

TAUILIILI (UIILI) v MALIFA (POROTESANO) AND  
LIMA (IETI) (Samoa Observer)

Supreme Court Apia  
Ryan CJ  
27, 29-30 August; 2-5 September 1991  
4 October 1991

DAMAGES - Libel - defamation - aggravation of further  
publications and costs when part only of claim succeeds.

National University of Samoa Act 1984 - statutory rules - ultra  
vires use of funds

LIBEL - assessment of damages - defence of justification

HELD: The Plaintiff was defamed in the inference that he was  
a dishonest person who misappropriated University  
funds. Damages assessed at \$20,000. The defence of  
justification was upheld on the inference that the  
Plaintiff was a poor administrator and that the  
University suffered as a result.

LETISLATION:

- National University of Samoa Act 1984, S4, 11, 12 and 44

K M Sapolu for Plaintiff  
L R Va'ai & A S Va'ai for Defendants

Cur adv vult

The Plaintiff sues the Defendants Porotesano Malifa and Ieti Lima  
for damages in the sum of \$250,000 in respect of an article which  
appeared in the newspaper published by the Defendants, the Samoa  
Observer, on 22 September 1989 wherein the Plaintiff says he was  
defamed. The parts of the article complained of were set out in  
paragraph 3 of the Amended Statement of Claim and read as  
follows:

"3. ON the 22nd day of September 1989 the defendants  
falsely and maliciously published in the Samoa (sic) or  
cause (sic) to be falsely and maliciously published in the  
Samoa Observer the following words and concerning (sic) the  
Plaintiff; as part of an article:

## STUDENTS CALLING FOR INQUIRY INTO UNIVERSITY

The students of the three-year BA course at the National University of Samoa are calling for an investigation into the university's administration.

They claim that mismanagement has taken place pointing out that they have not been paid their annual allowances of \$1,400 a head for this year.

Other sources say that the New Zealand government has cut off financial assistance to the university since the beginning of the year because of questionable transactions in the administration.

Stories of questionable activities began surfacing when the Vice Chancellor, Tauiliili Uili, sacked the head of the Samoan Language and Culture programme, Professor Aiono Fanaafi, three weeks ago.

Dr Aiono has since been reinstated on a ruling by the Supreme Court. And Dr Aiono's reinstatement apparently had a direct bearing on the students allowances complaint.

The reported \$26,000 that would have been saved from Dr Aiono's salary had her dismissal been final was to be used for the BA student's allowances.

The plan was to give the 30 students about \$860 each for the remainder of the year from the \$26,000 that would have been saved.

When Dr Aiono was reinstated, however, the plan backfired and the students were told that there would be no more allowances.

What has not been explained is the whereabouts of an amount of US\$40,000 given as a grant by the Canadian government specifically to pay the BA students their books and travel allowances.

The Secretary of the BA student body, Rev Fosi Tuumatavai, told the Observer yesterday that they had not been given their allowances for this year. Last year, the allowances were paid up.

He said early in the year when they enquired about the allowances, Tauiliili informed that the university council had cancelled them but the allowances for the university preparatory year (UPY) students were still being paid.

In July, Rev Tuumatavai and others met with Tauiliili in the presence of the Minister of Education, Patu Afaese and were told that it had not been a council decision to cancel the allowances.

At that meeting, the Minister instructed Tauiliili to start paying the allowances and to prepare a proposal for Cabinet to approve.

Later, the students were informed that their allowances would be paid but instead of the full amount of \$1,400 each, only \$860.00 would be given.

Inside sources said the problem started when New Zealand cut its aid to the university at the beginning of the year. This was because the New Zealand government was not satisfied with the university's administration.

And caught with[out] that injection of funds part of which went into the UPY's student allowances, the administration dipped into the Canadian grant of US\$40,000 inside sources are claiming.

Other stories are that a company in town has refused to do work for the university until a debt owing is paid up.

Also, returning from a trip to American Samoa recently where he stayed for two days, a senior university administrator claimed expenses of \$US1,000.

The teachers who had accompanied him over had been given only \$100 each.

Because they did not have enough for expenses they returned after one day, the sources said."

The trial took place between 27 August 1991 and 5 September 1991. On the morning of the first day of hearing the Defendants counsel Mr R. Va'ai fell ill and was unable to continue. Fortunately some 2 days later, Mr S. Va'ai stepped into the breach and conducted the case for the defence. That has some significance because the pleadings filed by the Defence up to the date of the trial were quite limited and restrictive insofar as the conduct of the Defence case was concerned. The nett result was that I allowed Mr S. Va'ai a great deal more latitude, particularly in his cross-examination of many of the Plaintiff's witnesses, than would normally have been the case given the Statement of Defence and Further Particulars which the Defendant had filed. In the ultimate I am satisfied that justice was served by this approach and the truth of the matter was unearthed.

At the conclusion of the trial I gave the following judgement:

"I regret to say that my commitments over the succeeding weeks and perhaps longer will preclude my giving a detailed and reasoned decision at an early date. However I am anxious that the parties should know the result of the hearing without having to wait for an unduly long period.

My basic findings are that the Plaintiff has been defamed in 2 respects:

- (a) as to his administrative and management abilities and
- (b) as to his honesty and integrity.

I find that the defence of justification has been made out in first instance as to the Plaintiff's administrative and management abilities but that it has not been made out insofar as his honesty and integrity are concerned. In respect of that second defamation I fix damages in the sum of \$20,000 and costs.

I will give reasons for my decision at the earliest possible opportunity."

It can be seen from the article and the Judgment that the Plaintiff's case was in essence in 2 parts, (a) that he was a poor administrator and that the University suffered as a result, and (b) that he was a dishonest person who misappropriated University funds.

The Plaintiff himself gave evidence and called a number of witnesses, among them persons of substance and integrity in Samoan society.

The Plaintiff has had a long career in public service and has been the Vice-Chancellor of the National University of Samoa since it was established in 1985 pursuant to the National University of Samoa Act 1984. That Act is a detailed legislative blueprint for the establishment and running of the University which regrettably has not been given full effect to, due in particular to 2 reasons which were manifest in the evidence before me. The first such reason was inadequate funding and the second was the attitude of the administration towards the Government of the day and Cabinet in particular. Under the constitution of the University, the Minister of Education is a Pro-Chancellor and effectively heads the Council and the Executive Committee of Council. Council is required to meet at least once a year but in fact has not met since late 1989. The evidence established to my mind that undue deference was paid by the University administration to the Government of the day, I

imagine for the reason that under S.40 of the Act the basic funding for the University was to come from moneys appropriated by Parliament for the purposes of the University. I was unable to detect in the evidence any real suggestion from any of the witnesses that the University was the autonomous body which the Act in my view contemplates. To give but one example, one of the Ministers of Education, who naturally enough was a Pro-Chancellor travelled overseas at one point to visit overseas scholarship students who were attending institutions of learning. They were clearly not university students of the University of Samoa but nevertheless funding for the trip amounting to some \$14,000 came from the University, which could ill afford it. Bodies such as the University which are established by Statute are required to carry out their functions strictly in accordance with their statutory rules and are not to be used in a manner which may be ultra vires their constitution. I apprehend that the reason for this particular payment was in reality an inability on the part of the University administration to distinguish between its particular and subscribed statutory functions and the other responsibilities which the Minister of Education/Pro-Chancellor had in other fields.

The article complained of by the Plaintiff was headed "Students calling for inquiry into University". It was spread over pages 1 and 5 of the newspaper and as I have already indicated in the judgment was interpreted as an attack on the Plaintiff's character in 2 ways; as to his administrative abilities; and as to his honesty and integrity. The Defence denied that the article was defamatory and in addition pleaded justification.

In addition to the original article a further series of articles appeared in the same newspaper dealing with the issue before the Court e.g. on 27 September 1989 a front page article headed "N.Z. has withheld aid to University, says Martin" (the N.Z. High Commissioner in Western Samoa). This was clearly a follow up of the earlier article. On 4th October a letter from the High Commissioner criticising the article of 27 September was published. Further articles which the Plaintiff suggests are indicative of the malice which the Defendants hold towards the Plaintiff appeared on 15 December 1989 entitled "VC's application for writ of arrest fails"; 20 December 1989 "Vice Chancellor tries again, fails again"; 22 December 1989 "Confidence lacking in National University, complaints find"; 25 January 1990 in a letter "Unanswered questions on University"; 9 May 1990 "VC's remark surprises educators"; 13 June 1990 "Court upholds discovery requests, will hear libel suits".

Plaintiff's counsel suggests that when looked at overall the only interpretation that can be placed on such a series of publications is that the Defendants are biased and prejudiced

against the Plaintiff and that at all times they have endeavoured to place before the public a one-sided and totally prejudiced view of the Plaintiff's involvement with the University as its principal administrator.

It became manifest early in the evidence that what had prompted the original article was the purported dismissal three weeks before of the Professor of Samoan language and culture, Professor Aiono Fanaafi. That action was clearly brought about because of some Cabinet dissatisfaction with either the course or the personalities involved and the evidence establishes quite clearly that the Council itself did not make a decision to dismiss the Professor or to suspend the study of Samoan Culture and language. Indeed it would be remarkable if such a decision would ever be made by a Council which considered itself in any way autonomous given S.4 of the Act which reads --

4. Functions of the University - The functions of the University shall include --

- (a) to retrieve, analyse, maintain, advance and disseminate knowledge of Samoa, the Samoan language and Samoan culture;
- (b) to maintain, advance and disseminate other knowledge by teaching, consultancy and research; and
- (c) to provide facilities for university education and training responsive to the needs of the people of Samoa.

It can be seen that the primary function of the University is the study of Samoa, its language and its culture.

It was suggested by the defence that the Plaintiff's performance as an Administrator was less than acceptable because of his autocratic manner, his failure to call regular meetings of the Council, his failure to have a bursar appointed, his failure to implement S.12 relating to the statutes and his failure to have the University accounts audited regularly -- all pointing towards a general incompetence as the primary day to day administrator of the University.

Insofar as the autocratic manner is concerned I am satisfied on the evidence that the Plaintiff's approach to his staff was at best paternalistic and at worst incompetent. For example after dissent among the staff had surfaced he banned the staff from having any meetings on the premises. In addition he wrote to Professor Aiono Fanaafi on 24 August 1989 dismissing her from her post, confirming that the University of Samoa no longer required her services. The minutes of the 30th meeting of the Executive Council indicate quite clearly that the Plaintiff had acted alone

in this regard (minute XV). It does seem to me that his action in this regard was high-handed and that at the very least the Executive Committee and in all probability the Council itself should have made a clear and unequivocal decision to dismiss the Professor given the significance of her position.

The failure of the Council to meet annually as required by statute speaks for itself but the Plaintiff's approach on this matter was that it was really a matter for the appointed Pro-Chancellor to call such meetings. With that approach I totally disagree. As the paid servant of the University in charge of the day to day running of the University he had an obligation to ensure that the Act was adhered to. The appointed Pro-Chancellor was not his political master although I have the strong feeling that he was perceived as such by the Plaintiff. Similarly a defence witness took exception, justifiable in my view, at meetings of the Executive being called on one hour's notice or held by circulation of proposed resolutions. The Plaintiff must take responsibility for such an unorthodox method of steering the methodology of the meetings.

S.11 of the Act requires the appointment of a bursar - in other words a treasurer or accountant to administer the financial affairs of the University. One has never been appointed, because funds were insufficient to meet a salary. What occurred was the engagement of a bursar's assistant although just how she could have held the position of assistant to a non-existent person is an exercise in convoluted logic which is beyond my comprehension. Some of the matters to which I shall refer later I am sure would not have occurred had a properly qualified bursar been in place. The Council had a statutory obligation to appoint a bursar and in my view the evidence establishes fault on the part of the Plaintiff in failing to ensure that such an appointment was made.

There were no statutes the making of which is a power the Council has. It is not obligatory under S.12 to have statutes but it does seem to me that running a University without statutes covering the management and discipline of the University (S.12 (2)(a)) is like playing rugby without having any rules governing the scrum: viz a recipe for chaos.

It is fundamental that any organisation set up by statute in the way the University is, should keep proper financial records and that those records should be scrutinized by an independent authority. Section 44 recognises this fact but the evidence establishes that the last audited accounts for the University were for the year 1988. Had there been vast sums of money coming in and out and had the running of the University been complex and involved then there may have been some reasonable excuse for the failure of the 1989/1990 accounts to have been audited by September 1991 but nothing of any substance was advanced by the Plaintiff. The absence of audited accounts since 1988 is really

an abject failure on the part of the Plaintiff to carry out a basic and fundamental administrative function. I really have no difficulty at all in reaching the conclusion that the defence of justification has been made out insofar as it relates to the defamatory allegations made against the Plaintiff relating to his administration of the University. His administration fell well short of what was required and hopefully steps will be taken immediately to correct the problem.

The Plaintiff's case on the question of his honesty and integrity is really based on the following passages in the article, which when looked at overall suggest quite vividly so the Plaintiff says that he is a thief and a dishonest person:

"Other sources say that the New Zealand government has cut off financial assistance to the university since the beginning of the year because of questionable transactions in the administration.

Stories of questionable activities began surfacing when the Vice Chancellor, Tauiliili Uili, sacked the head of the Samoan Language and Culture programme, Professor Aiono Fanaafi, three weeks ago.

Dr Aiono has since been reinstated on a ruling by the Supreme Court. And Dr Aiono's reinstatement apparently had a direct bearing on the students allowances complaint.

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The plan was to give the 30 students about \$860 each for the remainder of the year from the \$26,000 that would have been saved.

When Dr Aiono was reinstated, however, the plan backfired and the students were told that there would be no more allowances.

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And caught without that injection of funds part of which went into the UPY's student allowances, the administration dipped into the Canadian grant of US\$40,000 inside sources are claiming.

Also, returning from a trip to American Samoa recently where he stayed for two days, a senior university administrator claimed expenses of \$US1,000.

The teachers who had accompanied him over had been given only \$100 each."

The Plaintiff's view is that when the whole article is looked at and in particular when the foregoing paragraphs are considered, the only interpretation which can be placed on the Article is that he is a dishonest man and a thief -- that he has "dipped into" University funds, that he has cheated on expenses, that he has attempted to manipulate university finances to his own ends, that he has been involved in questionable activities.

The Defendant Malifa in his evidence conceded that he did not approach the Plaintiff to discuss with him the allegations which some of the students had made to him.

It hardly needs to be re-stated but that the media, and in particular the print media, whose images endure beyond the spoken word, must exercise its power in a balanced and impartial manner. Here there was no reasonable effort made by the Defendant to provide the Plaintiff with an opportunity to answer the allegations made. There was no attempt at impartiality or fairness and the Plaintiff was portrayed in a manner which encouraged denigration by the many readers of the paper.

Mr Malifa in his evidence said he "tried to get in touch with someone" -- hardly a strenuous effort for the champion of the freedom of the Press, which he then admitted to being.

Many witnesses for the Plaintiff gave evidence to the effect that having read the article they took it to mean that the Plaintiff was up to some dishonesty. They found it difficult to accept but that was the way they read the article.

I must say that I was in no doubt when I read the article but that the Plaintiff was involved in some financial skulduggery, that he was misappropriating University funds and that he was a dishonest person. He has satisfied me in the witness box that he was defamed - there was no suggestion in the article that any other administrator was involved -- and it was incumbent on the Defendants in that situation to prove that the defamation could be justified as being true in substance and in fact.

One of the witnesses called by the Defendants, Iosefa Maiava was the source of the statement in the article as to the N.Z. Government cutting off funds "but not exactly as it appeared in the article" so he said. In addition he also admitted telling the Defendants about the US\$1,000 expenses. Mr Maiava clearly wore his heart on his sleeve -- his animosity towards the Plaintiff was patently obvious and I am sure coloured his evidence. I can find nothing of substance in his evidence which would establish a positive defence to the question as to whether or not the Plaintiff had a reputation as a thief.

A former student Fosi Tuumatavai was the source of the allegation as to the grant of Canadian funds. He said that the Plaintiff had made a statement, basically as set out in the article, during the orientation week programme in 1988. The Plaintiff denied making such a statement and the evidence clearly establishes that there has never been such a grant. The inference which I take from the evidence as a whole on this topic is that the allegation that "the administration dipped into the Canadian grant of \$40,000" was a blatant lie on the part of the Defendants. "The Administration" could only refer to the Plaintiff and as such was a direct attack on his honesty. The witness denied telling the Defendant Malifa that this had occurred and in my view the Defendants falsely and maliciously fabricated this allegation.

Most of the evidence in relation to the misused expenses of US\$1,000 arose during the Plaintiff's cross-examination. It is true that the Plaintiff stated early in his cross-examination that he did not receive \$2202.14 (the equivalent of US\$1,000) for a trip to American Samoa but later conceded that he did. My assessment of the witness on this point is that his earlier answer was a genuine mistake. Having said that I must say that the voucher system employed by the University administration was primitive in the extreme but it is a giant step from that position to then go on to say that it was all part and parcel of a person's dishonest nature.

There is absolutely nothing in the Defence case which remotely proves to any extent that the Plaintiff was dishonest or a thief. Indeed at the end of the day it did seem to me that all that the defence was really saying on this issue was that no reasonable man could infer that it was alleged in the article that he was dishonest and a thief. As I have already said a number of witnesses took that inference and so did I. The dual defences viz that the article was not defamatory in this regard and if it was that it was true in substance and in fact must fail.

Damages:

The amount claimed by the Plaintiff was in my view grossly excessive and would have been so even if the defence of justification on the first ground had not been made out. In this country damages are assessed by a Judge alone unlike most common law countries where juries have that task.

Counsel were unable to point me to any other case in Western Samoa where damages had been awarded in a defamation case.

The Plaintiff and his family suffered a great deal of distress and humiliation as a result of the publication. It is true that as is so often the case many of the slights referred to were probably more imagined than real. Many of the Plaintiff's friends and associates conceded in the witness box that they were virtually forced to look again at the Plaintiff's reputation and character. If that was true for them then how much truer it must have been for those thousands of subscribers and readers who did not know him well.

The amount of \$20,000 which I awarded at the hearing should in my view adequately compensate the Plaintiff for the published libel. It takes into account that at no stage has an apology ever been tendered and also the aggravating factors of the continuing publication of slanted articles by the Defendants.

As to costs, Ms Sapolu has now asked for an award in excess of the scale. It is true that the scale seems quite out of date but I have no doubt that the excessive damages claimed by the Plaintiff were such that any hope of settling the dispute was negated and indeed that the litigation was prolonged and probably inflamed by such a claim. The Plaintiff like any other litigant should have considered this aspect of matters when formulating his claim. In addition of course the Plaintiff has failed to a significant degree with part of his claim - a part which I must say took up the greater part of the hearing. The application for costs in excess of scale is refused.