LAUOFO METI PROPERTIES AND OTHERS v MORRIS HEDSTROM SAMOA LIMITED, MOBIL OIL AUSTRALIA LIMITED AND OTHERS

Supreme Court Apia
Maxwell CJ
30 November 1989, 14 August 1990

TORT - negligence - statutory duty of care - S 7 Fire Services Ordinance - extent of implied or incidental powers - S7 a penal provision - legislative intent of S7.

TORT - negligence - common law duty of care - duty not to make the situation worse - breach of duty - damage caused.

CIVIL PROCEDURE - statutory limitation in S21 Limitation Act 1975 - whether S21 provided a defence for the 4th and 5th Defendant - cross notices by other Defendants.

HELD:

(1) No breach of statutory duty is created by S7 on the grounds merely that there has been damage caused by a fire while under the control of the Fire Service or more particularly the Chief Fire Officer.

Gordonna Ltd v City of St Johns 30 DLR (4th) 270

(2) S7 relates to the creation of a Fire Brigade. No specification of penalties for particular breaches of the statute.

Attorney-General v Crayford Urban District Council [1962] 1 Ch 575

(3) S7 charges members of the Fire Brigade with the duty of attending fires and saving property. There is a duty and if the work is carried out negligently, the statutory officer is liable for damage resulting from such negligence.

(4) The cross claims and issues to be resolved between Defendants do not arise until liability has been fixed.

LEGISLATION:

- Fire Services Ordinance 1949; S 7, 46
- Limitation Act 1975; S 21

CASES CITED:

- Tokaro Properties v Rowling [1978] 2NZLR 314
- Attorney-General v Crayford Urban District Council [1962] 1 Ch.575
- Maceachern & Others v Pukekohe Borough [1965] NZLR 330
- Dawson v Bingley Urban District Council [1911] 2KB 149
- Tally v Motueka Borough [1939] NZLR 253
- Solomons v Gertzenstein Ltd [1954] 2QB 243
- Board of Fire Commissioners v Rowland (1960) SR NSW 322
- Bennett and Wood v Orange (1967) 67 SR NSW 426
- Vincent v Board of Fire Commissioners [1977]1 NSWLR
- Gordonna Ltd v City of St Johns 30 DLR (4th) 270
- Osborne & Another v Burnie Fire Brigade Board [1959] Tas S.R.133
- Patrick Kilboy v South Eastern Fire Area Joint Committee [1952] SC 280
- Geddis v Proprietors of Bann Reservoir (1878) 3 App Cas 430
- Hughes v Lord Advocate [1963] AC 837
- Hawkins v Couldson & Purly Urban District Council [1954] 1 QB 319
- Great Central Railway Co v Hewlitt [1916] 2 AC 511
- East Suffolk Rivers Catchment Board v Kent & Another [1941] AC 74
- Anns & Others v Merton London Borough Council [1978] AC 728
- Flynn v Strachan [1959] NZLR 1223
- Milford Builders Ltd v Western Samoa Shipping Corporation & Others
- Watchtower Bible Society v The Huntly Borough Council [1959] NZLR 821
- Wrightcel (NZ) Limited v Felvin Suppliers [1975] 1 NZLR 50 (supra)
- Littlewood v George Wimpey & Co Ltd (1953) 2 QB 501; (1953) 2 ALL ER 915

R Drake for First Second & Third Plaintiffs
J Upton & C J Nelson for First & Third Defendants
E F Puni for Second Defendant
T Lynch for Fourth & Fifth Defendants

Cur adv vult

Essentially the facts are not in dispute and this is borne out by reason of an agreed set of facts having been placed before me. Counsel for the Attorney-General has argued that the real question is whether there is any legal liability on the 4th and 5th Defendants, that is whether in the circumstances these parties owed a duty of care to the plaintiffs and to the other Defendants.

I think at the outset I should traverse the procedural history of this action. The incident which brought about these proceedings occurred on the 4th February 1987 when a fuel truck over turned at Saleufi in Western Samoa with consequent disastrous consequences.

Particulars of the damage alleged to have been occasioned are as follows:

(a)	building destroyed	140,000.00
(b)	plant & machinery destroyed	458,148.00
(c)	furniture & fittings destroyed	4,865.00
(d)	stock destroyed	46,273.00
(e)	establishment costs	15,078.00
(f)	additional fees & consultations incurred	130,000.00
(g)	loss of profits opportunity	479,401.00
(h)	general/related costs	80,000.00
(i)	goodwill	150,000.00

The total claim was for WS $1,600,000.00.

An action was commenced with reasonable expedition and was set down for hearing as a first call on 31st August 1987. In order to make sense of the narrative I set out the facts as they are agreed to by all parties for the purposes of my decision. It is appropriate here as it gives an agreed factual background to the interlocutory matters I have attended to during the course of these proceedings down to the present. The result of this present decision will I believe permit this action to now continue to a final determination.

The First Second and Third Defendants did not prior to filing their respective cross notices give either the Fourth and Fifth Defendants any notice under section 21 of the Limitation Act 1975.

The Fourth Defendant is sued;

(a) by the Plaintiff as an operator of the Fire Service
(b) by the First, Second and Third Defendants as the employer of the Fifth Defendant

(c) by all parties on direct liability under the Fire Service Ordinance.

The following is the Memorandum of Agreed facts:

1. Hans Schwalger was a driver working for Morris Hedstrom. On 4 February 1987 at about 9.00 a.m. Hans Schwalger was driving one of the Morris Hedstrom trucks under a contract between Morris Hedstrom and Mobil to distribute fuel to retailers. Previously, the truck had had problems with its brakes. Those problems had been repaired a day or two before. The truck had been tested and performed satisfactorily. On the morning of 4 February 1987 Schwalger drove along Taufusi Road intending to turn to his right into Vaea Street. As he got to the corner to turn right the brakes failed. He was unable to negotiate the corner. The truck rolled over onto its side. Fuel leaked out of the four compartments in the tank on the back of the lorry and into the ditches.

2. After the spillage the fire brigade was called. They took control of the spillage area at 9.20 a.m.

   (a) The Vaea Street/Taufusi Road corner was closed off by the Police. Efforts were made to mop up the fuel. Eventually the crash tender from the airport was called.

   (b) A blanket of foam was laid on the affected area and it was hosed with water. The Brigade completed its involvement at 1.15 p.m. and withdrew from the spillage scene. The area was then declared safe by the Chief Fire Officer. The area was then re-opened to the public. No Brigade members were left to monitor the situation. They all departed the scene.

3. Some of the fuel had drained into an open ditch which runs along the north (seaward side) of Taufusi Road and past the Meredith premises on the corner of Taufusi and Saleufi Roads. Sketch plan attached.

4. In the late afternoon (around 4.30 p.m.) a fire started in the ditch in Taufusi Road. Apparently it was due to someone flicking a cigarette butt into the ditch and igniting traces of fuel which were left. The fire started on the west side of the Taufusi/Saleufi Road corner. It then worked its way in an easterly direction back under that intersection and into the ditch area outside Meredith's factory. It stayed in the corner by the culvert. Again, the Fire Brigade

were called. They got the call at 4.25 p.m. They arrived at 4.45 p.m. They had no operational fire engine. Previously they had two. The engine had broken down in late 1986 and was waiting for a new motor which was ordered.

5. The firemen came on foot and in non-fire Brigade vehicles. They brought hoses and a stand-pipe with them. They then connected the stand-pipe to the water hydrant at the corner of Taufusi Road and Vaea Street. There was insufficient water pressure. They then got a portable pump. They made a dam in the ditch with canvas and tried to pump water from the dam to the fire. In the meantime the fire had slowly spread out of the ditch and up the walls of the Meredith buildings. They started to burn. By the time the Brigade got any water pressure onto the fire it was out of control and unstoppable. Substantial damage was caused.

6. The First, Second and Third Defendants did not prior to filing their respective cross-notices give to either the Fourth and Fifth Defendants any notice under Section 21 of the Limitation Act 1975.

As I have said, I set out these facts as a background. I shall later in the narrative set out the questions of law which I am called upon to decide, but I do note here that it was acknowledged by all parties that the determination of the legal questions could facilitate a possible settlement of this action.

In any event early in 1988 I was called upon to rule on a motion by the Attorney General, as to whether a certain paragraph in the original Statement of Claim disclosed an offence. I gave as I understood the matter to be urgent, an interim decision on 25th January 1988. In my full decision, as I had indicated in my interim decision, I struck out the offending paragraphs. In that full decision I said:

> "I am satisfied that the Government's discretion as to what finance is available for what equipment is a decision for Government and not for the Court."

Further on I said:

> "It would be asking too much to have a government in the area of policy having each individual act as a watchdog to bring an action when it was believed that a private right had been breached. The Government is ultimately answerable to the electorate. That does not mean that the Court should give free rein to the Government of the Day, and where there

is a clear breach of statutory duty and an individual has suffered a loss the Court stands ever ready to see that the loss is recompensed."

Perhaps as the result of an intimation by me in this judgment the Chief Fire Officer, a statutory appointee pursuant to S.4 of the Fire Service Ordinance was joined as Fifth Defendant and Asuao Taalili Williams the Chief Fire Officer in his personal capacity as Sixth Defendant.

I further heard argument on the 23rd May 1986 by the Attorney-General for the Fourth, Fifth and Sixth Defendants to strike out certain paragraphs in the Amended Statement of Claim which had been filed. I do not need to particularise, suffice to say that I struck out Mr Williams as a Defendant in his personal capacity and incorporated his name as part of the intituling of the Chief Fire Officer. In respect to allegations, that certain paragraphs did not disclose an offence, relying on my earlier decision I struck out certain paragraphs and allowed others to stand. In regard to the latter, three were broad allegations of a breach of a statutory duty and I was not satisfied that their inclusion in the Amended Statement of Claim justified me striking them out. Those which in my opinion were tainted in terms of my earlier finding were struck out.

My earlier findings were the subject of some comment by Mr Upton in his submission and I shall deal with what he said later in my decision. There have been certain interlocutory proceedings and apart from noting for the purpose of their interest in the overall narrative there is little for me to comment on, except for a Cross Notice whereby the First and Third Defendants claim indemnity against the Fourth and Fifth Defendants.

The only other comment I have to make here relates to an abortive Pre Trial Conference which was held purportedly under my Chairmanship early in 1989. Costs are sought in respect to this and I propose making certain findings in respect to that meeting in this decision but separate from my finding as to whether there was a duty of care on the Government as a result of this incident.

I turn now to the specific issues. I have recited the agreed Statement of Facts which was incorporated in the Notice of Motion in Support of this application.

The following are the questions of law which were argued and are for my determination.

1. Did the Fourth & Fifth Defendants or both -

   (a) owe a statutory duty of care to the Plaintiffs or other Defendants under the Fire Service Ordinance 1955;

(b) owe a duty of care to the Plaintiffs or the other Defendants at Common Law.

2. Does Section 21 of the Limitation Act 1975 provide a defence in this action to the Fourth and Fifth Defendants?

Essentially the basis of the argument is that the Fourth and Fifth Defendants owed a legally enforceable duty of care towards the Plaintiffs and in appropriate circumstances towards the First and Third Defendants either at Common Law or arising from a breach of statutory duty. The situation which arose on 4th February 1987 and the manner in which it was handled is divided into 3 compartments.

(a) The failure of the Fourth and Fifth Defendants to provide appliances and plant, repair equipment provide adequate water supply for the fire fighting purposes;

(b) The handling of the fuel spillage at Saleufi by the Fire Service;

(c) The handling of the fire at and subsequent destruction of the premises and property of the Plaintiff at Saleufi on the day of the accident.

To begin with the applicants rely on Tokaro Properties v Rowling [1978] 2NZLR 314 where it was said that unless the cases pleaded are so clearly untenable that they cannot succeed, the parties should not be deprived of the opportunity of having their cases on that point considered at trial.

I shall deal firstly with the allegation of a breach of statutory duty.

Section 7 of the Fire Service Ordinance 1955 provides as follows:

"7. Duty of Fire Brigade -

Members of the Brigade shall be charged with the duty of attending at fires and saving property as directed by the Chief Fire Officer, and the Government of Western Samoa shall furnish such Brigade with all necessary appliances and plant for the performance of such duties."

It is argued this includes -

(a) the provision of adequate equipment
(b) the proper maintenance of such equipment; and
(c) the maintenance of adequate water supplies for fire fighting purposes.

The submission is therefore made that the Government of Western Samoa having created by statute a Fire Brigade has a duty imposed on it to provide the Brigade with all necessary appliances and machinery for the carrying out of its firefighting function.

The Attorney-General v Crayford Urban District Counsel [1962] 1 Ch. 575 is cited as authority for the proposition of the extent of implied or incidental powers. There it was held inter alia that in considering what was fairly incidental to or consequential on the general management of certain houses provided by a housing authority the relevant standard of management was not that of a private land owner but that appropriate to a local authority providing dwellings for a particular class of a community in pursuance of a statutory duty.

At page 589 Lord Evershed M.R. said -

> "It is true, as Sir Lynn observed, that certain things are specifically mentioned and specific power in regard to them is given to local authorities, and so, as he submitted, according to ordinary principles, these express references should be taken to exclude other activities of a comparable nature not expressly mentioned. I see the force of the argument, but I still think that it is shown by the references I have made that a council housing estate is, from the point of view of management, sui generis. If the plaintiffs are right, it would appear inevitably to follow that the arrangements such as those relating to insurance of television aerials and arrangements in regard to Electricity Board charges and the like would be equally open to challenge - a challenge that has never hitherto been suggested."

Then -

> "At least, such considerations would justify the view taken by me predecessor, Lord Green M.R., in Shelly v London County Council, that the widest significance should be given to the word "management" in this connection."

On the question of a breach of a statutory duty I was referred to a number of decisions.

In Maceachern & Others v Pukekohe Borough [1965] NZLR 330 it was held that S.257 of the then New Zealand Municipal Corporations Act 1954 manifested and gave effect to Parliaments concern for the protection of property and also for the personal safety of those exposed to the hazard of fire and if a person was able to establish a failure on the part of a corporation to keep

particular fire hydrants in effective working order such person was entitled to recover from the corporation such damages as could be proved to have resulted from the corporations default. At p.335 his Honour Gresson T.A. said -

> "The defendant local authority affixed to a wall in a street a plate intended to indicate the position of a fire plug in the water main. This was in fact inaccurate and misleading. A fire broke out on the Plaintiff's premises, which were a short distance from the fire plug. The Fire Brigade was quickly in attendance, but there was considerable delay owing to their inability to find the exact position of the fire plug. As the result of this delay the fire assumed greater dimensions and caused more damage than it would otherwise have done. The Act in question contained no specific provision for the recovery of penalties, and the Court of Appeal held that, in putting up a misleading indication plate, the defendant was guilty of an act of misfeasance, and was therefore liable to the Plaintiff for the extra loss caused by the fire as damages for breach of its statutory duty. Much of the argument turned on the distinction between nonfeasance and misfeasance in highway cases, and, as previously stated, I am unaware of the acts or omissions which rendered the fire hydrants ineffective in the present case. Nevertheless, there would appear to be little logical distinction between damage due to delay caused through a misleading indication as to the situation of a fire plug, and damage allegedly due to a failure to keep fire hydrants in effective working order. In circumstances such as are assumed in the question before me, it is in my view not unreasonable for Parliament to be deemed to have intended to impose civil liability against a council financed through rating for breach of its statutory duty, and such an intention would accord with the whole scheme and purpose of the Fire Services Act and the effective reorganisation of fire prevention and protection on a national basis."

The learned Judge was aware of the unusual path he had set out on because he acknowledges 'the judicial bias against the construction of penal statutes to create torts'.

In Dawson v Bingley Urban District Council [1911] 2KB p.149, section 66 of the Public Health Act 1875 stated that every Urban authority was required to cause fire plugs to be provided and maintained and to 'paint or mark on buildings and walls within the streets words or marks near to such fire plugs to denote their situation'. It was held that by putting up an indication plate that was in fact misleading the Defendants were guilty of

an act of misfeasance, and not of nonfeasance only and that they were therefore liable to the Plaintiffs for the extra loss caused by the fire as damages for their breach of statutory duty. At p. 156 Vaughan Williams L.F. said:

> "The observations of the Lord Justice may lead the Legislature to change the law and adopt a system of fines for misfeasance, but as the law stands I have no doubt actions lie for misfeasance by public bodies, and that the verdict of the jury must stand and the judgment of the learned judge reversed."

Later on the same page Farwell said:

> "The breach of a statutory duty created for the benefit of individual or a class is a tortious act, entitling any one who suffers special damage therefrom to recover such damages against the tortfeasor."

Further at p.157 the Lord Justice said:

> "The act done or omitted may, apart from the statute be innocent, or its omission may be not actionable but the enactment makes it actionable. For instance, a man who mero motu puts up a signpost on his own land by four cross roads, but inadvertently put the arms wrong, would not be liable to any one misled: no action lies for an innocent misrepresentation: Derry v Peek (1); but if he was under a statutory liability to put up and maintain a correct signpost and made a similar mistake he would be liable for breach of his statutory [duty]."

This case I believe may be distinguished on the basis that it creates a specific positive obligation to identify fire plugs and such a misleading plate gives rise to a breach of a statutory duty. In the matter I am called upon to deal with I am asked to decide in a broad sense on the breach of the Western Samoan Governments duty under the Ordinance.

Tally v Motueka Borough [1939] NZLR 253 appears to me to be in a slightly different category. On a question of law argued it was held that the immunity from liability for damage to property granted to them by S.52 of the Fire Brigades Act 1926 and the then S.271 of the Municipal Corporations Act 1933 was absolute and provided the work as authorised by statute and done bona fide liability did not attach to any of the persons named in such section if negligence was proved -

(a) on the part of the person authorising the work in the selection of his agent or otherwise; or

(b) on the part of the person actually carrying out the work.

This authority is cited to highlight the fact that there was no such equivalent section in the Western Samoa Fire Ordinance.

Reference was also made to Fleming on Torts 7th edition. While I look at this I must keep in my mind the question whether or not S.7 is a penal provision. Generally speaking penal provisions create offences for breach of a specific duty or obligation such as that which I have referred to previously.

I cite the learned author at p.116 -

> "Most important, perhaps, among the latent premises which influence the judicial approach, is that a penal statute will more readily be accepted as a source of civil liability, if it enacts a safety standard in a matter where the person upon whom the duty is laid is already, under the general law of negligence, bound to exercise reasonable care. In such a case, the effect of the provision is only to define specifically what must be done in performance of the general duty. This explains the readiness with which industrial safety regulations have been treated as conclusively determining the standard of care owed by employers for the protection of their men. Conversely, if the grant of a private right of action would involve recognition of an interest that is not otherwise protected by law against negligence, the courts have evinced the strongest reluctance to extend the protection of penal statutes beyond the specific sanction actually provided. A striking example is the well known decision in Atkinson v Newcastle Waterworks, where a householder whose property had been gutted by fire vainly sought to establish a cause of action against a water supply company on the basis of its failure to comply with a statutory duty to maintain a specified pressure in its pipes. In this situation, it used to be thought unwise to shift the loss because the householder is clearly a better insurance carrier against fire risk, and this explains the refusal alike to recognise a common law duty of care and to permit recourse to penal legislation. The same reasoning has been urged in support of the more general thesis that negligence per se cannot ordinarily apply to statutes directing the provision of a service or benefit, since the common law rarely exacts duties of affirmative action. No less would it explain the entrenched policy against construing positive duties imposed on public authorities (for example to construct roads or sewers or for fire brigades "by all possible means to

extinguish the fire") as intended for the benefit of citizens as individuals, though here the primary reason is undoubtedly an unwillingness to impede the exercise of administrative functions and a fear of unduly taxing limited budgets."

I have already made certain comments in this regard in my previous decisions as to the ultimate right of the Government of a State to determine where and how its funds should be distributed. There are other matters I shall touch on later, but if the State in its wisdom decides not to purchase certain items which may materially assist in a public service such as fighting fires then that is an executive decision it is entitled to take. It is not in this instance in my view negligent per se to omit to acquire certain equipment. What it does or omits to do with equipment or appliances already purchased is another matter. I am here required to look at the question of legislative intent and what was behind the thinking of the legislators when s.7 was enacted. The essential directives of legislation which is penal in nature should be to make it clear what the evil is which is being addressed.

As I see it in the present case s.7 relates to the creation of a Fire Brigade for an emerging state. It does not specify penalties for particular breaches. At this stage I return to what the Fire Brigade actually did on the morning of the 4th of February 1987: It took control of the situation, probably with the aid of the police. There was no express authority for the Brigade to actually take charge and clear up the spillage but common sense clearly dictated that in these circumstances the Brigade was the most appropriate authority to undertake the work, given the high risk of fire hazard by virtue of the nature of the product spilled. It was certainly a proper situation with which the fire service should deal. To the extent that the Attorney-General v Crayford Urban District Council (supra) is authority for extended and reasonable powers I agree that it has application in the present case. The issue does not end there and even though the Fire Service may not necessarily escape liability I am not satisfied that s.7 per se gives rise to a breach of a statutory duty of care.

This brings me to the nature of the cause of action. To succeed in an action for damages the Plaintiff is required to establish a breach of a statutory obligation which on the proper construction of the statute is intended to be a ground for civil liability to a class of persons of which the Plaintiff is one. Solomons v Gertzenstein Ltd [1954] 2 QB 243.

It must also be established that the breach of statutory duty caused or materially contributed to the damage or injury.

Again it is significant to note that I am required to consider whether in the present case there has been a breach of such statutory duty. There is a matter on the other side of the coin which I believe should be addressed and that is whether there has been the breach of a duty of care in the exercising of a statutory power and it is in this area that the applicants may be on stronger ground. There is no doubt that the Fire Service Ordinance was intended to benefit a class of persons, namely the public. The intention of the statute must be clear as to its intention to impose upon a person the right to sue for a statutory wrong. The general provision of the statute is to create a service whose duty is to attend fires and save property. There are no specific penalties referred to for the breach of the statute.

I was referred to the further cases by Mr Upton -

Board of Fire Commissioners v Rowland (1960) SR NSW 322

Bennett and Wood v Orange (1967) 67 SR NSW 426

Vincent v Board of Fire Commissioners [1977] 1 NSWLR

With respect to Counsel I do not see that they are relevant. They are such cases where there is a statutory limitation on the right of action. I am not even prepared to go so far as to say that in the event of statutory limitation not being present the decision may have been different. That of course is a possibility, but my reading of these cases does not make such a conclusion unequivocal.

Counsel for the Fourth and Fifth Defendants referred me to Gordonna Ltd v City of St Johns 30 Dominion Law Reports (4th) 270 a cause of action against a city arising out of an alleged breach of statutory duty to supply water to inhabitants of the city must be found in negligence - a common law duty of care and can only succeed if it is proven that in the cases and on the finding of certain facts -

(1) a duty of care existed

(2) there was a breach of that duty, and

(3) meeting the principles of causation damages resulted.

"The plaintiffs' building, which was within the boundaries of the defendant city but at the end or the fringe of the water-main and hydrant system, was destroyed by fire mainly because the nearest hydrants were 1000 and 1300 feet away and as a result the water pressure was inadequate and did not allow the fire department to fight the fire effectively. Section 116 of the City of St John's Act, R.S.N. 1970, c.40,

provides: "It shall be the duty of the Council to cause a sufficient supply of pure and wholesome water to be conveyed to the City.... and to establish hydrants throughout the City as the Council shall think necessary." The Plaintiffs brought an action for damages against the city for the difference between the damage that they sustained as a result of the fire and the lesser amount that they alleged would have occurred if the firemen had been able to fight the fire effectively. Held, the Plaintiff's action should be dismissed."

At p. 739 Steele J. said -

> "Upon reading Kamloops v Nielsen, Anns and the speech of Lord Wilberforce, it is difficult to avoid the conclusion that the distinction between a statutory duty and a statutory power is of diminishing significance in determining liability of a public authority. The Supreme Court of Canada in Saskatchewan Wheat Pool departed from the English position of distinguishing between the tort of negligence and the tort of breach of a statutory duty: "Negligence and its common law duty of care have become pervasive enough to serve the purpose invoked for the existence of the action for statutory breach, per Dickson J., Saskatchewan Wheat Pool, at p.24 D.L.R., p.225 S.C.R. That simply means, just as he says, the civil consequences of breach of statute are to be subsumed in the law of negligence." That conclusion is in harmony with the statement of Lord Wilberforce in Anns when he said: "..... it is irrelevant to the existence of this duty of care whether what is created by the statute is a duty or a power, the duty of care may exist in either case."

There is I suggest considerable fairness in the result brought about by this decision, which does not because there is no breach of statutory duty, mean that a party loses a cause of action. There may still be a remedy in negligence. I am not certain whether I am assisted by Osborne & Another v Burnie Fire Brigade Board [1959] Tasmania State Reports 133. That case is authority for the proposition that an action for damages will lie when there is a negligent omission to perform a statutory duty. There is no suggestion of a negligent omission on the present facts.

In fact at p.142 Gibson J. said -

> "The immunity given by s.57 relates only to the exercise of powers and the performance of duties so that an omission to perform a duty may still give rise to an action if the statute should be so construed."

That I suggest is the end of the matter. In so far as the first question of law is concerned I am satisfied that no breach of statutory duty is created by s.7 on the grounds only that there has been damage caused by a fire while under the control of the Fire Service or more particularly the Chief Fire Officer. It may well be that had the Chief Fire Officer failed to attend the fire there would be a breach of statutory duty. Counsel for the applicants on this motion cites section 46 of the Fire Services Act 1949 -

> "46. No action against Urban Fire Authority for failure to provide against fire -
>
> (1) No action or proceedings shall be brought against the Crown, or the Council, or any Urban Fire Authority, or any officer or servant of any of them, or against any brigade, or officer, or servant, or member of a brigade or any person whatsoever to recover damages for any damage to property occasioned by the (Chief Fire Officer) or any officer or member of a fire brigade of any district, or any other person, in the exercise in good faith of his powers, duties, or obligations at or in connection with any fire or suspected fire, including any fire or suspected fire occurring beyond the area in which the Urban Fire Authority of that district has authority:
>
> Provided that nothing in this subsection shall relieve any of them against, or in any way affect, the liability of any of them for any damage to property caused by or in connection with the use of any fire engine or other motor vehicle for transport purposes.
>
> (2) No action or proceedings shall be brought against the Crown, or the Council, or any Urban Fire Authority, or any officer or servant of any of them, or against any brigade or officer or servant or member of a brigade to recover damages for any loss or damage or bodily injury or death which is due directly or indirectly to fire, where the loss or damage or bodily injury or death is also due to or contributed to by any (Chief Fire Officer) or officer or member of a brigade taking any action, or failing to take any action, while he is acting in good faith in performance of his duties under this Act and is in attendance at a fire."

While this section may apply to breaches of statutory duty it seems to me to also apply to actions which might be brought under the appropriate head of negligence for a common law breach.

I turn now to the Common Law Duty of Care and here Mr Lynch is on less strong grounds. In his written submissions he emphasises issues which really amount to omissions on the part of the Chief Fire Officer. There is certainly a statutory duty on the Chief

Fire Officer to attend a fire and damping down a petrol spill a potential fire hazard, is within his authority. However once he has attended and actually taken certain steps he is not a bystander and must do all he can to render the situation safe for the public and those in the immediate vicinity. On the agreed set of facts, the Fire Brigade took control and closed off the streets through the instrumentality of the police. Efforts were made to mop up the fuel, a crash tender was called, foam was laid over the affected area and it was hosed with water. After this the area was declared safe. In hindsight it was not and no one argues that it was not fuel from the spill which ignited and caused damage. Fuel had drained into an open ditch, so clearly had not been totally or properly mopped up.

Mr Lynch argues that nothing in the agreed facts permits the inference that Lauofo Meti was worse off because of the Chief Fire Officers intervention than he otherwise would have been.

With respect I cannot agree. On the agreed facts it is difficult to know what should and should not be inferred. It is rather a question to consider now whether there is prima facie breach of a common law duty of care. That is for the Court which ultimately determines the facts by seeing and hearing the witnesses must decide. My task is to say whether on the agreed facts there has been a breach of a common law duty of care sufficient to enable the action to continue against the Fourth and Fifth Defendants. For instance on the basis there was still fuel in the drain it is important to hear how it got there and to know in greater detail what mopping up steps were undertaken and whether the Chief Fire Officer was justified in opening up the area. Clearly, and this is an inference I do draw, the area of the spill was closed to the public. It was opened up. Had it remained closed a trial judge may be entitled to say that the fire would not have started. The test is not that the situation is no worse, because once having involved himself if there has been negligence the Chief Fire Officer must assume a degree of responsibility for having intermeddled. Mr Lynch upbraids counsel for not citing Western Samoan Decisions. He speaks of mature judgment and sensitivity to take cognisance of the fact that in the area of this action evolution has been along the philosophies of developed jurisdictions. He submits that Western Samoa should not be treated as having a similar capacity. That proposition is unarguable. However, traditionally jurisprudential development has been along Westminster lines, with emphasis on legal thinking in New Zealand appellate courts. Let me say that I agree with a regional development to take account of Pacific Jurisprudence. However such an approach is in its infancy and in my earlier decision I endeavoured to point up the limited financial resources of the Government of Western Samoa and a decision such as that may have been given less sympathetically in a more developed jurisdiction.

That I suggest is a separate issue from the question of the common law particularly in the field of negligence and a law of torts is part of all developed Western nations to which Western Samoa courts may look for precedent. It is argued that s.7 imposes upon the Chief Fire Officer duties which he is not able to carry into effect. I cannot agree. There are statutory duties upon the Chief Fire Officer and he purported to carry these out. He may have been guilty of an omission of his duty had he not attended the scene. A community is entitled to expect that if there is a fire service it will carry out its statutory duties. If it does not do so it may well have to account and justify its failure to attend before some tribunal.

Again it is argued that the Government is not liable for any act or omission on the part of the Chief Fire Officer. It is clear that he is a statutory appointee and that as such he is not subject to the directions of Government as to which fire he should and should not attend. However it seems to me that on the basis there is a common law duty of care the Chief Fire Officer was working during the course of his employment and the Government would be liable for his acts of negligence should they be proved. As a statutory appointment I assume the Chief Fire Officer is paid by the Government. Clearly on the agreed facts I must find that what the Chief Fire Officer purported to do was in the course of his employment and that he is not to be held personally liable for negligence.

Certainly the Attorney General represents both parties. My views are borne out by Lord President Cooper in Patrick Kilboy v South Eastern Fire Area Joint Committee [1952] SC p.280 where he says at p.285:

> "The defenders' contention would certainly lead to surprising consequences. By common consent local authorities, nationalised boards and even the Crown may incur vicarious responsibilities for employees engaged in transport, gas, electricity and other types of undertaking or public service, however specialised the technical skill which these employees might be required to display. But the fireman would enjoy a position of splendid isolation - not self-employed, not an independent contractor, remunerated by wages for full-time duties, but having no superior to whom the maxim respondent superior could be applied. The innocent citizen, so the defenders argued, who is injured in the street by the negligent driving of a fire engine or by the reckless conduct of a fireman on duty at a fire, has no remedy except against the actual delinquent."

As I am not prepared to find that there has been a breach of statutory duty to extinguish the fire I look at what the Chief Fire Officer and his officers did. In Geddis v Proprietors of Bann Reservoir (1878) 3 App.Cas.430 at p.455 Lord Blackburn said:

> "It is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing what the legislature has authorised if it be done negligently."

The cases where negligence has been established are common, see for instance Hughes v Lord Advocate [1963] AC 837; Hawkins v Couldson & Purly Urban District Council [1954] 1 QB 319.

In Great Central Railway Co v Hewlitt [1916] 2 AC 511, Lord Parker said:

> "It is undoubtedly a well settled principle of law that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned and was likely to be occasioned by their exercise damages for negligence may be recovered."

Gordonna Ltd v City of St Johns (supra) is authority for this.

Much emphasis was placed by Mr Lynch on whether a power or a duty exists. In my opinion this is irrelevant. If there is a breach of a duty of care a party is liable.

Much of Mr Lynch's argument as to negligence was founded on the argument that there was a duty not to make the situation worse than it otherwise might have been. He argued that even though the intervention did not remove all of the petrol the situation was analogous to the removal of water in East Suffolk Rivers Catchment Board v Kent & Another [1941] A.C. 74. This decision appears to be unusual to say the least and does not stand up to close scrutiny. See Anns & Others v Merton London Borough Council [1978] AC 728. While it does support Mr Lynch's argument I believe in the present situation it can be distinguished. In the present case there was an immediate danger to life and property. It again becomes a question of what was reasonable in the circumstances and without seeing or hearing the witnesses this is impossible to judge. What is known is that the Chief Fire Officer satisfied himself the danger had been removed by opening the streets up to the public. That turned out to be incorrect bearing in mind that it appears the fuel in the drain was ignited by a cigarette. The fire services were in attendance between 9.20 a.m. and 1.15 p.m. No one remained to monitor the situation and all fire officers, I take it, departed the scene. On the basis that Taufusi Road was one of the roads closed off the fact that petrol escaped into a drain in that area is not unforeseeable. My duty is as regards the facts and whether on them the Fourth and Fifth Defendants could be found to owe a duty

of care. Causation is not part of the facts and that is not an inference I believe I should draw, however on the facts as they exist and without further explanation one would be tempted to do so. Mr Lynch cited the following passage from Charlesworth 7th Edition in the Chapter - The Duty to take Care:

> "a person who institutes a task he is not obliged to perform owes a duty to take care in its performance so long as he does not add thereby to the damage which would have been caused, if he had done nothing." 2-19 p.36.

East Suffolk Rivers Catchment Board v Kent and Another (supra) is quoted, but it seems to me inappropriate. There is a difference between an individual and a board with statutory powers. I have dealt with the extensions to the power of the Fire Board and am satisfied damping down petrol was a logical extension. Charlesworth speaks of a power but no duty whereas s.7 charges members of the Fire Brigade with the duty of attending fires and saving property. There is a duty and therefore if the work is carried out negligently I find the statutory officer is liable for any damage sustained by a member of the public. If there is a duty to attend fires and save property it follows there is no discretion and that the work must be carried out with the greatest skill the Fire Service is able to bring to the emergency. On the facts before me I am unable to say that the Fire Service did use its skills properly and with efficiency. Fuel had escaped and had not been neutralised at a time when the Chief Fire Officer exercised his discretion to open the area to the public. This is on the agreed facts and is to me negligent. The fire started at approximately 4.30 p.m. and although on the facts they were called at 4.25 p.m. the Brigade did not arrive for another 20 minutes. This is not explained and bearing in mind the seriousness of the situation would be an indication of negligence as would be the fact that between 1.15 p.m. to 4.30 p.m. the area was not monitored.

I come to the conclusion therefore that legally the Fourth and Fifth Defendants owed a Common Law Duty of Care at least to the Plaintiffs. On the question of their common law liability to the First, Second and Third Defendants my finding is as follows. I do not at this stage make any finding as to contribution by the First, Second and Third Defendants but it is certainly a question which will be addressed to the trial judge. Contributory negligence must, I believe, arise as an issue. The Chief Fire Officer undertook a duty. On the facts as I say there is a duty of care to the Plaintiffs not a statutory one but a common law duty. Once having embarked on his duty the Chief Fire Officer was obliged to remove the menace to the best of his ability. The First Second and Third Defendants were known or should have been known to him. Whatever the fault of these defendants he also owed them a duty and ideally have carried out his task so that he involved neither himself nor the Government of Western Samoa in

any litigation. Once the Chief Fire Officer assumed responsibility his duty of care lay not only to the Plaintiffs but also to the other Defendants. I am satisfied therefore that the Fourth and Fifth Defendants also owed these Defendants a duty of care and that the issue or question should be tried accordingly. My answers therefore to the questions of law in paragraph 1.1 of the Notice of Motion are as follows:

(a) Neither the Fourth nor Fifth Defendant owed a Statutory duty of care to the Plaintiffs or other Defendants.

(b) Both the Fourth and Fifth Defendants owed a duty of care to the plaintiffs and other Defendants at Common Law.

I turn now to the question of s.21 of the Limitation Act 1975. Subsections 1 and 2 provides:

"21. Protection of persons acting in execution of statutory or other public duty -

(1) No action shall be brought against any person (including the Government) for any act done in pursuance of execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty, or authority, unless -

(a) Notice in writing giving reasonable information of the circumstances upon which the proposed action will be based and the name and address of the prospective Plaintiff and of his solicitor or agent (if any) in the matter is given by the prospective plaintiff to the prospective defendant as soon as practicable after the accrual of the cause of action; and

(b) The action is commenced before the expiration of the year from the date on which the cause of action accrued:

Provided that, where the act, neglect, or default is a continuing one, no cause of action in respect thereof shall be deemed to have accrued, for the purposes of this section, until the act neglect, or default has ceased:

Provided also that the notice required by paragraph (a) of this subsection may be given, and an action may thereafter be brought, while the act, neglect, or default continues:

Provided further that any such person may consent to the bringing of such an action at any time before expiration of 6 years from the date on which the cause of action accrued, whether or not notice has been given to the prospective defendant as aforesaid.

(2) Notwithstanding the foregoing provisions of this section, application may be made to the Court, notice to intended defendant, for leave to bring such an action at any time before the expiration of 6 years from the date on which the cause of action accrued, whether or not notice has been given to the intended defendant under subsection (1): and the Court may, if it thinks it is just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it is just to impose, where it considers that the failure to give the notice or the delay in bringing the action, as the case may be, was occasioned by mistake or by any other reasonable cause or that the intended defendant was not materially prejudiced in his defence or otherwise by the failure or delay.

The fire occurred on 4th February 1987 and the cross notice was issued on 5th October 1988. Mr Lynch says that no notice was given prior to the cross notices being given. He argues that the point is not that the 12 months limitation period expired prior to the cross notices being filed, but that they are now incorporated and cannot be heard. It is argued that in the present case the Defendants, if they are liable to the Plaintiffs are joint tortfeasors as between themselves and are liable to claims for contribution as between themselves. The First and Third Defendants say they claim contribution by way of cross notice in the initial proceedings rather than by a separate action. This makes sense. Section 15 of the Limitation Act provides for the purposes of any claim for a sum of money by way of contribution or indemnity however the right to contribution or indemnity arises the cause of action in respect of the claim shall be deemed to have accrued at the first point of time when everything has happened which would have to be proved to enable judgment to be obtained for the sum of money in respect of the claim.

In Flynn v Strachan [1959] NZLR 1223 Henry J. said at p.1225:

> "Section 14 clearly contemplates that the person claiming contribution or indemnity has available to him a proceeding at law whereby he can allege and prove sufficient to enable judgment to be obtained, not in the form of a declaration of liability, but in the form of a judgment for a sum of money. It seems to me that every person claiming indemnity or contribution has available to him two forms of Court proceedings, being, first, a separate action after liability on the original tortious act has been established or

admitted; and, secondly, by third-party procedure after an action has been commenced. Under RR.99C, 99H, and 99J, judgment for a sum of money may be obtained against a third party, so it is possible for a defendant under such procedure to get a judgment for a sum of money against a third party in respect of the claim for contribution or indemnity."

The essential facts and those upon which the Fourth and Fifth Defendants rely are that the First, Second and Third Defendants did not give any notice to the Fourth and Fifth Defendants under section 21 of the Limitation Act 1975. Cross notices were issued however after the proceedings were issued. Counsel for the Attorney General relies heavily upon the decision of Bathgate J. in Milford Builders Ltd v Western Samoa Shipping Corporation & Others where leave under s.21(2) of the act was refused against the Western Samoa Government and the Third Defendant. His Honour was particularly critical of the manner in which the case had been presented. From that case resting as it does on its own facts, it seems clear that the Plaintiffs first consideration was the First Defendant. At page 6 Bathgate J. says:

"Again, it is significant that there was no claim involving the second and third defendants in the correspondence on the part of the plaintiff. "Cabinet Approval" to the contract. could not in itself imply liability on the part of the Government, nor would such an approval be necessary if the Government was in fact a party to the contract. On the whole of the evidence it seems clear the Government was not a party to the contract, or if it was, it was not liable for any payment to the plaintiff."

Again at page 7 he says:

"It was as if the parties were then considering how judgment would be met rather than the first issue how and against whom the judgment would be obtained. To my mind this emphasizes that there was no right of action by the plaintiff directly against the second and third defendants. That is consistent with all the evidence and to me confirms that the second defendant was not a party to the contract or liable for payment to the plaintiff under the contract. I appreciate that I am not concerned with the question of liability between the parties at this stage. I am however concerned with the question of whether it would be just to grant leave under s.21(2), and to try to understand the nature of the claim against the second and third defendants in relation to the question of whether or not the failure to give notice was occasioned by mistake or other reasonable cause, or that the second and third defendants were not materially prejudiced by the failure to give notice. I am also concerned, it seems to me, where there has never been

express notice in writing whether the statement of claim gives reasonable information to the second and third defendants of the circumstances upon which the action against them is based, in an intelligible manner, as must be required by the notice under s.21(1)(a) of the Act."

The proceedings had been issued and Bathgate J. followed a line of authorities which held that if leave had been granted it would have operated retrospectively to give validity to proceedings which had been brought: see Watchtower Bible Society v The Huntly Borough Council [1959] NZLR 821. In Milford from the outset no notices had been given as between the Plaintiff and the Third Defendants. I agree with the remarks of Bathgate J., where at page 12 of his decision he says:

> "For a variety of reasons, including those of public policy, practice, historical or political, the private domestic law of independent sovereign states generally recognised and followed the maxim that "the king", sovereign, president, head of state, governor or however the head of state was described, "could do no wrong", and such executive head or sovereign, his or her servants or agents, could not be sued or made liable under the private domestic law of that state, without the consent of such person or persons. This recognition of immunity from suit on the part of the sovereign and his servants is a reason for the Government Proceedings Act 1974, under which in Western Samoa the sovereign has consented to being sued and liable in civil proceeding, in common with other persons and citizens, but only on its terms, including the timely requirements of notice as contained in s.21 of the Limitation Act. That provision may therefore be a reservation on the waiver of sovereign immunity from proceedings against the Independent State of Western Samoa, and its servants or agents, acting for the State."

I am satisfied the facts here are substantially different. Although Wild C.J. in Wrightcel (NZ) Limited v Felvin Suppliers [1975] 1 NZLR 50 (supra) made no distinction between tort and contract in respect of s.14 of the Limitation Act, it may be of greater importance in the present instance. I am not here concerned with a Plaintiff who has failed to give notice under s.21(1) to a party, but a claim to contribution as between Defendants.

No question has been raised as to the adequacy of the notice given by the Plaintiffs to the Fourth and Fifth Defendants. Counsel for the First and Third Defendants argues that counsel for the Attorney General fails to appreciate the nature of a cross notice seeking contribution. What in essence the cross notices seek is contribution between Defendants. That, it is argued, is a cause of action which would never have arisen had

proceedings not been initiated. Section 15 seems to me to be appropriate on the issue and enacted for that very reasons. In Littlewood v George Wimpey & Co Ltd [1953] 2 QB 501; [1953] 2 All ER 915 Denning LJ said:

> "It seems to me clear that a tortfeaser cannot recover contribution until his liability is ascertained. If he has not been sued and has paid nothing and admitted nothing, he can have no cause of action for contribution, for the simple reason that he may never be called on to pay at all. The damaged plaintiff may go against the other tortfeasor only. Once the liability of the first tortfeasor has, however, been ascertained by judgment against him or by admission, then he has a cause of action for contribution against the second tortfeasor."

Further Wrightcel (NZ) Limited v Felvin Suppliers [1975] 1 NZLR (supra) at page 52 Wild C.J. said:

> "Though Denning LJ was speaking of a tortfeasor and the New Zealand cases mentioned were claims in tort, it seems to me that the reasoning applies equally to a claim for contribution or indemnity arising out of an action in contract. In my opinion it follows from s.14, which has no parallel in the United Kingdom, that for the purposes of the limitation period a defendant's cause of action on a monetary claim by way of contribution or indemnity arising out of contract arises only when he becomes able to obtain a judgment for money in respect of his claim for contribution or indemnity."

I am satisfied that it is proper to apply the New Zealand authorities which follow closely the approach taken by the Courts in Great Britain. I am satisfied the cause of action arises at a time when everything has happened which needs to be proved down to the entry of judgment by a Plaintiff against a Defendant. Thereafter if the issue has not been dealt with in those proceedings the cross claims and issues between Defendants may be required to be resolved. However that point does not arise until liability has been fixed. There is the other aspect of the matter, namely, that it avoids a multiplicity of claims and actions can proceed on the same set of pleadings. This is not in my view a situation where section 21 of the Limitation Act 1975 applies as at the time of the hearing of argument time had not begun to run. Accordingly I find the First Second and Third Defendants are not barred from the issue of cross notices. It would be strange indeed where parties were involved in a common cause brought against them by another that issues between them as to liability could not be tried without periods of limitation being raised one with another. The other method of proceeding would be to wait until judgment had been given against the First and Third Defendants and then give notice, but this I am

satisfied would make a nonsense of the rules of court which should ensure that litigation is brought to a speedy and just conclusion.

An interesting point has arisen in the course of these proceedings and I have been asked to make a finding on it in favour of the First and Third Defendants. The issues in this action are clearly complex and an approach was made to me during 1988 to consider chairing a pre-trial conference with a view to considering the position, particularly as to liability between the numerous Defendants. My understanding is that any indications given by me would be considered by all parties with, as in all pre-trial conferences, a view to endeavouring to achieve some agreement on the trial procedure and in the final analysis an ultimate settlement.

There was no precedent in the Western Samoan jurisdiction for such a conference either in the Rules of Court or informally, although one of my brother judges and myself had attempted mediation in matrimonial matters. To keep the Supreme Court calender under control has been for me a high priority and accordingly I gave approval to chairing a pre-trial conference. Apart from a discussion as to convenient dates I took no part in the preparation for the meeting.

The conference took place in the courtroom and lengthy written submissions were presented by Mr Upton for the First and Third Defendants. From memory these traversed some of the evidence it was proposed to call on behalf of the First and Third Defendants. It became clear after some time that all was not well for Mr Lynch proceeded to object to certain matters. Indeed at one stage he suggested that if this action were to proceed to trial an application may be made to disqualify myself if I considered and took into account certain written submissions made by Mr Upton. I accept that in the normal course of events ideally a judge who chairs a pre-trial conference should not hear the main trial, except on questions of law. I believe I had made it clear that the conference was to traverse certain facts and that in the normal course I would make my tentative views on what was placed before me. As Mr Upton's address proceeded it was clear that the Attorney General's counsel did not see this as an avenue to achieve a settlement. Indeed after some time Mr Lynch made it clear that he had no authority on behalf of the Government or the Fire Brigade to settle the claim or to admit any liability whatsoever. It took some half hour and questions from me to ascertain this. It is regrettable, that at least the Government's position had not been made known at the outset of the hearing.

As a result of this abortive meeting I am asked to consider the question of the costs of Mr Upton having come to Apia for the hearing. I have read Mr Nelson's affidavit and the facts of this are not challenged.

As a preliminary I have considered whether I should leave this to the end of the hearing, should the action proceed to trial. However on the basis that I have been intimately involved with the proceedings and acquainted with the background of the immediate question, I believe it is, for the sake of the trial judge, preferable that I make a finding.

On 7th November 1988 Mr Nelson in a letter to the Attorney General said:

> "We also wish to advise that we will be seeking a pre-trial conference in this matter before the Chief Justice on 25 November 1988. We believe we can usefully narrow down the points in dispute by such a conference and thereby focus solely on the contentious aspects of the claim. The Registrar of the Court advises this is an available date for His Honour and our Mr Upton will be in Western Samoa for this purpose. If there is any difficulty in this regard please contact me. I will liaise with you further regarding this."

Again on 30th December Mr Nelson wrote again to the Attorney General:

> "2. Pre-trial Conference:
>
> As you are aware the Chief Justice has indicated he would be prepared to preside over a judicial pre-trial conference to consider the question of liability (including the issue of contribution) and to assist in reaching agreement if at all possible on the point. If such a conference were convened the Chief Justice may wish to express his own views on the topic, but of course in a provisional and non-binding way.
>
> Please be good enough to confirm in writing your willingness to take part in such a conference and also confirm your client consents to the Chief Justice presiding at the trial of this matter should that become necessary. It seems to us such a conference is essential in this case not only because of the sheer size of the claim but also because of the issues involved. We consider all parties to the case have an obligation to explore the question of settlement to see if it can be resolved on a mutually acceptable basis.

> The Supreme Court calender is such that a conference can be convened on either 13 or 27 February 1989. A half day would be required. I ask that all parties respond on this matter well before those dates to enable us to arrange for overseas counsel to be present. I also ask that your client responds to the questions attached hereto before those dates."

On 18th January 1989 once again Mr Nelson wrote to the Attorney General:

> "Mrs Drake and Mr Puni have now indicated their availability for a pre-trial conference on Monday 27 February 1989. The Chief Justice will also be available on that date and arrangements have been made for the presence of the various overseas counsel involved. The only party yet to indicate availability are yourselves. I appreciate you are heavily tied up in the present Nurses' Commission of Inquiry however I urgently need your indication that the 27th is a suitable date. The Court calendar for 1989 is rapidly filling up and you are already aware of the Plaintiff's concern in completing interlocutory matters as advised by their memo dated 11 January 1989. Obviously the longer these proceedings take to resolve the higher the quantum the Plaintiff will claim against our clients and yours. There is no doubt it is in the interests of all parties to attempt early resolution whether by settlement or by trial."

It appears that the Attorney General did reply but did not make reference to the pre-trial conference, however eventually on 8th February 1989, the Senior State Solicitor replied:

> "I refer to your letter of 3 February 1989. I wish to confirm our availability for the pre-trial Conference set down for 27 February, and our agreeing to the Chief Justice presiding at the trial if so required.

In a final letter dated 21st February 1989, Mr Nelson exhorted all parties to have submissions that they may wish to file ready for filing and presentation. Mr Nelson went on to record his concern if there was any application for adjournment to file submissions. It was against this background that the conference was set down and discontinued. Mr Nelson claims on behalf of Mr Upton NZ$8,945.00 and WS$5,353.98 for his firm.

The situation which arose is regrettable and should never have occurred. I believe it was at worst a lack of experience on the part of counsel in the Attorney General's office and at best a failure of communication. The letter of the senior state solicitor appears to have been a reasonable acknowledgment upon which other counsel might act. It is significant that the senior state solicitor was not the principal advocate at the failed conference.

I believe that there was insufficient done on the part of the Attorney General's office to make its position on the question of liability clear. I am of the opinion that the pre-trial conference was a genuine attempt by counsel for the First and Third Defendants to examine the question of liability among the Defendants inter se and if possible provide a basis to discuss settlement. The solicitors involved for the Attorney General should have taken a clear and unequivocal stance and indicated a denial of liability. I am not clear what was expected to be achieved by counsel for the Attorney General at such a conference. I can understand the frustration of counsel for the waste in terms of time and expense. The prime responsibility for the discontinued conference must therefore rest with the office of the Attorney General. There is in my opinion no alternative. If the Governments instructions on its own behalf and on behalf of the Chief Fire Officer were to deny liability and not explore the possibilities of a settlement then its counsel should have conveyed this to counsel for other parties. Civil litigation is difficult enough at the best of times when counsel reside in the same town. However when parties are represented by overseas advisers accuracy and respect at a professional level for one another are prime pre-requisites. The question now is should I award costs as sought. There is a compelling argument to award the full amount. That in my view would be unjust. However to ensure that counsel are aware of their responsibilities some recognition of the default should be signalled. I acknowledge that from the outset solicitors from the Attorney General's office who have been involved in this action have changed from time to time for such reasons as the completion of employment contracts. However vigilance and attention to such complex issues as in the instant matter are vital, so that cases proceed to resolution.

I therefore award to the First and Third defendants the sum of NZ$3,000.00 on account of New Zealand counsel's fee and WS$1,500.00 on behalf of Mr Nelson's fee.

There is one final matter to refer to which from my point of view is important and strikes at my judicial integrity. As I mentioned previously it was suggested at the meeting in February 1989 that the question of my eligibility to preside over this action might later be reviewed. Although a fixture had been made for the present argument on the agreed facts, after entering court I was asked by Mr Lynch to see counsel in Chambers. He asked me to disqualify myself because he said that there was reasonable suspicion that I would not be impartial. I must say that on the eve of the conclusion of my career as a judicial officer, a suggestion that I might lack partiality, in this case involving the Government, gave me much sadness.

I refused the application. A number of reasons were given, none of which do I believe justify any enlargement because a decision to decline such an application is clearly very subjective. My main reasons for refusing the application were, like the previous matter, it was made just as I was to embark on a hearing of legal argument. It was not supported by counsel for the other parties who appeared to be quite prepared, as in the past, for me to hear the case. There had I believe been nothing either in my previous findings nor in my conduct of the case at any stage to justify a submission that I would be less than partial. Above all the parties themselves had agreed on the facts and those were not subject to judicial findings. My role was solely to apply the law as I saw it to those facts. As with any judge I trust my findings on the law will stand the scrutiny of a superior court. All I can say is I have done my best and on the question of impartiality and integrity I give my findings with a clear conscience.