IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 42/97

BETWEEN: TOFILAU ETI ALESANA of Apia, Prime Minister

Plaintiff

A N D: SAMOA OBSERVER COMPANY LIMITED a duly incorporated company having its registered office at Vaitele, Western Samoa

First Defendant

A N D: SAVEA SANO MALIFA, Publisher of Apia

Second Defendant

Counsel: K M Sapolu for plaintiff
T Malifa for first and second defendants

Hearing: 18 June 1997

Judgment: 23 June 1997

JUDGMENT OF SAPOLU, CJ

This judgment is on an application by counsel for the plaintiff to recall the judgment which I delivered on 5 June 1997 in respect of two orders made in that judgment concerning the plaintiff.

Counsel for the plaintiff referred to the judgment of Wild CJ in the then Supreme Court of

New Zealand in *Horowhenua County v Nash (No.2) [1968] NZLR 632* in support of her submission that in certain circumstances the Court has jurisdiction to recall a judgment which has already been delivered. At p.633 of his judgment Wild CJ said :

> "Generally speaking, a judgment once delivered must stand for better or worse subject, of "course, to appeal. Were it otherwise there would be great inconvenience and uncertainty. "There are, I think, three categories of cases in which a judgment not perfected may be "recalled - first, where since the hearing there has been an amendment to a relevant statute or "regulation or a new judicial decision of relevance and high authority; secondly, where "counsel have failed to direct the Court's attention to a legislative provision or authoritative "decision of plain relevance; and thirdly, where for some other very special reason justice "requires that the judgment be recalled".

Counsel also referred to the judgment of Thomas J in the High Court of New Zealand in *Bridon New Zealand Ltd v Tent World Ltd [1992] 3 NZLR 725* and its discussion of R.540 of the High Court Rules (NZ) under which the Court may recall a judgment at any time before a formal record of it has been drawn up and sealed.

In my judgment which was delivered on 5 June 1997, the plaintiff was required to show separately in the prayer for relief in the statement of claim the amount claimed for general damages and the amount claimed for exemplary damages instead of claiming a global amount which includes both. That part of my judgment was based in part on a passage from *The Law of Torts in New Zealand (1997) 2nd edn pp 1234-1235*, which refers in brief terms to the judgment of Lord Cooke of Thorndon in *Television New Zealand Ltd v Quinn [1996] 3 NZLR 24*. I pointed out in my judgment that the report of that case was not available to the Court at the time of my judgment.

Since the delivery of my judgment, counsel for the plaintiff has obtained a copy of *Quinn's* case where Lord Cooke of Thorndon in his judgment pointed out that the practice in defamation

cases in both England and New Zealand is to direct a global award for damages rather than a separate award for exemplary damages where it is claimed as part of general damages. Counsel further pointed out that under the High Court Rules (NZ) it is not required that a separate amount should be specified for exemplary damages when claimed as part of general damages. She therefore submitted that we should follow the practice and the position in England and New Zealand and that my judgment be recalled in respect of the order made that the statement of claim should show separately the amount claimed for exemplary damages and the amount claimed for general damages.

I accept what counsel for the plaintiff has pointed out to be the practice and position in England and New Zealand. All that is now clear from the full report of *Quinn's* case. The difference, however, between the position in England and New Zealand and that in Western Samoa is that in those two countries, a defamation action is tried before a jury and the assessment of damages in such action is very much the province of the jury. It has therefore been said that the concern behind directing a global award rather than separate awards in a defamation case is the fear of a jury doubling up : see *The Law of Torts in New Zealand (1997) 2nd edn p.1235 footnote 235* and *Quinn* at p.36. In Western Samoa civil actions, which include defamation actions, are not tried before a jury or assessors but before a Judge sitting alone. The assessment of damages is therefore solely for the trial Judge. If, therefore, the reason for claiming a global sum and for directing a global award in a defamation action in other jurisdictions is the concern about a jury doubling up, then that reason does not apply in Western Samoa.

Counsel for the plaintiff, however, argued that there is an overlap between exemplary damages and general damages which would make it difficult to make an assessment for separate awards of damages. I have not been persuaded by this argument for these reasons. As already stated, if the reason for directing a global award of damages, which has given rise to the practice of

claiming in a statement of claim a global sum which includes exemplary damages as part of general damages. is the concern about a jury doubling up, then that reason does not apply in Western Samoa. Secondly, a claim for a global sum is likely to create uncertainty on an appeal as to how much was actually awarded for exemplary damages and how much was actually awarded for other general damages. In *Television New Zealand Ltd v Quinn [1996] 3 NLZR 24* Lord Cooke of Thorndon said at p.36 :

> "[The] ordinary practice in both England and New Zealand is to direct a global award. even "if the jury are satisfied that an added punitive element should be reflected in it. See for "instance *Cassell & Co Ltd v Broome [1972] AC 1027, 1072* per Lord Hailsham of "St Marylebone LC, and *Taylor v Beere [1982] 1 NZLR 81*. This has been thought to "militate against an impermissible doubling up. *One consequence of this practice is that it "is not possible to conclude with certainty how often New Zealand jury awards have "included something for punitive damages*". (italics mine)

In *McGregor on Damages (1988) 15th edn*, the learned author in discussing the question whether in practice there should be separate awards for compensatory damages and for exemplary damages said at para 1797 :

> "In *Broome v Cassell & Co [1972] AC 1027*, where the jury had in fact returned separate "awards for the compensatory and exemplary damages, the House of Lords emphasised that "the general practice should be to award a single sum; some subsequent cases, such as "D*rane v Evangelou [1978] 2 All ER 437* and *Guppy (Bridport) v Brookling (1983) 14 HLR "1*, have adhered to this while others, such as *Riches v News Group Newspapers [1986] QB "256* have not. Lord Diplock was of the opinion in *Broome v Cassell & Co* that a Judge "sitting alone should make separate awards in any event, but Lord Salmon, in delivering the "judgment in *Attorney General of St. Christoper, Nevis and Anguilla v Reynolds [1980] AC "637 (P.C.)* thought there was no such obligation. *It is thought that, whether the trial be by "Judge alone or with a jury, separate assessments are to be encouraged; as with actions for "personal injury, identification of the constituent parts of a damages award assists "appellants and appellate Courts*". (italics mine)

It is clear from this passage that the question whether there should be separate awards for compensatory and exemplary damages where claimed has been the subject of differing judicial opinions in England for a number of years. However, the learned author of *McGregor on Damages 15th edn* is clearly in favour of separate awards for compensatory and exemplary damages as that would be of assistance in an appeal to appellants and to appellate Courts.

The third reason is that in the absence of jury trials in civil actions in Western Samoa, it would be consistent with the general rule of modern pleading if the plaintiff is required to show separately the amount claimed for exemplary damages so that the defendant would be in a clear and better position to formulate his response. It would also place the Judge in a better position and assist the trial Court, to know how much is being claimed for exemplary damages and how much is being claimed for compensation by way of general damages. I am also of the view that if the purpose of exemplary damages, which is not to compensate the plaintiff but to punish the defendant for high-handed or flagrant disregard for the plaintiff's rights, is kept firmly in mind, that will assist in distinguishing the facts relevant to exemplary damages from the facts relevant to compensatory damages and the so-called category of 'aggravated damages', and in the making of separate awards for damages.

As to the other matter raised by counsel for the plaintiff, I would accept that it is not obligatory on the plaintiff to refer specifically or in express terms to the pleadings set out in the statement of claim which relate to the claim for exemplary damages. In my judgment in *Gates v Samoa Observer & Others (1997)* (C.P. 13/97; which was delivered on 17 June 1997) on a very similar application for further particulars as in the present case, the plaintiffs in that case were not required to show in express terms which pleadings in their statement of claim relate to exemplary

damages. I think no such order should also be made in this case and that view is not inconsistent with *Quinn*.

The present plaintiff is therefore only required to file within 7 days an amendment to the statement of claim showing separately the amount which is claimed for exemplary damages.

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CHIEF JUSTICE

Solicitors:
K M Sapolu, Apia, for plaintiff
Libra Law & Consultancy, Apia, for first and second defendants