

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 346/92

BETWEEN: UTUGA FAAMANATU of Fagaloa,
School Inspector

PLAINTIFF

A N D: HOTEL KITANO TUSITALA a company
duly incorporated in
Western Samoa and carrying on
business there as a hotelier

FIRST DEFENDANT

A N D: IESE PUA c/- Hotel Kitano
Tusitala, Clerk

SECOND DEFENDANT

COUNSEL: Mr T.K. Enari for Plaintiff
Mr C.J. Nelson for Defendant

DATE OF HEARING: 29 October 1993

DATE OF JUDGMENT: 3 November 1993

JUDGMENT OF SAPOLU, CJ

This is an action in negligence for damages.

The plaintiff says that on or about 10 January 1992 he drove his Nissan double cab pick up vehicle along Convent Street towards Savalalo. When his vehicle arrived at Morris Hedstrom Ltd's Hardware division, he stopped his vehicle. He then reversed his vehicle and turned it onto the road between the Morris Hedstrom building and the Bartley building so that his vehicle was on that road facing Convent Street. At the time the plaintiff was reversing his vehicle onto the road between the Morris Hedstrom building and the Bartley building, two vehicles went past apparently heading towards the road intersection at Savalalo. The third vehicle that

came, which was a taxi, stopped to give way to the plaintiff's vehicle. When the plaintiff's vehicle was on the road between the Morris Hedstrom building and the Bartley building trying to turn back in the easterly direction along Convent Street, the plaintiff looked east and west along Convent Street to see if the road was clear. He saw that Convent Street was clear in both directions. Going west from where the plaintiff's vehicle was at that time is an almost straight strip of road of about 40 metres. So if the plaintiff is right, then the road was clear for about 40 metres in the westerly direction. At that time, the taxi that had stopped was still stationary to give way to the plaintiff's vehicle.

In order for the plaintiff to be able to drive his vehicle back in the easterly direction along Convent Street, he had to drive his vehicle across Convent Street in front of the taxi that had stopped and then further across the centreline of the road before he gets to the lane on the inland side which is the lane for vehicles travelling east from where the plaintiff was at the time. The plaintiff says he drove his vehicle slowly across Convent Street in front of the taxi that had stopped and when he reached the centreline he again looked towards the westerly direction and the road was still clear. When the front of his vehicle was half way across the centreline, the right front mudguard of vehicle was all of a sudden hit by the first defendant's vehicle driven by the second defendant and travelling from the westerly direction heading towards the easterly direction.

Pausing here for the moment, I must say that I find the plaintiff's account unbelievable. If the plaintiff is right that the road was clear immediately before he drove his vehicle onto Convent Street to turn towards the easterly direction and that the road was still clear from the westerly direction, which was for about 40 metres, when his vehicle reached the centreline of the road, then clearly no accident should have occurred. The fact that an accident occurred clearly suggests that the road was not

clear from the westerly direction. The inference must be that the plaintiff made an error when he thought that the road was clear from the westerly direction when his vehicle reached the centreline and so continued to drive across the centreline onto the side of the road where the first defendant's vehicle was coming from. If on the other hand the road was not clear, then the plaintiff's vehicle should have stopped and give way to the traffic on Convent Street travelling from west to east until they have gone past.

The second defendant says that he was driving a four wheel drive vehicle belonging to his employer, the Hotel Kitano Tusitala, the first defendant along the Convent Street from west to east. He was driving at about 20m.p.h and when he approached the place where the accident occurred, he did not see where the plaintiff's vehicle was as there was a truck apparently travelling westerly with a container on its tray obstructing his view of any traffic emerging from the road between the Morris Hedstrom building and the Bartley building onto Convent Street. He only saw the plaintiff's vehicle emerging onto the side of the road he was travelling on when his vehicle was close to it. The distance between the two vehicles at that time must have been about 20 feet as described by the second defendant. He says he tried to stop his vehicle but it was too late. So the collision happened.

Considering all the circumstances of this case, I must say that I find the second defendant's account more believable than that of the plaintiff. In Tunoa Tanoai v Tagaloa Mika Ah Kam (an unreported decision of this Court) this Court said :

"To succeed in an action in negligence a plaintiff must
"prove four things. Firstly, that the defendant owed a
"legal duty to the plaintiff to take care; secondly,
"that the defendant had breached that duty to take care;
"thirdly, the plaintiff suffered damage as a consequence

"of the defendant's breach of his legal duty to take
"care; and fourthly, that the damage suffered by the
"plaintiff was not too remote but a sufficiently
"proximate consequence of the defendant's breach of
"legal duty. If one of these four elements is absent
"then an action in negligence must necessarily fail".

Of the four elements of the tort of negligence, the element that is really in dispute in this case is whether the second defendant, as the driver of a vehicle on the road, had breached his legal duty to the plaintiff to take care. On the evidence I am not satisfied on the balance of probabilities that the second defendant had breached that duty.

The plaintiff's action in negligence for damages is therefore dismissed. Costs are awarded to both defendants which I fix at \$250.

T. F. M. Sapolu
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CHIEF JUSTICE