

## Kauhala v Minister of Police & another

10 Supreme Court, Nuku'alofa  
Ward CJ  
Civil Case No.579/94

5 October 1994

*Practice and procedure - strike out writ*  
*Tort - negligence - breach of duty of care*

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This was an application to strike out a claim for damages arising from a Police failure to execute a warrant of arrest (to enforce compensation awarded for assault) against a police officer.

Held:

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1. There must be, and here there was not, a sufficient relationship between the Police, who were ordered by the magistrate to arrest the wrongdoer for failure to pay, and the person he should have paid, to give rise to the reasonable contemplation that neglect of duty or carelessness by the police officers would cause damage to the plaintiff.
2. In addition the plaintiff had not shown a sufficient relationship based on a general duty between him and the police.
3. Action struck out but no order for costs against plaintiff because that would be unjust given the attitude of the police in the "disgraceful episode".

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Cases referred to : Anns v London Borough of Merton [1977] 2 All ER 492  
Hill v Chief Constable of West Yorkshire [1988] 2 All ER 238  
Alexandrou v Oxford [1993] 4 All ER 328

Statute referred to : Police Act, s.20

Counsel for plaintiff : Mr Tu'ivai  
Counsel for defendant : Miss Tapueluelu

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### Judgment

This is a claim for damages against the Minister of Police and the Kingdom of Tonga but, following the filing of a statement of defence in which it was claimed there was no cause of action against the defendants, I set it down today for determination of that preliminary point. For such a determination, I must proceed on the basis that the facts set out in the statement of claim are correct.

60 The Plaintiff brought a private prosecution against an on duty police officer for assault. It was heard in the Magistrates Court on 11 February 1994. The magistrate made an order that the defendant should pay \$100 compensation within one month or be committed to prison for 2 months in default of payment. On the 11 March the money had not been paid and the magistrate issued a warrant for the arrest of the officer.

Despite a number of attempts by the plaintiff and his lawyer to have the warrant executed or the compensation paid, nothing happened until, on 22 June 1994, the plaintiff commenced this action. The efforts of the plaintiff to resolve the matter included a letter from his lawyer to the Police Commander which never received even the basic courtesy of a reply.

70 In an amended statement of defence, reference is made to the fact that the wife of the officer involved had paid \$100 to the police on 14 August which had been kept in the police safe ever since. It is suggested that, as people normally enquire about compensation payments due to them, the police did not consider they needed to do anything about telling the plaintiff.

The facts set out above are not denied and reveal a disgraceful episode. By section 20(c) of the Police Act, the duties of a police officer include executing promptly all orders, process and warrants lawfully issued to him by any competent authority. That clearly includes a warrant of arrest issued by a court. There must be a suspicion the reason this 80 warrant was not executed was because the warrantee was a fellow officer. The failure of the Commander to deal with this and the attitude of the police when they eventually received the money ordered in compensation reinforces that suspicion.

In such cases, a member of the public should have some remedy. One would hope that normally a complaint to the Commander of such a serious nature would result in immediate action. It did not. It was apparently ignored. Failing that, the filing of a writ and statement of claim might have been expected to produce a result. It did not. Two months later, when the money was, at last, paid in, the police were still apparently so disinterested in the rights of the Plaintiff and his claim against them that they did not make the effort even to inform him the money was available no less than six months after they 90 were ordered to arrest the officer.

The claim made is for damages arising out of the failure by the police to execute the warrant. Whether such a breach of duty gives rise to a cause of action depends on the two part test described by Lord Wilberforce in *Anns v London Borough of Merton* [1977] 2 All ER 492 @ 498.

100 \*First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider

whether there are any consideration which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise."

110 In this case, the damage claimed is for failure to execute and does not include the loss of the \$100 ordered in compensation. Under the first stage in the above test I cannot accept there is sufficient relationship between the police who were ordered by the magistrate to arrest the wrongdoer for failure to pay and the person he should have paid, to give rise to the reasonable contemplation that neglect of duty or carelessness by the police officers would cause damage to the plaintiff.

That is sufficient to allow me to strike out the action but had I found in favour of the plaintiff on that part, I would have struck out the action on the ground that the Plaintiff has not shown a sufficient relationship based on a general duty between him and the police on the authority of Hill v Chief Constable of West Yorkshire [1938] 2 All ER 238 and the cases that have followed it such as Alexandrou v Oxford [1993] 4 All ER 328.

The case is struck out showing no cause of action. However, it would be unjust in view of the attitude of the police throughout to give them their costs. I shall order that each party shall pay their own costs.