IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 373/94

BETWEEN: SIALAOA SIALAOA of Siusega, Sign Writer

Plaintiff

A N D: LALOMILO KAMU of Siusega, Director of Education of the Methodist Church

First Defendant

A N D: THE ATTORNEY GENERAL of Apia

Second Defendant

Counsel: TRS Toailoa for plaintiff
R Drake for first defendant
M Bailey for second defendant

Hearing: 2 November 1996

Judgment: 24 December 1996

JUDGMENT OF SAPOLU, CJ

This is an action by the plaintiff against the first and second defendants in the tort of malicious prosecution. It is understood to be the first action of its kind to have been brought before the Courts in this country.

To have a clear picture of the material issues involved in this case, I will discuss the actions against the defendants separately. I will deal first

with the plaintiff's action against the first defendant and then with his action against the second defendant.

Action against first defendant:

Evidence:

Essentially what happened was that when the first defendant and his wife arrived at their home at Siusega on Tuesday night, 28 December 1993, their daughter was not at home. She was supposed to have attended a choir practice but it was reported to the first defendant that his daughter did not turn up at the choir practice. A search for her aroused suspicion in the first defendant that his daughter was at the plaintiff's house. However when the first defendant and his wife went with other people to the plaintiff's house, they were prohibited by a male relative of the plaintiff from entering the house. That relative of the plaintiff was later to be jointly charged with the plaintiff as a co-accused.

After being refused entry into the plaintiff's house, the first defendant's wife came to the police for help. Eight police officers went to the plaintiff's house and searched it. They found one of the bedrooms was locked. So they knocked and kept knocking on the door until it was opened by the plaintiff. The police entered the bedroom and found the first defendant's daughter under the bed. When she refused to come out, the police pulled her out from under the bed. She then went into the sitting room where her father was.

According to the first defendant, when he confronted his daughter in the sitting room she appeared to be in a distressed condition and her hair was messy. She told him that the plaintiff had made her hide under the bed. Later the first

defendant and his wife took their daughter in their car to their home. On the way she opened the door of the car and rolled out. Her parents stopped the car and put her back in.

The following morning, 29 December 1993, the first defendant's daughter made two written statements. The first statement was prepared at home at Siusega at 8.00am, the second statement was made when she was interviewed by the police at the Apia police station at 10.30am. Both statements were in the possession of the police and were produced by consent in evidence by counsel for the second defendant, the Attorney General. The first defendant's daughter was not called to testify.

In the first of her two statements, the first defendant's daughter says that at about 6.25pm in the evening of 28 December 1993, she went with two gay acquaintances to the house of the plaintiff to get some coconuts. While at the plaintiff's house she says the plaintiff gave her a cup of beer to drink. She was uncertain whether to accept it, but the plaintiff insisted, so she drank it. One of her gay acquaintances then told her that he would drop off their other gay friend at the choir practice and then come back. Those two then left. At that time the plaintiff passed the first defendant's daughter another cup of beer which she also drank. Then the plaintiff wanted her to go with him into the bedroom to talk but she says she refused. About 7.45pm she says she told the plaintiff and his male relative she was going to her choir practice but the plaintiff's reply was to wait until his car arrived then he would drop her off at the choir practice. She was starting to get drunk at that time and the plaintiff again asked her to go with him into the bedroom. When she refused

again, the plaintiff pulled her from her chair into the bedroom. She says she tried to scream but as the plaintiff had his mouth over hers she screamed inside her mouth. The plaintiff then had sexual intercourse with her and she vomitted.

Afterwards she went to the bathroom to wash herself and when she returned from the bathroom the plaintiff's male relative sexually abused her. She then heard the brakes of a car which sounded like those of her car. She became scared, confused and gasped for air. However the plaintiff shoved her under the bed and kept kicking back her legs when they showed out. At the end of her statement she requests the police to place her statement before the Court.

In her second statement, the first defendant's daughter essentially repeats to the police what is said in her first statement. She further states that the plaintiff and his male relative both had forceful sexual intercourse with her without her consent and she is not a girlfriend of any of those men.

On 29 December 1993, the plaintiff was also interviewed by the police and he gave a written statement to the police. Even though he admitted to having sexual intercourse with the first defendant's daughter, the plaintiff denied that it was done without her consent. One of the first defendant's daughter gay acquaintances who went with her to the plaintiff's house also made a written statement to the police. I will come back later to those two statements as they are not relevant to the action against the first defendant because there is no evidence that the first defendant was aware or had any knowledge of those statements when he made his own statement on 6 January 1994 to the police.

On 29 December 1993 the first defendant's wife also made a written statement. That statement was also produced by consent in evidence by counsel for the second defendant, the Attorney General, so presumably that statement was also in the hands of the police. In her statement, the first defendant's wife relates her observations of what she saw on the night of the alleged incident and what her daughter had related to her about that incident. What the first defendant's wife says regarding what her daughter had related to her is substantially the same as what her daughter told the police as to what happened during the alleged incident.

Then on 5 January 1994 the police jointly charged the plaintiff and his male relative on the count of rape and held the plaintiff in police custody; the co-accused could not be found at that time. The following day, 6 January 1994, the police had the appropriate information filed and sworn before the deputy registrar of this Court who remanded the plaintiff on bail to appear in Court on 24 January 1994 when his case was to be called for mention. I will pick up the chronological sequence of events from there onwards when I come to the plaintiff's action against the second defendant.

On 6 January 1994, after the plaintiff had been charged on 5 January, the police also obtained a written statement from the first defendant. That statement was also produced by consent in evidence by counsel for the second defendant. In his statement the first defendant relates what he observed on the night of 28 December 1993. He also relates what his daughter had told him about the alleged incident which is substantially the same as what his daughter had already told the police on 29 December 1993.

That brings me to the law which is relevant to the action against the first defendant.

Relevant law:

The tort of malicious prosecution is stated in Clerk and Lindsell on Torts 16th edition p.1042 at para 19.05 in these terms :

> "In an action of malicious prosecution the plaintiff must show first that "he was prosecuted by the defendant, that is to say, that the law was set "in motion against him on a criminal charge; secondly, that the "prosecution was determined in his favour; thirdly, that it was without "reasonable and probable cause; fourthly, that it was malicious. The "onus of proving everyone of these is on the plaintiff".

Dealing now with the first element of malicious prosecution, I am of the clear view that the first defendant did not prosecute the plaintiff, that is to say, he did not set the law in motion against the plaintiff on a criminal charge. Before the police interviewed the first defendant on 6 January 1994, they had already charged the plaintiff on 5 January. Therefore it could not have been the first defendant's statement made to the police that caused the police to charge the plaintiff. It would be recalled that before the police charged the plaintiff they were already in possession of the two written statements made by the first defendant's daughter on 29 December 1993, one of those two statements having been made directly to the police. The police must also have been in possession of the written statement made by the first defendant's wife on 29 December 1993 before they charged the plaintiff on 5 January 1994. Then on 6 January the police filed and swore the appropriate information in the Court registry. That was the same day the police obtained a written statement from the first defendant. However there is no evidence to show whether the first defendant's statement was given

to the police before or after the information was filed and sworn in the Court registry.

It is also clear that what the first defendant told the police in his statement was what he saw on the night of the alleged incident against the plaintiff and what his daughter had related to him regarding what happened during that incident. He then requested the police at the end of his statement to investigate the matter and have it brought before the Court. There is no evidence that the first defendant knew that what his daughter had related to him was false. So it cannot be said that he was misleading or deceiving the police with false information as to what happened between his daughter and the plaintiff during the alleged incident. His request to the police to investigate the matter was one a parent in the circumstance of the first defendant would have been expected to make.

In these circumstances and having regard to the legal principles I will refer to shortly, I am of the clear view that the first defendant did not prosecute the plaintiff. The plaintiff has therefore not established the first element of malicious prosecution.

One must bear in mind that the first defendant is not a prosecutor in the technical sense of the word 'prosecutor'. He was just another private individual who related information to the police as to what he observed and what he was told by his daughter. However, as it will be shown, there may be circumstances where a private individual may yet be a prosecutor. But such circumstances do not exist in respect of the first defendant.

In the case of *Pandit Gaya Parshad Tewari v Sardar Bhugat Singh (1908) 24 TLR 884*, the Privy Council stated :

> "If, therefore, a complainant did not go beyond giving what he believed to "be correct information to the police and the police, without interference "on his part (except giving such honest assistance as they might require), "thought fit to prosecute, it would be improper to make him responsible in "damages for the failure of the prosecution. But if the charge was false "to the knowledge of the complainant, if he misled the police by bringing "suborned witnesses to support it, if he influenced the police to assist "him in sending an innocent man for trial before the magistrate, it would "be equally improper to allow him to escape liability because the "prosecution had not technically been conducted by him".

In the United States it is stated in the American Law Institute, Restatement of the Law, Torts (2nd edition 1977) p.409 at para 653 that :

> "When a private person gives to a prosecuting officer information that he "believes to be true, and the officer in the exercise of his uncontrolled "discretion initiates criminal proceedings based upon that information, "the informer is not liable under the rules stated in this section even "though the information proves to be false and his belief was one that a "reasonable man would not entertain. The exercise of the officer's "discretion makes the initiation his own and protects from liability the "person whose information or accusation has led the officer to initiate "the proceedings. If, however, the information is known to the giver to "be false, an intelligent exercise of the officer's discretion becomes "impossible, and a prosecution based on it is procured by the person "giving false information. In order to charge a private person with "responsibility for the intiation of proceedings by a public official, it "must therefore appear that his desire to have the proceedings initiated, "expressed by direction, request or pressure of any kind, was the deter-"mining factor in the officials decision to commence the prosecution, or "that the information furnished by him upon which the official acted was "known to be false".

Then in the decision of the House of Lords in *Martin v Watson [1995] 3 All ER 559*, Lord Keith of Kinkel in a judgment concurred in by the other members of the House of Lords stated at p.567 :

"The circumstances that a defendant in an action of malicious prosecution "was not technically the prosecutor should not enable him to escape "liability where he was in substance the person responsible for the "prosecution having been brought. The mere fact that an individual has "given information to the police which leads to their bringing a "prosecution does not make that individual the prosecutor".

In Fleming, The Law of Torts 8th edition (1992) that learned author states at p.612 :

"The defendant must have been 'actively instrumental' in setting the law "in motion. Merely supplying information, however incriminating, to the "police on which eventually they decide to prosecute is not the equivalent "of launching a prosecution; the critical decision not being his, 'the "'stone set rolling is a stone of suspicion only'".

A little further the same learned author goes on to say :

"On the other hand, an informant may be regarded as a prosecutor if the "information virtually compels the police to prosecute, even more where he "deliberately deceives the police by supplying false information without "which they would not have prosecuted".

In New Zealand, it was stated by Denniston J in the case of *Fanzelow v Kerr (1896) 14 NZLR 660* at p.667 :

"I do not think the defendant can be said to have 'instigated' the "prosecution anymore than the man who at any time exercises his right and "duty to inform the police of circumstances requiring investigation. It "seems to me that it would be very dangerous to lay it down that any man "who honestly, even if mistakenly, informs the police that he believes a "crime to have been committed, in consequence of which they investigate "the matter and afterwards take proceedings, is to be held responsible in "an action of this kind for the proceedings so taken by the police".

In the decision of the Court of Appeal in *Commercial Union Assurance v Lamont [1989] 3 NZLR 187* McMullin J stated at p.207 :

> "As a general rule a prosecution will be considered to be brought when "the information is laid and by the person who lays it. In the result, "in prosecutions under the Crimes Act 1961, as was Mr Lamont's, the "police will generally be treated as the prosecutor and no action for "malicious prosecution will be against the person on whose information "the police have acted. But in some cases the person who supplied the "information to the police may be regarded as the prosecutor if, inter "alia, he puts the police in possession of information which virtually "compels an officer to lay an information; if he deliberately deceives "the police by supplying false information in the absence of which the "police would not have proceeded".

In the light of those principles, I am of the clear view that on the evidence the first defendant did not prosecute the defendant. Perhaps it should be added here that there is also not sufficient proof for this Court to conclude with the necessary confidence that what the first defendant related to the police regarding what his daughter told him was false. The first defendant's daughter did not testify orally, so I am reluctant to make any conclusions on the issue of credibility without having seen her in the witness stand.

Having found that the first element of malicious prosecution has not been proved in relation to the action against the first defendant, it is not necessary to go on to consider the other elements of the tort. If it had been necessary to go further, it is also clear that on the evidence there is no proof of malice on the first defendant's part.

That brings me to the plaintiff's action against the second defendant, the Attorney General.

Action against second defendant:

Evidence:

The action against the second defendant, the Attorney General, is based on allegations involving a principal state solicitor and a state solicitor both of whom were formerly employed in the Office of the Attorney General. For convenience they will both be referred to by their names and as state solicitors. Likewise, for convenience, the evidence regarding the written statements made by the first defendant, his wife and his daughter as already discussed will be treated as relevant to the action against the second defendant without having to repeat that evidence here.

Now in the written statement which the plaintiff gave to the police on 29 December 1993, he says that he had had an 'affair' with the first defendant's daughter, and on the day of the alleged incident, 28 December 1993, the first defendant's daughter came to his house with two gay, Tagi and Ioata. The first defendant's daughter drank beer with them and the plaintiff says that after Tagi and Ioata had left, the first defendant's daughter started flirting with him. So he asked the first defendant's daughter to go with him into the bedroom and in there they had sexual intercourse with her consent. The plaintiff denies that she screamed. In his oral testimony given in Court the plaintiff also denied certain parts of his written statement. However I do not consider those denials of parts of the plaintiff's statement as relevant to the present action because the question whether the two state solicitors involved are liable, and therefore the second defendant, must be determined on the basis of the evidence available to the state solicitors at the time they were handling the case against the plaintiff, and not on information that came up later after their involvement had

ceased.

Now Tagi Fualau who went with the first defendant's daughter to the plaintiff;s house on the evening of 28 December 1993 also made a written statement to the police. That was on 6 January 1994. He says in that statement that he and another gay named Ioata were going to the plaintiff's house for coconuts when the first defendant's daughter joined them and asked to go with them. When they arrived at the plaintiff's house, they had a drink of ice water and then the first defendant's daughter went to the rear extension of the house and talked to another boy. Shortly afterwards the plaintiff who had been talking to Tagi went and talked with the first defendant's daughter. At about 6.00pm Tagi says she twice asked the first defendant's daughter to leave as it was time to go to their choir practice. However the reply from the first defendant's daughter was that she would catch up with them in time for the choir practice. Tagi and Ioata therefore left while the first defendant's daughter was still at the plaintiff's house. She did not turn up at the choir practice that night.

Tagi also says in his written statement that on a different day when she went to Aleisa for coconuts, the first defendant's daughter asked to go with him. When they arrived at Aleisa the plaintiff was there in a house. It is not clear whether that was the plaintiff's house. Tagi also says that when he came out of the house, the plaintiff and the first defendant's daughter were still inside the house. Later they all left the house together. Tagi further says that he had often seen the plaintiff talking with the first defendant's daughter at their pastor's house.

It is clear that before Tagi made his statement to the police on 6 January 1994, the police had already charged the plaintiff on 5 January. However it is not clear whether the appropriate information was filed and sworn in the Court registry before or after Tagi made his statement to the police.

After the information was filed and sworn by the police on 6 January, the deputy registrar remanded the plaintiff on bail to appear in Court on 24 January when his case was to come up for mention. The police then referred their case file to the office of the second defendant whose professional staff conduct criminal prosecutions for the police in the Supreme Court; the charge of rape in this case is a matter within the Supreme Court's jurisdiction. The police case file was received by the second defendant's office on 19 January and was then referred to Mr Edwards an Australian lawyer who was a state solicitor. That was the first time, as the evidence shows, that the office of the second defendant became involved in the case. The evidence suggests that at that time all the statements by potential prosecution witnesses which were in the case file were in Samoan except for one of the statements made by the first defendant's daughter and that of the first defendant's wife. It is therefore unlikely that Mr Edwards an Australian lawyer was in a position at that stage to make a proper assessment of the case file. The only two statements which were certainly in English at that stage were in support of the charge against the plaintiff.

When the case was called for mention on 24 January, it was Mr Kosimiti Lâtu, then a local state solicitor, who appeared for the prosecution. It is not clear when he first received the file, but because of the seriousness of the charge he opposed bail being granted to the plaintiff. The plaintiff who was

represented by different counsel at that time, was then remanded in custody for trial on 11 to 13 July 1994 after he entered a not guilty plea to the charge against him. As it appears from the documentary evidence produced for the second defendant, the Court did indicate on 24 January that criminal cases, including that of the plaintiff, where the accuseds were remanded in custody to await their trials would be reviewed in February so that they could be rescheduled for early trial dates.

Now Mr Latu who started as a state solicitor in 1991, testified that when he received the case file in respect of the plaintiff, police investigations were still incomplete as the police had not found the plaintiff's co-accused. However he was of the opinion that there was enough information in the case file to establish a prima facie case if the charge was to proceed to trial before a panel of assessors. By covering letter of 27 January Mr Latu returned the case file to the police advising them of the trial dates and requesting the police to prepare and submit trial documents by 6 June.

On 17 March 1994 after reviewing the case against the plaintiff, the Court rescheduled the case for hearing from 11 to 13 July to 26 to 28 April. An appeal which had been filed by new counsel for the plaintiff in respect of the custody remand was withdrawn. By letter of 17 March, Mr Edwards advised the police of the rescheduled dates of the plaintiff's trial and requested the police that he be provided with the trial documents as soon as possible. The case file with the trial documents was returned by the police to the second defendant's office on 12 April and by letter of 15 April Mr Edwards wrote to the Commissioner of Police acknowledging receipt of the file and saying that he agreed with the

recommendation from the police superintendend in charge of the criminal investigation branch that the charge against the plaintiff should be withdrawn. The reason being that there was no corroboration of the account given by the complainant, the first defendant's daughter, regarding the issue of consent. Mr Edwards also expressed the view that on the information available a panel of assessors properly directed would have to have a doubt and therefore acquit the accused of the charge. Mr Edwards subsequently informed the first defendant, his wife and his daughter of the decision to have the charge withdrawn and on 21 April he made application to the Court for the withdrawal of the charge against the plaintiff and it was granted. So the charge against the plaintiff was withdrawn five days before the trial was to commence on 26 April.

Evidently the state solicitors were of the opinion that there was sufficient evidence to establish a prima facie case. No doubt that opinion must have been based on the statements made by the first defendant's daughter. However in the absence of corroborating evidence regarding the issue of consent, Mr Edwards was of the opinion that there was insufficient evidence to obtain a conviction. Perhaps it should be added here that Mr Edwards also testified that the medical report on the first defendant's daughter was of no assistance.

That brings me to the law which is relevant to the action against the second defendant.

Relevant law applied to evidence:

Before I come to the elements of malicious prosecution, I wish to deal first with an important issue which has arisen in this case. This is the

question whether the Attorney General and his agents enjoy immunity from civil liability in suits for malicious prosecution for the conduct of a criminal prosecution. As it will appear shortly, there is no unanimity amoungst the major common law jurisdictions where the issue has arisen as to the answer to that question.

In the United States, it appears from the majority judgment of the United States Supreme Court in the case of *Imbler v Pachtwan 424 U.S. 409 (1976)*, that a prosecuting counsel enjoys absolute immunity from civil actions which arise out of a prosecutor's initiation of a prosecution and presentation of the case for the State. In Scotland, the Lord Advocate who would be the equivalent of our Attorney General, is also absolutely immune from civil liability for bringing criminal prosecutions. In the Scottish case of *Ilester v Mac Donald [1961] S.C. 330*, the Court there said at p.377 :

> "It is, therefore, an essential element in the very structure of our "criminal administration in Scotland that the Lord Advocate is protected "by an absolute privilege in respect of matters in connexion with "proceedings brought before a Scottish Criminal Court by way of "indictment... Never in our history has a Lord Advocate been sued for "damages in connexion with such proceedings. On the contrary, our Courts "have consistently affirmed the existence of such immunity on his part".

In Canada, however, the position seems to be different. The majority of the Supreme Court of Canada in the case of *Nelles v Ontario [1989] 2 S.C.R. 170* held that the Attorney General and Crown Attorneys do not enjoy absolute immunity in respect of suits for malicious prosecution. Lamer J, as he then was, in delivering the judgment of himself, Dickson CJ and Wilson J said at pp.199-200 :

"A review of the authorities on the issue of prosecutionial immunity "reveals that the matter ultimately boils down to a question of policy. "For the reasons I have stated above I am of the view that absolute "immunity for the Attorney General and his agents, the Crown Attorneys, "is not justified in the interests of public policy. We must be mindful "that an absolute immunity has the effect of negating a private right of "action and in some cases may bar a remedy under the Charter. As such "the existence of absolute immunity is a threat to the individual rights "of citizens who have been wrongly and maliciously prosecuted. Further, "it is important to note that what we are dealing with here is an "immunity from suit for malicious prosecution; we are not dealing with "errors in judgment or discretion or even professional negligence. By "contrast the tort of malicious prosecution requires proof of an improper "purpose or motive, a motive that involves an abuse or perversion of the "system of criminal justice for ends it was not designed to serve and as "such incorporates an abuse of the office of the Attorney General and his "agents the Crown Attorneys.

"There is no doubt that the policy considerations in favour of absolute "immunity have some merit. But in my view those considerations must give "way to the right of a private citizen to seek a remedy when the "prosecutor acts maliciously in fraud of his duties with the result that "he causes damage to the victim. In my view the inherent difficulty in "proving a case of malicious prosecution combined with the mechanisms "available within the system of civil procedure to weed out meritless "claims is sufficient to ensure that the Attorney General and Crown "Attorneys will not be hindered in the proper execution of their impor- "tant public duties. Attempts to qualify prosecutorial immunity in the "United States by the so-called functional approach and its many "variations have proven to be unsuccessful and unprincipled as I have "previously noted. As a result I conclude that the Attorney General and "Crown Attorneys do not enjoy an absolute immunity in respect of suits "for malicious prosecutions".

Earlier on in the judgment, Lamer J stated at p.197 :

"One element of the tort of malicious prosecution requires a demonstration "of improper motive or purpose : errors in the exercise of discretion or "judgment are not actionable".

In the English case of *Riches v Director of Public Prosecutions [1973] 2 All ER 932 (CA)* the plaintiff who was acquitted of a criminal charge sought damages for malicious prosecution against the Director of Public Prosecutions.

It would appear that the prosecuting function of the Director of Public Prosecutions in England is similar to the prosecuting function of our Attorney General. In the case mentioned, Stephenson LJ in the Court of Appeal said at p.941 :

> "I do not wish to be taken as saying that there may never be a case where "a prosecution has been initiated and pursued by the Director of Public "Prosecutions in which it would be impossible for an acquitted defendant "to succeed in an action for malicious prosecution, or saying that the "existence of the Attorney General's fiat where required conclusively "negates the existence of malice and conclusively proves that there was "reasonable and probable cause for the prosecution. There may be cases "where there has been, by even a responsible authority, the suppression of "evidence which has led to a false view being taken by those who carried "on a prosecution and by those who ultimately convicted. But that case "is, as it seems to me, many miles from this one".

It would appear from what Stephenson LJ said that he gave recognition to an exception to the immunity traditionally enjoyed by the Director of Public Prosecutions. That is, in his view, the Director of Public Prosecutions does not enjoy any immunity where there has been suppression of evidence as a result of which a prosecution has been brought against an innocent person. So a limited immunity from actions for malicious prosecution was recognised by Stephenson LJ in respect of the Director of Public Prosecutions.

After much consideration of the question in issue here, I have decided to adopt the position stated in the majority judgment of the Supreme Court of Canada in ***Nelles v Ontario [1989] 2 S.C.R. 170*** for the reasons elucidated by Lamer J in that judgment. That means the Attorney General and his professional staff do not enjoy an absolute immunity in respect of suits for malicious prosecution. I think counsel for the second defendant in this case quite rightly did not argue

otherwise or sought to strike out the action against the second defendant on the ground of immunity.

I will therefore move on to consider the first element of the tort of malicious prosecution in respect of the action against the second defendant. That is, did the second defendant prosecute the plaintiff by setting the law in motion against him on a criminal charge against him. This question has also been put in other forms such as : did the defendant procure or instigate the initiation of criminal proceedings against the plaintiff, or was the defendant actively instrumental in setting the law in motion against the plaintiff. It appears these are variations in the expression of the same idea.

It is clear that before the state solicitors of the second defendant's office first became involved in this matter when Mr Edwards received the police case file on 19 January 1994, the police had already obtained statements from potential prosecution witnesses, had charged the plaintiff, and had filed the appropriate information in the Court registry. Therefore the state solicitors cannot be said to have procured or instigated the initiation of criminal proceedings, or even set the law in motion against the plaintiff on a criminal charge. Criminal proceedings were already procured and instigated, and the law was already set in motion against the plaintiff on a criminal charge before the state solicitors became involved. In order to bring the state solicitors and therefore the second defendant within the ambit of the first element of malicious prosecution, I think it must be shown that they 'adopted' or 'continued' the prosecution against the plaintiff. In Fleming The Law of Torts 8th edition p.613 (1992) the learned author stated :

"A defendant may be liable not only for initiating but also for adopting "or continuing proceedings. Thus a prosecution, commenced under a bona "fide belief in the guilt of the accused, may become actionable, if at a "later stage the prosecutor acquired positive knowledge of his innocence, "yet perseveres bent on procuring a conviction".

The state solicitors clearly did not initiate the prosecution against the plaintiff for, as I have already stated, the prosecution had already been initiated before they became involved.

The question then is whether they, or one of them, adopted or continued the prosecution even after they had acquired positive knowledge of the plaintiff's innocence. In the case of Mr Edwards, I think it is clear that he did not adopt or continue the prosecution in terms of what is said by Fleming The Law of Torts 8th edition (1992). When Mr Edwards first received the case file, all the statements in it were in Samoan except for one of the statements by the first defendant's daughter and that of the first defendant's wife. Both statements were of course in support of the charge and information filed against the plaintiff. When Mr Edwards received the police case file again in the second week of April together with the prepared trial documents (which presumably included the English translations of all the statements in Samoan) he assessed the case file and advised the Commissioner of Police that he agreed with the recommendation from the police superintendend to withdraw the charge against the plaintiff and the charge was withdrawn on 26 April. There is therefore no evidence that Mr Edwards subsequently acquired positive knowledge of the plaintiff's innocence but still persevered bent on procuring a conviction. The evidence clearly suggests the contrary, for after Mr Edwards assessed the case file and having read the recommendation from the relevant police superintendent,

he made the decision there and then to withdraw the charge and took the necessary steps accordingly.

In respect of Mr Latu his only involvement was down the line when he appeared for the prosecution on 24 January 1994 when the plaintiff's case was called for mention and he opposed bail because of the seriousness of the charge. He had no other involvement in the prosecution's case. On the evidence it cannot be said that he adopted or continued the prosecution in terms of what is stated by Fleming The Law of Torts because there is no evidence that he acquired positive knowledge of the plaintiff's innocence yet persevered bent on procuring a conviction.

I am therefore of the view that the first element of malicious prosecution has not been established in respect of the action against the first defendant. But in case I am mistaken in this view, I will move on to consider the element of malice. Here agin Fleming The Law of Torts 8th edition pp.620-621 (1992) explains the notion of malice in these terms :

> "'Malice' has proved a slippery word in the law of torts, and should long "have been replaced, in this context as in the law of defamation, by "'improper purpose'. At the root of it is the notion that the only proper "purpose for the institution of criminal proceedings is to bring an "offender to justice and thereby aid in the enforcement of the law, and "that a prosecutor who is primarily animated by a different aim steps "outside the pale, if the proceedings also happen to be destitute of "reasonable cause. 'Malice' has, therefore, a wider meaning than spite, "ill-will or a spirit of vengeance, and includes any other improper "purpose, such as to gain a private collateral advantage. Indignation or "anger aroused by the imagined crime is, of course, not sufficient "because, far from being a wrong or devious motive, it is one on which the "law relies to secure the prosecution of offenders".

A little further on at p.621 Fleming goes on to say :

> "The burden of proving malice lies on the plaintiff, and may be discharged "by showing either what the motive was and that it was improper, or that "the circumstances were such that the prosecution can only be accounted "for by imputing some wrong and indirect motive to the prosecutor. "Occasionally it has been somewhat loosely said that absence of reasonable "cause is evidence of malice, but that malice is never evidence of want of "reasonable cause. Neither proposition is universally correct. Proof of "a particular fact may supply evidence on both counts, such as lack of "honest belief in the guilt of the accused or evidence that the "prosecution was set on foot on the complete absence of, or upon "ludicrously and obviously insufficient information. On the other hand, "evidence that the prosecutor was animated primarily by a desire to injure "the plaintiff would not furnish even a prima facie case of absence of "reasonable cause; and conversely evidence that the defendant had too "hastily formed a belief in the guilt of the plaintiff on unreasonably "insufficient grounds, does not ordinarily suffice to warrant an inference "of malice".

What was said by Lamer J in *Nelles v Ontario [1989] 2 S.C.R. 170 at pp.197 and 199* that in suits for malicious prosecution we are concerned with improper purpose or motive and not with errors in the exercise of discretion or judgment which are not actionable is also applicable here.

Applying these principles to the evidence, there is no evidence to show that the state solicitors involved in this case had any improper purpose in mind. The picture that emerges from the evidence is that the state solicitors were simply carrying out their prosecuting function without any spite, ill-will, indictiveness, dishonesty, fraud or any other improper purpose which may constitute malice. The action by Mr Edwards in withdrawing the charge against the plaintiff before the date of trial after he had assessed the case file and formed the opinion that as there was no corroboration on the issue of consent it would be difficult to procure a conviction is evidence which negates any

suggestion of malice. It is evidence which suggests absence of malice on the part of Mr Edwards.

If we are also to assume for the purpose of argument that the state solicitors made a mistake in the course of their handling of this case, something which counsel for the second defendant did not concede, it is clear from *Nelles v Ontario* that an error in the exercise by a prosecutor of his discretion or judgment does not constitute actionable malice. Even professional negligence is not synonymous or co-extensive with the notion of malice. As pointed out by Lamer J, in suits for malicious prosecution we are not dealing with errors of discretion or judgment by a prosecutor, or even with professional negligence.

Counsel for the second defendant submitted that the absence of reasonable and probable cause for instituting the criminal prosecution against the plaintiff is evidence of malice. Even if we are assume that there was absence of reasonable and probable cause, I am still of the clear view that in the circumstances of this case there was no improper purpose or malice on the part of the state solicitors. As pointed out by Fleming The Law of Torts 8th edition p.621 (1992), the proposition that absence of reasonable cause is evidence of malice is not universally correct. That must mean that absence of reasonable cause is not in every case evidence of malice. It must be a question of fact dependent on the circumstances of each case whether absence of reasonable and probable cause constitutes evidence of malice at the same time. Professor Fleming at p.621 of his textbook even suggests that evidence that a prosecutor had too hastily formed a belief in the guilt of the plaintiff on unreasonably insufficient grounds, does not ordinarily suffice to warrant an inference of

malice.

For all those reasons I conclude that malice has not been established against the state solicitors and therefore vicariously against the second defendant.

In all then, the actions against the first and the second defendants are dismissed.

On the question of costs, even though the action against the first defendant has been dismissed, the first defendant did have a counterclaim against the plaintiff which was withdrawn during the course of the hearing principally due to comments from counsel for the plaintiff that it disclosed no cause of action. I make no order as to costs in respect of the first defendant or plaintiff. As to the second defendant, counsel did not seek costs and I make no order as to costs in respect of the second defendant.

T F M Sapolu
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CHIEF JUSTICE