

Hamilton v Tonga Water Board

Supreme Court, Nuku'alofa

Lewis J

10 Civil case 226/94

20 September 1994, 5 May 1995

Breach of statutory duty - supply of water - failure - damages

Malicious prosecution - criminal charge - not civil action

Tort - breach of statutory duty - supply of water

20 The water supply of the plaintiff, not a land holder but an occupier only of land was disconnected by the defendant. The plaintiff sued for damages for malicious prosecution (of a civil counter claim in the Magistrates Courts brought against her by the defendant for earlier water connection difficulties) and for breach of statutory duty for failure to supply her with water.

Held:

1. The claim for malicious prosecution could not succeed because the previous proceedings did not relate to a criminal charge.
2. On the breach of statutory duty claim the plaintiff did have locus standi and the defendant had a statutory duty to supply her with water (she being a consumer within the meaning of the Water Board Act and Regulations).
3. The defendant intentionally breached that duty by disconnecting, and failing to resume, the plaintiff's water supply.
4. The defendant was liable to the plaintiff in damages - general of \$1000 and punitive of \$1000 (in view of the treatment of the plaintiff and particularly following an earlier decision, on appeal, of the Supreme Court).

40 Cases considered : T.W.B. v Hamilton (App 376/93) Dalgety J (10/12/93)
Clark v Pikokivaka (C 90/93) Ward CJ 10/9/93)

Statutes considered : Water Board Act

Regulations considered : Water Board Regulations, r.17

Counsel for plaintiff : Mr Edwards

Counsel for defendant : Mr Taumoepeau

Judgment

The plaintiff, Ms Fale Hamilton is a Tongan, raised and educated in Western Samoa. In June of 1992 she took up permanent residence in Nuku'alofa. The grandfather, of the plaintiff, one Vito Kafoa Langifisi, was the holder of an 'api kolo at Ma'ufanga. He died there on the 11th September of 1986.

After the death of Vito Langifisi the premises remained vacant with the exception of occasions when his widow and more laterly some relatives who are not identified in the evidence, moved in. Their occupancy is neither disputed nor important to the issues in this matter.

At the 2 January 1994, Mr. Langifisi (or more accurately the estate of Mr Langifisi), owed to the board the sum of TOP\$759.36 monies for water supplied. There is no dispute as to the amount of money owing. The issue has been whether the defendant owed a statutory duty to the plaintiff and if so was at the material time in breach of that statutory duty.

Upon her arrival in Tonga in 1992, the plaintiff resided with her family. She told the court that there had been a conversation between her parents and the landholder, Hon Fakafanua and the plaintiff concerning her occupancy of the api. It not clear from the evidence just where or when it occurred. What is clear is that as a consequence of the conversation the plaintiff formed the belief that she was permitted and encouraged to commence residing in her late grandfather's premises with the approval of the estate holder. Ms Hamilton took up occupancy in the subject premises on the 19th of June 1992.

It was from that moment that the not inconsiderable difficulties Ms. Hamilton was to continue to have for a long period with the water board began.

I now interpolate the pleadings (the judge then read into the judgment the entire statement of claim and the defences raised and continued as follows):

By virtue of the regulations made pursuant to the provisions of the Water Board Act Cap 92, Regulation 17, provision is made for liability for charges for water supply: Regulation 17 provides:

"17. The owner or the occupier of premises, or both of them, is or are liable jointly and severally for the due payment of all charges for water or for other services supplied to those premises by the board under these regulations."

In the decision Tonga Water Board v Fale Hamilton and Vito Langifisi 376 of 1993 in the Supreme Court of Tonga, Dalgety J was asked to hear and determine an appeal from a Magistrate concerning issues closely related to the present case. The Water Board was the unsuccessful appellant. In his published judgment Dalgety J said

"1. (Ms Hamilton) raised a civil action in the Magistrates Court at Nuku'alofa ... against the Tonga Water Board ... claiming payment from them general damages of 500 pa'anga in as much as they had repeatedly pestered her by demanding that she should pay to them an outstanding water account of 700 pa'anga incurred by a previous occupant of the dwelling house she now occupies and, when she refused to pay (the said account) they repeatedly disconnected her water supply

2. In effect by way of counterclaim the appellants raised civil proceedings in the Magistrates Court at Nuku'alofa ... against the First Respondent and Vito Langifisi the Second Respondent, claiming payment of 735.24 pa'anga in respect of water supplied to the second respondent's premises, being premises

now under the care and control of the first respondent"

"... Both cases were tried before Magistrate Palu on 5th March 1993. In respect of case 143/92 the Magistrate granted a decree in favour of the First Respondent (Qua Plaintiff) and ordered the appellants (Qua defendants) to pay her damages of 50 pa'anga and costs of 91 pa'anga. The counter claim 07/93 was dismissed"

"The appellants have appealed (sic) both decisions upon the grounds that the Magistrate erred in fact and in law in holding (a) that the First Respondent was not the occupier of the premises in question and, (b) that the first respondent had suffered damage as no evidence of loss was adduced at the trial."

Dalgety J added:-

"The appellants ask me to construe this regulation (reg. 17) so that a current occupier can be made to pay debts incurred by a previous owner or occupier in respect to the supply of water to the premises. Harsh though it might be such a construction is at least plausible, but only if the last three words of that regulation are regarded as superfluous and adding nothing. Such an approach is inappropriate. the whole regulation must be considered in order to construe its proper meaning. The words "under these regulations" is in fact crucial to a proper determination of the correct interpretation of the regulation."

And concluded

"Water supplied "under these regulations" is the water supply applied for by the applicant. In my opinion that is all an applicant such as the first respondent is liable to pay for. She may be the occupier but the debt does not relate to her occupation of the premises and predates her application."

Commenting on the manner in which the Board had dealt with the transaction and with the Consumer Ms. Hamilton, Dalgety J observed:-

"The claim for General Damages, presumably for the inconvenience caused her by the actings (sic) of the applicants. They disconnected her water supply three times between June and December 1993; they "hassled" her about her grandmother's account and eventually they said they would not reconnect until she paid that account. This was unpardonable conduct by functionaries of a state enterprise who had failed to sue the grandmother and never taken any steps to disconnect her water supply as her arrears progressively increased. In such circumstances a modest award of 50 pa'anga plus costs is amply justified and I shall refuse the appeal against the decision in case 143/92."

I agree with Dalgety J, whose judgment was delivered on the 10th day of December 1993. Events which followed it are the subject of the present action.

The plaintiff's claim is in the alternative. The first seeks an award of damages under a number of heads, the first claim alleges "Malicious Prosecution" of the plaintiff by the prosecution.

A malicious prosecution is an abuse of the process of the court by wrongfully setting the law in motion on a criminal charge: Mohamed Amin v Jogendra Kumar Bannerjee [1947] AC 322

To be actionable as a tort the action must have been without reasonable and probable cause, must have been instituted or carried on maliciously and must have terminated in the plaintiff's favour.

The proceedings before this court relate to a civil claim for damages. The learned Judge on appeal said as much. This matter is not a prosecution for an alleged offence against the criminal law. It does not relate to a criminal charge. To the extent that the plaintiff's claim is based upon an allegation of malicious prosecution, it fails.

As an alternative head of claim, the plaintiff seeks damages for "breach of statutory duty or function, harassment and unfair treatment". It is always open to a plaintiff to proceed to claim damages for breach of statutory duty. I consider that the words "Duty or function, harassment and unfair treatment", add nothing to the head of claim styled "Breach of statutory duty". The defendant claims that the plaintiff has no locus standi. I consider that she does.

The Defendant's statutory duty is spelled out as set out in paragraphs 1-5 inclusive of the plaintiff's statement of claim. Those allegations are admitted by the defendant in the defence.

I find that the defendant was at all material times under a statutory duty as pleaded by the plaintiffs and as admitted by the defendant in paragraphs 1-5 of the statement of claim. In so finding I have considered the judgement of Ward CJ in Paul Clark v Moseese Pikokivaka and Others 90/93, Supreme Court of Tonga delivered 10 September 1993, particularly at Page 7:-

"Although it is a form of negligence, breach of statutory duty is frequently considered as separate and distinct tort. In order to demonstrate it falls in that category, it is necessary to show:

1. That the injury claimed is within the scope of the statute and the statute is directed at the plaintiff.
2. That the duty imposed by the statute can give rise to liability in civil proceedings.
3. That the duty prescribed by the statute was not properly carried out.
4. That the breach produced the damage claimed.

The evidence shows and I find, that between the 8th day of February 1994 and June of 1994, the defendant in breach of its statutory duty, intentionally (as contrasted with accidentally,) and wrongly disconnected the water supply to the premises in respect of which the plaintiff was an occupier and continued to maintain the disconnection thereby depriving the plaintiff of a supply.

The plaintiff was forthright and frank as a witness. I unhesitatingly find that she was doing the best she could do to recount events as she recalled them, honestly and to the best of her ability.

Moreover in the face of a clear directive as to how the law required the Board and its officers to construe the provisions of the Water Board Act 1966 (CAP. 92) and the regulations made thereunder and in particular regulation 17, concerning which, as considered and clear interpretation is set out at page three of the judgment in appeal 376/93, Mr. Lavemau persisted in claiming the correctness of his interpretation of the regulation. It is obvious to me that his treatment of the plaintiff has seriously disaffected her, coming as it did hard on the heels of the treatment which Dalgety J characterised as "unpardonable conduct by functionaries of a state enterprise."

Had the Acting Manager of the Water Board, the witness Mr. Lavemau, carefully considered the judgment of Dalgety J which he said had been read to him, an easily understood judgment of a judge of the Supreme Court of Tonga, none of this litigation and

attendant costs to the Kingdom of Tonga and ultimately the taxpayers of Tonga may have occurred.

I am left with unease about the evidence of Mr. Lavemau. He holds a responsible position. The construction Dalgety J placed upon Regulation 1, was simply and plainly written. If Mr. Lavemau considered the learned judge to be wrong, it was his duty to seek the opinion of the Government Solicitor. There is no evidence that he did that and no appeal by the Board against the decision of Dalgety J.

200 It was therefore his duty to properly consider the application of Ms. Hamilton for a supply of water to the subject premises in an account in her own name. On no reading of the evidence can it be said of Mr. Lavemau that he discharged his duty properly to the applicant consumer Ms. Hamilton on her many applications for a water supply to the premises. Had he said he was mistaken in his understanding of the judgment of Dalgety J that may have excused him. But he did not. What he said in his evidence was what was done in terminating the water supply to the subject premises was "normal practice" ... "policy".

210 There is some evidence from Mr. Lavemau that Fale Hamilton had attempted to have a supply connected in the name of Vito Langifisi, that she wanted to have the Board connect water to the property where Langifisi is the consumer. If by his evidence, Mr. Lavemau would have me understand that Ms. Hamilton was in some way attempting to have water charges debited to the "Langifisi" account and not to pay then I reject the evidence. Ms. Hamilton said and I accept that she did not ask for a water supply in Langifisi's name but in her own. Moreover I am satisfied that at the time when the late Mr. Koloi was the Manager, that Ms. Hamilton requested the supply of an application form but her requests were refused then and consistently thereafter.

220 Ms. Hamilton made an application to the Water Board by letter (Exh. D27) for a fresh water supply. It is not in the form provided by the Regulations but in the circumstances in which this plaintiff found herself, I am sure that the board was under no illusion as to what was being sought. In any event, her letter is in substantial compliance with the form in the schedule to the water supply regulations. There was a submission by Crown Counsel that no fee had been paid or proffered by the Plaintiff with the plaintiff's letter of application for a supply. That is clearly the fact but it was well within the province of the Water Board officers to have simply asked for the payment of a fee. Mr. Lavemau says that he simply did not regard the letter (which he acknowledges having received), as proper application and took no action on it.

230 The Crown argues that Ms. Hamilton was at all material times not a consumer and therefore as regards Ms. Hamilton the board was under no duty. With respect, to approach the matter on that basis, in my opinion, is to perpetuate the process which led the litigants to court before Dalgety J. The duty to Ms. Hamilton was to provide a water supply upon her application. I find the plaintiff to have been at law a consumer within the meaning of the Water Board Act 1966 (Cap.92) and Regulations.

As a consumer I find that Ms. Hamilton was to be supplied by the Board with a water supply and common sense dictates that she was to be treated equally and fairly with other consumers by the same Board. In my opinion she had not been treated equally and fairly with others for the reasons given.

240 I am satisfied that by its failure and refusal to supply the plaintiff the defendant has breached the statutory duty imposed upon it by the provisions of the Water Board Act and

Regulations. I turn now to consider the plaintiff's claim for damages.

There can be no doubting the plaintiff's distress at being denied a supply of fresh water by the defendant. She was put to considerable physical exertion in carrying water to the subject premises by hand. She felt that she was being discriminated against. I accept her evidence that this disgraceful episode has profoundly upset her. I award her damages in the sum of TOP \$1000.00 against the defendant for breach of statutory duty.

This is a case in which, for reasons I have made plain, there should be an award of punitive damages. I award the plaintiff TOP\$1000.00 by way of punitive damages. I am unable to find the items of special damage proved.

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It is ordered that:-

1. There be judgment for the plaintiff on the claim in the sum of TOP \$2000.00
2. The costs of these proceedings shall be those of the plaintiff to be taxed or agreed.