna'uta insisted he go with him and the plaintiff to Pea. There he went to sleep in the car, while Tauna'uta went to the plaintiff's house, and he was surprised to learn soon afterwards that the plaintiff had run away.

In cross-examination he said he had taken the plaintiff upstairs, but when asked whether he had done what the plaintiff had said, he replied to each of the allegations simply "no". When asked about an iron bar he replied, "I did not carry round any iron bar in the police station". When asked whether he had hit the plaintiff with an iron bar in the charge office, he replied, "No, it was just a piece of wood, maybe a table leg or something. I was standing by Lesini and told him to

apologise to Fale'aka, she was sitting there in the room by the charge office". When asked if he had hit Lesini with a piece of wood at the charge office he said "no".

From the evidence and the demeanor of all the witnesses including Fale'aka Vao I make my finding without any difficulty. It is clear to and beyond the standard of probability, on the evidence that I heard, that what the two youths claimed had occurred downstairs in the police station did occur. I accept and find also that what the plaintiff claimed occurred upstairs did occur. I find that the plaintiff was struck in the police station by the officer Vilisoni as he says he was.

COMMENT

There was a claim in the statement of claim that a private prosecution that was brought out of these events, and on 17 September 1999 Vilisoni Finau was convicted of assaulting the plaintiff. This pleading was admitted in the statement of defence. Vilisoni Finau gave evidence about it, and a comment is called for. He said he had no lawyer, as if that was the cause of his conviction. He said he gave his evidence and had no other witness. He said he was fined $100 plus $100 compensation to the plaintiff plus $200 lawyer's fee and $8 court costs.

It is for the first defendant to consider the future of this officer in the police force. However, what occurred was wrong not merely because it was assault, it was also a gross dereliction of duty by the police officer. A police officer's only function is to enforce the law, and his duty once he has arrested a suspect on suspicion of committing a crime is clear. This has been emphasised in recent times by this Court and the Court of Appeal. The Court's function is to turn its face firmly against abuse of their authority by police officers, and to express its disapproval. This it does by rejecting evidence shown to have been obtained by force or other persuasion, or obtained while suspects who were entitled to be free on bail are wrongly kept in custody. Even had the actions of this officer resulted in a trial, his actions would have been criticised and the evidence he obtained rejected. On the evidence before me, including some of the evidence of the officer, this was not police work at all, but unprincipled bullying.

Counsel for the plaintiff chose to open his case by quoting Thomas Jefferson, "Give me liberty or give me death", and I mention it because the remark was endorsed on behalf of the defendants by their counsel in his submissions. Both counsel accepted, and I commend them both, that if the police abuse liberties, there is no defence left except principle, as stated in the Constitution, and to flee to the Courts for protection from the police is a desperate remedy.

DECISION ON LIABILITY

The plaintiff's claim is that he was unlawfully assaulted and unlawfully imprisoned. Counsel for the defendants cross-examined and made submissions on the basis that the defendants are not liable for what the officer did. Plaintiff's counsel submitted that the right defendants had been sued, and that the evidence showed that it was not only this officer who acted badly, but other officers also. He pointed to the evidence that no officer intervened, even though others observed

what was happening both upstairs and downstairs at the police station. The only intervention, he said, was by an officer who cautioned Vilisoni Finau against breaking a bone.

From the facts as I have found them it is apparent that what occurred was a series of assaults, as defined in the Criminal Offences Act cap 18 at s112, by a police officer on duty in the presence of other police officers on duty. These were assaults of an aggravated nature, with a piece of wood and a bar as well as with the hand. They were committed in the central police station in the hours after midnight in the presence of other police officers on a suspect who was aged 13 or 14.

As for the claim of unlawful imprisonment, again one needs only state the facts as found for the claim to become self-evident. The plaintiff was arrested at Pea, on the information given to Vilisoni Finau by a policeman there. The plaintiff had denied the allegation on the spot, but Finau had that power under s 21 of the Police Act cap 35. However the plaintiff was thereafter kept in various parts of the police station for the purpose of obliging him to abandon his denial and confess to the crimes of which he had been accused. That was an illegal purpose. Even without requiring the plaintiff to unlock and enter the cell, and even without using the services of the youth Langoia for that purpose, even without the entire cell episode, the police officer detained the plaintiff for an unlawful purpose. The officers in the station that night who knew what was happening and did nothing to require Vilisoni Finau to desist were all parties to it, to a greater or lesser degree.

Counsel for the defendants responsibly made no claims outside the ambit of the evidence. He relied on factual submissions that the claims had not been made out, and legal submissions that Vilisoni Finau was not on duty because his hours of duty were 8.30am to 4.30pm. He submitted that vicarious liability had to be established, and had not been. He relied on *Keneti 'Otuafi v Sipa & Ors*, CA19/90, judgment delivered by the Court of Appeal on a day in March 1992. This judgment seems to be unreported. There are some similarities with the facts of this case, but as the Court noted, it was a decision on its own unusual facts. The Court upheld a decision that the Minister of Police in the facts of the case was not vicariously liable for what a man, who happened to be a police officer, had done.

The factual basis for that finding is absent here. Vilisoni Finau said he was working overtime on urgent police duties, that he was working on them in the police station, that he had been taken from those duties because a CID officer was required to attend every complaint of housebreaking and he had the only available police car. Counsel for the plaintiff relied on a 1912 English authority, *Lloyd v Grace, Smith & Co* [1912] AC 716 and the principle that the employer is liable for the malpractice of the employee committed in the course of employment. There are appropriate cases in Tonga, e.g. a judgment of the Court of Appeal, *Hsu & Hsu v Latu* [1991] Tonga LR 25, a case of an assault by an employee in the course of employment. *'Uhila v Tatola & Ors* [1992] Tonga LR 9 was a case that included assault by a police officer and vicarious liability was found established.

Those being the only arguments for the defendants, I am satisfied that they are properly sued, and have no hesitation in finding liability established.

QUANTUM

The plaintiff seeks damages of $15,000 for the assaults, $3,000 for the unlawful imprisonment and $1,000 as exemplary damages. Neither party cited authorities or precedents in respect of quantum.

There was no challenge to any of the evidence given by the plaintiff or by his guardian about the effects on the plaintiff. The plaintiff said he was born on 29 September 1984 and is now aged 15. He said he had been at school previously, classes 1 to 6 at Pea GPS, but since this incident had had "no ambition whatever regarding education". He said that since he grew up he had wanted to be a policeman, but no longer wants that. He said that during the times he was being hit in the car he was frightened and shivering. When he was hit in the car park he fell and was unconscious. Among the events in the police station he was lifted and dropped, he was told to lock the door and to fetch the iron bar, he was hit with other policemen watching and none intervened. He was ordered to put himself in the cell, and Langoia locked him in. He said he was very scared and very sore. He said he was "frightened to death". He said that after returning from running away he was very sore and "in a difficult state". He said he stayed in bed for three days and it was while he lay in bed that the thought of committing suicide vanished from his mind.

Maliana Laumape, who is the plaintiff's guardian, gave evidence. She said that he had been at home when Langoia and another came to get him to answer questions about some money that had been taken. She said she next saw him the following morning, at about 4 or 5 o'clock, when he came in the back door of their house and went out through the front door and disappeared. A policeman was there and asked where he had gone. She saw him next at about 10am, she saw he was unhappy and he told her the police had beaten him. He showed her his stomach and his buttocks. Demonstrating across the navel area, she said she saw red and black bruises, and some skin coming off. She said it was the same on his buttocks.

She said it made her feel angry and full of hatred for the police officer that had done the beating. She said she did not take him to the hospital because she was afraid the police might get him from there and beat him again. She said he stayed in bed three days, and that she lied to the police when they came looking for him. Her reactions and feelings about the matter are not to be taken into account when assessing damages for the plaintiff, but they are taken into account in assessing the credibility of the plaintiff's claims.

When it comes to assessing the damages which will compensate for the injury proved, I first combine the two primary claims into one of $18,000. In the circumstances of this case, the separation is artificial. What are the standards to apply? The defendants have left the decision to me. In my research I found the 1991 case *Hsu* (above), where a security guard assaulted a nightclub patron and broke his jaw. A jury awarded $8,000, which the Court of Appeal upheld because it was not so high as to justify setting it aside. The Court suggested nonetheless that it would have thought $5,000 would have been more appropriate. This is useful guidance, as it was intended to be.

In 1990 this Court decided *'Akau'ola v Fungalei & Ors* [1991] Tonga LR 22. The award in general damages was $2,000 after a finding that the plaintiff had suffered "a vicious attack" at the hands of two police officers. The Court found he had been driving illegally and thereafter had attempted in a long and dangerous drive, to avoid arrest. The Court pronounced his account of being punched and kicked when caught, further injured when thrown into a police van, and punched and slapped in the van all the way from Tatakamotonga to Nuku'alofa, was "greatly exaggerated". The Court concluded with these remarks:

> *We know from a depressing series of cases in this court, both criminal and civil, that this sort of behaviour does occur with some frequency. It must be acknowledged that a police officer has a very difficult job. He has to deal with very difficult people, and there are times when his patience is sorely tried. Nevertheless, when dealing with offenders he may only use such force as is reasonably necessary to restrain them. A number of police officers still appear to believe that they have the right to exercise discipline over the public as a parent would over a child – by physical beating. By now the message from this court should be loud and clear. Such abuse of authority will not be tolerated, and where it is proved to have occurred it will be stamped on, with increasing severity, until the bully boy in uniform no longer roams our streets."*

On that reasoning the Court added to the award of general damages a further award of $2,000 exemplary damages. The category for the exemplary award was abuse of public authority, cf. *Rookes v Barnard* [1964] AC 1129. The categories were re-affirmed for this jurisdiction by the Privy Council in *Kingdom of Tonga v Mokofisi* [1990] Tonga LR 58, at 60.

I assess first the general damages. It is clear that had the plaintiff in *'Akau'ola* made good his claims, the award of general damages would have been higher. The claims of the present plaintiff are not dissimilar, and have been made out. They are similar in some respects to the facts of Langoia's case, referred to briefly above. In that case, arising out of the same incident as the present, I awarded $8,500 in general damages. An award in the same general range is indicated, but higher on the scale, because here the beatings began in the car, went on longer, and were more serious with one bout of unconsciousness. Also, they involved further degradation of the plaintiff such as the picking up/dropping incident, and the incident when he was told to put himself in the cell and Langoia was sent to release him. It seems as well that there is in the present case an element of aggravation that was missing in the case of Langoia. This plaintiff specified that his ambition had been to be a policeman. Whether he ultimately returns to that remains to be seen, as he is still young. But for the present his mind is firm and clear. His ambition has been destroyed. He has given up going to school. The blow to his self-esteem is specific in this effect, and is present now. This seems to me to be aggravation in the first and strict sense that is mentioned in *Halsbury*, 4th ed., Vol 12, #1186. I bear in mind that damages are intended as *restitutio ad integrum* for the plaintiff, not as punishment for the defendant.

Weighing all these things, I assess general damages against the defendants, including an element of aggravated damages, at $12,500.

'Uhila (above) was decided in 1992. The levels of damages awarded there are not a guide because the awards were nominal, without specification of what would otherwise have been awarded. I adopt the comments of the Court at p 11 of that judgment, that ".... an assault by a police officer on a man in his custody ....cannot be justified and the victim is entitled to his remedy", but the case is not authority for allowing that a slap by a police officer on an accused person in custody is a minor assault. Even that is a serious abuse of power, and must be included in what the Court said in *'Akau'ola*:

> *... a police officer... when dealing with offenders .. may only use such force as is reasonably necessary to restrain them.*
>
> .....
>
> *Such abuse of authority will not be tolerated, and where it is proved to have occurred it will be stamped on, with increasing severity, until the bully boy in uniform no longer roams our streets."*

These words of the Court in 1990 are relevant only to an award in exemplary damages, but in that context I note that had the award in that case been effective, then the present case would not have happened. Clearly as punishment for the defendants an award greater than $2,000 is called for, but the plaintiff has specified $1,000 for exemplary damages. He shall have that.

CONCLUSION

In summary, I give judgment for the plaintiff. I award against both defendants general damages of $12,500 and exemplary damages of $1,000. Costs will follow the event, to be agreed or taxed.

SUPREME COURT TONGA

NUKU'ALOFA, 28 April 2000

JUDGE