IN THE SUPREME COURT OF TONGA NO.C.583/95

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

22/08/02

BETWEEN : KAVEINGA TUKUAFU : *Plaintiff*

AND :1. SIONE SIAKUMI
2. NATIONAL RESERVE BANKOF TONGA: *Defendants*

BEFORE THE HON. CHIEF JUSTICE WARD

COUNSEL : Mrs Taumoepeau for the Second Defendant/Applicant
Mr L Foliaki for the Plaintiff/Respondent

Date of Hearing :11 January 1999
Date of Judgment :15 January 1999

INTERLOCUTORY JUDGMENT OF WARD CJ

By writ filed on 3 July 1995, the plaintiff seeks damages arising from the death of his son after he was struck by a vehicle driven by the first defendant. The claim, under the Fatal Accidents Act, was initially made by the father on behalf also of the brother and sister of the deceased. Mr Foliaki for the plaintiff now concedes that the two latter are not covered by the provisions of the Act and seeks to proceed only on behalf of the father.

No defence was filed by the first defendant and application for judgment in default was filed with the Court on 1 September 1995. The case seems to have followed an unhurried course with a series of hearing dates fixed and then adjourned until, on a date in January 1998, judgment in default was entered on liability against the first accused with damages to be assessed. The question of the liability of the second defendant was then set down for trial on 20 July 1998.

The file suggests that, by 21 April, that date was being reserved for the assessment of damages but the question of which matter was to be tried was never resolved because it was again adjourned - this time sine die.

On 13 October, the second defendant filed an application to strike out the claim against it and the hearing today is to consider that application and to determine the liability of the second defendant.

One ground upon which it is sought to strike out is that the brother and sister of the deceased were not beneficiaries protected by section 3 of the Fatal Accidents Act as has already been mentioned. That point has been conceded and, in any event, is no ground to strike out.

It is also suggested that the action was started out of time. The statement of claim pleads that the accident and the death occurred on 4 July 1994. By section 6 of the Act, the action must be commenced within 12 months after the date of the death and, in compliance with that, the writ was filed on 3 July 1995. Mrs Taumoepaeu, for the second defendant, suggests that the death and the date on which it occurred must be proved. In an application to strike out on the ground of no reasonable cause of action, the court can consider the pleadings alone and will grant the application only if they disclose no cause on their face. The matters averred in the claim may need proof before the court can determine the matter but, at this stage, the pleadings clearly suggest facts that, if proved, mean the writ was filed in time. The application on that ground is refused.

The third ground is that damages are claimed solely for bereavement and no such damages are recoverable. Whilst it is clear that such damages are not recoverable, the statement of claim also prays for special and general damages. This ground fails.

The final ground is that "the claim by the plaintiff has been satisfied by the default judgment against the first defendant....therefore the claim against the second defendant should be struck out". Mrs Taumoepeau relies on the position at common law whereby there could only be one action and one judgment for a joint tort. She correctly cited Brinsmead v Harrison as authority for the proposition that recovery of judgment against one of a number of joint tortfeasors barred further action against any others. She concedes that the position has been altered in England by the provisions of section 6 of the Law Reform (Married Women and Joint Tortfeasors) Act, 1935, and the more extensive provisions of the Civil Liability (Contribution) Act 1978, but she questions whether such statutes are of general application and, if so, whether they apply in Tonga by virtue of sections 3 and 4 of our Civil Law Act.

I have no doubt that these English Acts are of general application. The Privy Council has accepted the definition of such statutes as "Acts of Parliament which are of general relevance to the conditions of other countries and in particular, not based on politics or circumstances peculiar to England"; Teta Ltd v Ullrich Exports Ltd (1981-84) Tonga LR 127.

The test as to whether or not such an Act applies in Tonga has been set out by the Court of Appeal in Kingdom of Tonga v Save; Civil Appeal No 626/93:

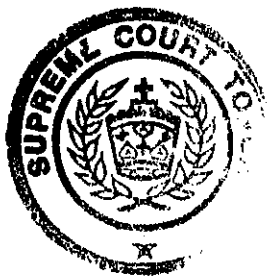
> "1. Does local law provide a complete code? If so, that is the end of the matter and local law applies;
>
> 2. If not, does the local law expressly or by implication exclude English law?"

There is no local law that covers this matter or excludes the English law so the English Act applies. There is a clear right to proceed against the second defendant and the application to strike out fails.

The final matter for determination is the liability of the second defendant. The basis of the second defendant's challenge to liability also relies on the position already taken by Mrs Taumoepeau under the common law. My ruling that the Law Reform (Married Women and

Joint Tortfeasors) Act and the Civil Liability (Contribution) Act apply here provides the answer to her challenge on this point also. Mrs Taumoepeau admits that the first defendant was an employee of the second defendant and was acting in the course of that employment at the time of the accident. The plaintiff claims against the second defendant on the basis of vicarious liability. Such a claim is possible under the English Act and is available here.

The trial of the claim against the second defendant must proceed. The second defendant must pay the costs of today.



NUKU'ALOFA: 15 January, 1999

CHIEF JUSTICE