IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

196/93

BETWEEN: BEEHIVE (SAMOA) TRAVEL & TOURS LTD of Apia

PLAINTIFF

A N D: ROPATI PESETA KEY of Apia

DEFENDANT

Counsel: Ms R. Drake for Plaintiff
Mr T. Malifa for Defendant

Dates of Hearing: 2 & 3 November 1993

Date of Judgment: 9 November 1993

JUDGMENT OF SAPOLU, CJ

Facts:

The relevant facts of this case as the Court finds them to have been established from the evidence are as follows.

The plaintiff is a company which operates a travel and tours business along Beach Road at Matafele, Apia. In the course of its business the plaintiff, amongst other things, issues airline tickets to people who come to its office and want to travel overseas. The defendant lives in Auckland, New Zealand, and works for the Justice Department there as a security officer at Mt Eden prison. In 1988 he visited Western Samoa and wanted to take a cousin by the name of Avei Fa'aso'o to New Zealand. So he went to George Stehlin the then manager of the plaintiff's travel and tours business and requested an airline ticket for his cousin to travel to New Zealand but the airfare was to be paid later from Australia. That request was accepted by Stehlin and an airline ticket was issued on credit for the defendant's cousin to travel to New Zealand. The defendant undertook to be surety for

payment of the ticket. The cost of the ticket was $865 tala. All this happened in June 1988. And on 22 June 1988 the defendant's cousin went to New Zealand.

When the defendant returned to New Zealand, he contacted his sister who lives in Sydney, Australia, to pay for their cousin's airfare of $865 tala. On 30 September 1988 the defendant's sister sent an international money transfer for AUD$700 through the Commonwealth Bank of Australia in Sydney to Stehlin to pay for her cousin's airfare. At the foreign currency conversion rate at that time, AUD$700 was equivalent to about $1,180 tala. She then called Stehlin by phone, after the international money transfer was sent, to confirm that the money was received. Stehlin confirmed receipt of the money for the defendant's cousin airfare. According to the defendant's sister the money she sent was to cover her cousin's airfare for $865 and the balance of the money was for Stehlin himself as a token of appreciation for issuing her cousin's airline ticket on credit. She also says that the word "gift" shown on the international money transfer was put in by the bank in Sydney in order to facilitate the transfer of the money to Western Samoa. I am impressed with this witness's frankness and her evidence is also uncontradicted. I accept her evidence as true.

When the money was received in Western Samoa by Stehlin, he says he received it on behalf of the plaintiff. This evidence is also uncontradicted and I also accept it. What happened then to the money is far from clear. But this should not count against the defendant. Once receipt of the money was acknowledged by Stehlin as manager of the plaintiff's travel and tours business for the purpose of paying off the airfare of the defendant's cousin, the defendant's obligation to pay for his cousin's airfare was fulfilled. What happened to the money after receipt by Stehlin is a matter between the plaintiff and Stehlin as its manager and employee, and has nothing to do with the defendant.

Stehlin in his evidence acknowledged receipt of the money but does not recall what he did with the money. He does not recall whether the Bank

of Western Samoa to which the international money transfer was sent by the defendant's sister released the money to him or whether he instructed the bank to transfer the money direct to the plaintiff's account with the bank. He also does not recall whether he issued a receipt for the money. The defendant's sister apparently received no receipt apart from the acknowledgment on the telephone by Stehlin that the money she sent had been received. I find Stehlin's evidence as to what he did with the money very unsatisfactory.

Stehlin left the plaintiff's employment in 1989. In September 1992, Charles Schwenke, the plaintiff's managing director took over the running of the plaintiff's business. He checked the plaintiff's records for any out-standing accounts and he came across the ticket that was issued on credit to the defendant's cousin. I assume here from the actions that followed that he also came across a record of the undertaking by the defendant to act as surety for payment of his counsin's airline ticket. Mr Schwenke then checked the plaintiff's receipt books from the date of the issuing of the airline ticket to the defendant's cousin but found no such record. So on 8 October 1992, he wrote to the defendant in Auckland, New Zealand, about the outstanding balance of his account of $865. There is mention in that letter of a payment made by the defendant in March 1989 for his brother's airfare but we are not really concerned with that payment here.

By letter dated 5 November 1992, the defendant responded to Schwenke's letter pointing out that the airfare for his cousin had already been paid by his sister in Australia to Stehlin when he was with the plaintiff's business. He also pointed out that the airfare for his cousin was paid before the airfare for his brother was paid. The defendant also advised Schwenke in the same letter to contact Stehlin about his cousin's airfare as all accounts he had with the plaintiff had been paid. The evidence of the defendant's sister and that of Stehlin clearly confirm what the defendant says in his letter that the account for his cousin's airfare had been paid to Stehlin when he was with the employment of the plaintiff.

In reply to the defendant's letter of 5 November 1992, Schwenke sent a letter dated 18 November 1992 pointing out that he had searched all of the plaintiff's receipt books from April 1989 and August 1989 and there was no record of a receipt being issued in respect of the alleged payment of the airfare for the defendant's cousin. He also says in evidence that he checked through the plaintiff's receipt books for the period prior to April 1989 but found no receipt to show that the airfare for the defendant's cousin had been paid. He also says that he tried to contact Stehlin on the phone several times but was unsuccessful. Stehlin says that his phone at home has a receiving machine and that receiving machine did not register any phone calls from Schwenke around this time. Given the unsatisfactory nature of Stehlin's evidence in certain respect, I am reluctant to accept his evidence about the absence of any phone calls from Schwenke about this time.

Now the defendant does not seem to recall whether or not he received Schwenke's second letter of 18 November 1992. He thinks that he probably did not receive it. What seems clear is that Schwenke did not receive a reply to his second letter. It should be mentioned that the defendant, at the time Schwenke sent his two letters to him, had no longer resided at his address the letters were sent to. He had rented out his house at that address and was living at a house provided by his employer. But it is clear from the defendant's evidence that he visits his house at his first address regularly to collect the rent from his tenants and any mail sent to him at that address. He collected Schwenke's first letter from his tenants but seems to think that he did not receive Schwenke's second letter from his tenants. It should also be mentioned that Schwenke apart from his phone calls never personally visited Stehlin and enquired if the airfare for the defendant's cousin was paid to him, even though Schwenke lives about $\frac{2}{3}$ of a mile or so from Stehlin's home. Stehlin's evidence seems to suggest that he and Schwenke have not been on good terms.

Then in April 1993, one of the plaintiff's staff members informed Schwenke that the defendant was in Apia. Schwenke then made enquiries and on 20 April 1993 he confirmed from those enquires that the defendant was in Apia and was due to leave Western Samoa on 1 May 1993. So he instructed the plaintiff's solicitor to take legal action against the defendant. He also checked the plaintiff's receipt books again to reconfirm that the airfares for the defendant's cousin had not been paid. That was reconfirmed by the plaintiff's receipt books. So Schwenke says he formed the honest belief that the defendant was still indebted to the plaintiff in the sum of $865 tala pursuant to his undertaking to pay for his cousin's airfare.

The plaintiff's solicitor upon receiving instructions prepared an application filed in the Magistrates Court for a writ of arrest against the defendant claiming that the defendant was indebted to the plaintiff in the sum of $865 and that he was about to leave Western Samoa thereby evading payment of that amount. On 23 April 1992, the Magistrates Court issued a writ of arrest and that writ was given to the Police for execution.

On Saturday night, 1 May 1993, the defendant went to Faleolo International Airport to leave for New Zealand. It appears his flight was to leave at 2.00am that night. There was a large crowd at the airport that night because of arriving passengers and departing passengers as well as people awaiting the arrival of their relatives and friends and people seeing off their relatives and friends. When the defendant approached the check-in counter, a member of the staff of Polynesian Airlines informed him that there was a stop notice against him. When he looked behind him, there were three police officers right behind him. He asked the police officers what had happened and they told him that they had a writ of arrest against him for a debt of $865 he owed to the plaintiff. The police officers then served the defendant with the writ. The defendant objected to the Police that he had no debt with the plaintiff as he believed the debt had been paid.

The defendant was then taken in a police vehicle to the Faleolo Police Station. He says he was embarrassed, humiliated and disgraced to be arrested infront of so many people especially as he is known by many people and that he is the holder of the matai title Peseta of his family.

He was detained by the Police at the Faleolo Police Station. He asked the Police if the writ could be suspended to allow him to go to New Zealand as the debt for which he had been arrested had been paid. The Police told him that could not be done and unless he paid the amount in the writ, the Police will continue to detain him. The defendant's friends who were with him, advised the defendant to do something to enable him to leave for New Zealand that night as it was embarrassing and disgraceful for him to be arrested before so many people at the airport. So the defendant with the Police accompanying him went to a Polynesian Airlines phone at the airport where the defendant called his sister in law in Apia. Apparently the Police after accepting the undertaking from the defendant's sister in law that she will pay for the writ on the following Monday as there was no bank opened on Saturday night, allowed the defendant to depart for New Zealand. He was the last passenger to get on the plane. When the defendant arrived in New Zealand, he says he could not sleep the whole night because of what happened to him at Faleolo International Airport. He decided to return to Samoa to sort this matter out. So he phoned his sister in law to withhold payment of the writ as he was coming back to Samoa to sort out this matter. He came back on the very next flight from Auckland to Samoa and arrived back on 3 May 1993. It appears he was rearrested by the Police the following morning and taken before the Magistrates Courtthe same morning, 4 May 1993. The Magistrate remanded the defendant in custody until about 11.00am or soon thereafter the same morning when he was released after paying $900 into the Magistrates Court Law Trust Account. That money is still in the Magistrates Court Law Trust Account awaiting the outcome of this case.

The defendant has now counterclaimed against the plaintiff for substantial damages in trespass and false imprisonment, or alternatively for breach of his constitutional rights under Articles 6(3) and 13 of the Constitution and his right to privacy, or alternatively for injurious falsehood.

I will deal first with the plaintiff's claim and then with the defendant's counterclaim.

The plaintiff's claim:

The plaintiff's claim that the defendant owed $865 to the plaintiff for the unpaid airfare of the defendant's cousin is clearly contradicted and disproved by the facts as found by the Court. The payment made by the defendant's sister to Stehlin for the defendant's cousin airfare was nothing other than payment to the plaintiff. Stehlin was the manager of the plaintiff's business at that time. Stehlin acknowledged receipt of that payment as manager of the plaintiff's business for the purpose of paying off the airfare for the defendant's cousin. What Stehlin might have done with that money without issuing a receipt for it is a matter between Stehlin and the plaintiff and has nothing to do with the defendant.

The plaintiff's claim certainly cannot succeed and must be dismissed. It is accordingly dismissed. Judgement is entered for the defendant in respect of the plaintiff's claim.

The defendant's counterclaim:

At the outset, one cannot help feeling sympathy for the defendant for he was arrested even though the debt for which he was arrested had already been paid. But having said that, his counterclaim must still be determined according to law uninfluenced by any feeling of sympathy.

The first cause of action by the defendant is framed as trespass to the person in the form of false imprisonment. There are three species of trespass to the person. These are assault, battery and false imprisonment. It is false imprisonment that forms the first cause of action by the defendant.

The essence of false imprisonment is stated by Cooke P when delivering the judgment of the New Zealand Court of Appeal in Willis v Attorney General [1989] 3 NZLR 573, 579 as follows:

> "False imprisonment is the unlawful total restraint of the "liberty of a person. It may be but is not necessarily "brought about by force or the threat of force; see "generally 45 Halsbury's Laws of England (4th ed) "para 1325 and the authorities there collected. Force "or the threat of force is not the gist of the action".

In 45 Halsbury's Law of England (4th ed) para 1325, it is there stated:

> "Any total restraint of the liberty of the person, for "however short a time, by the use or threat of force "or by confinement, is an imprisonment. To compel a "person to remain in a given place is an imprisonment, "but merely to obstruct a person attempting to pass "in a particular direction or to prevent him from "moving in any direction but one is not. The gist "of the action of false imprisonment is the mere "imprisonment. The plaintiff need not prove that the "imprisonment was unlawful or malicious, but establishes "a prima facie case if he proves that he was imprisoned "by the defendant; the onus then lies on the defendant "of proving a justification".

It thus appears that an action for false imprisonment protects the liberty of a person from any unlawful total restraint imposed on that liberty. 'Imprisonment' in the sense in which it is used in the tort of false imprisonment does not mean incarceration in a penal institution. It means any total restraint on the liberty of a person. So the word 'imprisonment' in this context has a wider-meaning than its usual meaning. Justification as

a defence to an action for false imprisonment must be a legal justification permitted by statute or common law: see for instance the judgment of Walsh J in Watson v Marshall (1971) 124 CLR 621. If a legal justification for the imprisonment, that is total restraint of a person's liberty, is proved then that imprisonment or total restraint is not unlawful and an action for false imprisonment will not succeed. It is also clear that malice is not an essential element of false imprisonment, but malice may be a relevant factor in assessing damages.

With those principles of law as a starting point of this inquiry, I turn now to consider the defendant's cause of action for false imprisonment. There is no doubt that from the point in time that the Police arrested the defendant at the check-in counter at Faleolo International Airport, and then detained him at the Faleolo Police Station, and then accompanied him to the Polynesian Airlines phone where the defendant called his sister in law, and up to the point in time the Police finally allowed the defendant to board the plane, there was a total restraint on the defendant's liberty. He was still under arrest at that time and had no liberty to go where he may want to go. The Police pursuant to the writ of arrest were in full control during all that time. I find therefore that between the time the Police arrested the defendant and the time they allowed him to board the plane, there was a total restraint on his liberty to go where he may want to go. Accordingly there was imprisonment of the defendant during that period of time.

The other incident of imprisonment alleged by the defendant is the time he was arrested by the Police after he arrived back in Samoa on 3 May 1993 and when he was remanded in custody by the Magistrates Court on the morning of 4 May 1993. I also find that there was a total restraint on the defendant's liberty to go where he may want to go from the time he was rearrested by the Police and during the time he was remanded in custody by the Magistrates Court, up to the time he was released from custody after payment of $900 into the Magistrates Court Law Trust Account. Accordingly,

there was imprisonment of the defendant during that period of time.

Imprisonment having been proved, the defendant has therefore established a prima facie case. It is now for the plaintiff against whom the counter-claim is made to point to the facts which may constitute a legal justification. As I understand the arguments for the plaintiff, it does not rely on any statutory justification. The plaintiff simply says it had an honest belief based on a comprehensive check and double check of its receipt books that the defendant owed money to the plaintiff as there was no receipt to confirm that the defendant had paid the money he owed the plaintiff. The plaintiff had also written a second letter dated 18 November 1992 to the defendant about the account which was still outstanding in his name but received no reply. The defendant does not recall having received that letter and seems to think he never received it. Be that as it may, the plaintiff came to the belief that the defendant still owed the money for which the writ of arrest was issued. The plaintiff also tried several times to contact by phone Stehlin who received the money for payment but was unsuccessful. Notwithstanding what the plaintiff says the fact is that the plaintiff's belief, even if it was honestly held, was mistaken. There was also some dispute during the course of the hearing whether Schwenke should have gone and see Stehlin personally about the alleged outstanding account after he received the letter of 5 November 1992 from the defendant and after his attempts to contact Stehlin by phone were unsuccessful; or whether the defendant should have contacted Stehlin to go and tell the plaintiff that the defendant's account had already been paid.

I have been unable to find any authority which says that in circumstances like those of the present case, honest belief constitutes legal justification or a valid defence to an action for false imprisonment. Counsel for the plaintiff also did not refer to any authority which says that in circumstances like those of the present case, honest belief is a

valid defence to an action for false imprisonment. There are circumstances where good or reasonable cause, or a belief based on reasonable and probable grounds may protect a person making an arrest. But those circumstances are not present in this case. There is also no other defence raised by the plaintiff. I have therefore come to the conclusion that the plaintiff has not raised a legal justification whether statutory or common law. However that is not the end of the matter.

The imprisonment here is twofold. Firstly, there is the imprisonment made by the Police when they arrested and detained the defendant at Faleolo. That arrest and detention were made pursuant to a writ of arrest issued by the Magistrates Court on application by the plaintiff. Then secondly, there is the imprisonment of the defendant when he was rearrested by the Police and remanded in custody by the Magistrates Court. This second arrest was again made pursuant to the writ of arrest that brought about the first arrest of the defendant. It is clear that it was not the plaintiff who personally arrested, detained or remanded the defendant in custody. The actual arrest, detention and custodial remand were carried out by the Police pursuant to the writ of arrest issued by the Magistrates Court and pursuant to the order of the same Court for the defendant to be remanded in custody.

Questions of agency and vicarious liability must therefore necessarily arise. That is, were the Magistrates Court and the Police acting as agents for the plaintiff so that the plaintiff should be held vicariously liable for the acts of its agents. The point is discussed in some of the leading text-books on the law of torts in relation to false imprisonment and the acts of a ministerial officer and the judicial acts of a Court of justice. In Street on Torts 8th ed., p.32 it is said :

> "If the defendant wrongfully gives the plaintiff into
> "custody and then the Magistrates remands the plaintiff
> "the defendant in answerable in false imprisonment for
> "damages only up to the time of the remand. Once a

"judicial act interposes liability for false imprisonment "ceases. It becomes important at this stage to distinguish "false imprisonment from malicious prosecution, a tort "concerned with the abuse of the judicial process, and "which, unlike false imprisonment calls for proof of "malice and of absence of reasonable cause. Therefore, if "A wrongfully prefers a complaint against B before a "magistrate who then issues a warrant or tries him forth-"with or remands him, A has not committed the tort of "false imprisonment even if the magistrate has no juris-"diction".

In Salmond & Henston Law of Torts 20th ed pp 131-132 it is said :

"No action for false imprisonment will lie against a person "who has procured the imprisonment of another by obtaining "against him a judgment or other judicial order of a court "of justice, even though that judgment or order is erraneous, "irregular, or without justification. The proper remedy in "such a case is an action for malicious prosecution or other "malicious abuse of legal process....The rule, therefore, "that no action for false imprisonment will lie against a "litigant in respect of judicial imprisonment procured by "him is a valuable protection against liability for error "in the course of legal proceedings. Accordingly, if the "plaintiff has been wrongly arrested without a warrant and "taken before a magistrate, who remands him in custody, he "must sue in respect of his imprisonment before the remand "in an action for false imprisonment, but in respect of that "which is subsequent to the remand in an action for malicious "prosecution. The reason for this distinction is that a man "cannot be sued in trespass (and so not for false imprison-"ment) unless he himself, whether personally or by his agent

"has done the act complained of. A court of justice, "however, is not the agent of the litigant but acts in "the exercise of its own independent judicial discretion. "The litigant can be charged only with having maliciously "and without reasonable cause exercised his right of "setting a court of justice in motion. This exemption "of the litigant from any liability for false imprisonment "extends even to cases in which the court ordering the "imprisonment has acted without jurisdiction".

In Clerk & Lindsell On Torts 14th ed it is stated at para 686 :

"Legal proceedings may be either ministerial or judicial. "In the case of the former, the party employs the machinery "of the law entirely at his own risk and is directly res- "ponsible for the consequences. In case of the latter, "he appeals to the discretion of a judge or magistrate, "which is thus interposed, and the steps thereupon taken "result immediately from the exercise of that discretion "and not from the act of the party. 'The distinction "between false imprisonment and malicious prosecution "is well illustrated by the case where parties being "before a magistrate, one makes a charge against another, "whereupon a magistrate orders the person charged to be "taken into custody and detained until the matter can "be investigated. The party making the charge is not "liable to an action for false imprisonment, because he "does not set in motion a ministerial officer, but a "judicial officer. The opinion and judgment of a judicial "officer are interposed between the charge and the impri- "sonment. Under such circumstances a man may indeed be "liable in an action for malicious prosecution if he has "wrongfully set the law in motion,....but he cannot be

"sued in an action of trespass, which is a remedy for a "direct and immediate wrong".

Then Clerk & Lindsell On Torts goes on to say at para 693 :

"The power of imprisonment in respect of debt, whether "before or after judgment, depends upon the provisions "of the Debtors Act 1869, and has been severely curtailed "by the Administration of Justice Act 1970. It can "only be exercised judicially and upon sworn informa- "tion. Therefore, however, wrongfully and fraudulently "the judge's order may have been obtained, it is neverthe- "less a purely judicial act and consequently an arrest in "pursuance of it cannot be a trespass, and the injured "party must sue the defendant for procuring the order "maliciously and without reasonable and probable cause".

Applying the above statements of principle to this case, the issuing of the writ of arrest in this case is neither an act of the plaintiff or a ministerial act, but a judicial act done in the exercise of the judicial discretion of the Magistrates Court. The actions of the Police in arresting the defendant pursuant to the writ of arrest were strictly in accordance with the authority of the writ so that those actions were an integral part of the judicial act by the Magistrates Court. There has also been no suggestion that the arrest of the defendant by the Police on the two separate occasions referred to was nothing else but pursuant to that writ. The remand of the defendant in custody was also a purely judicial act by the Magistrates Court in the exercise of its judicial discretion. Therefore the acts complained of were not the personal acts of the plaintiff. Nor can it be said that the Magistrates Court and the Police were acting as agents of the plaintiff so that the plaintiff should be held vicariously liable for their acts. Now what is said in the passages quoted from the textbooks cited that an action

for malicious prosecution would be the appropriate action does not apply to this case. The reason is that an action for malicious prosecution presupposes that there had been prior criminal proceedings initiated by the defendant against the plaintiff and that those criminal proceedings had terminated in favour of the plaintiff. In this case we are concerned with civil proceedings and no criminal proceedings are involved.

So where a defendant maliciously and without reasonable and probable cause initiates civil proceedings against the plaintiff and those proceedings terminate in favour of the plaintiff, then the plaintiff may bring an action for malicious civil proceedings: see the judgment of Cooke J in New Zealand Social Credit Political Leagua v O'Brien [1984] 1 NZLR 84 (CA). If a plaintiff is also arrested pursuant to a writ of arrest in relation to such civil proceedings, he may also bring an action for malicious arrest: see Development Bank of Western Samoa v Tuimauga Eliu [1993] (an unreported decision of this Court). But what must be borne in mind in an action for malicious civil proceedings or malicious arrest is that malice is an essential ingredient of such an action and it must be proved.

In the present case, I do not think it can be said that the plaintiff was acting maliciously when it applied for a writ of arrest against the defendant. Thus even if the defendant's first cause of action was framed in malicious civil proceedings or malicious arrest, it would have been unlikely to succeed. In all, I am not satisfied that the defendant's first cause of action can succeed.

Coming now to the defendant's second cause of action which is based on Articles 6(3) and 13 of the Constitution and the tort of privacy, I am of the view that Articles 6(3) and 13 if they had been breached had not been breached personally by the plaintiff himself. I say this for the reasons already stated in relation to false imprisonment and question of agency and

vicarious liability as well as the related question of ministerial and judicial acts. Moreover, the Police did inform the defendant promptly of the grounds of his arrest when they arrested him at Faleolo International Airport. When the defendant was rearrested on his return to Samoa he was already aware of the grounds of his arrest. Therefore I do not think that Article 6(3) of the Constitution which provides that every person who is arrested shall be informed promptly of the grounds of his arrest has been breached even if Article 6(3) applies to the circumstances of this case.

As for Article 13 of the Constitution, the right there provided is the right to move freely throughout Western Samoa and to reside in any part thereof. It is not just a right to move freely throughout Western Samoa. It has the additional requirement of residence. I am also of the view that in the circumstances of this case Article 13 has not been breached. As for infringement of the defendant's privacy, I say no more than that the plaintiff has committed no breach of the tort of privacy for the reasons already given in relation to question of agency, vicarious liability, ministerial acts and judicial acts.

In all then I am not satisfied on the balance of probabilities that the defendant's second cause of action has been proved.

As for the defendant's third and last cause of action which is framed in injurious falsehood, what has already been said about agency, vicarious liability, ministerial acts and judicial acts also apply here. It is also to be remembered that injurious falsehood is often described as an economic tort.

I am also not satisfied on the balance of probabilities that the defendant's third cause of action can succeed.

The result of all this is that the counterclaim is also dismissed.

I have given careful consideration to the question of costs as the plaintiff's claim and the defendant's counterclaim are both dismissed. I have come to the view that in the circumstances of this case, costs in the

action should be awarded to the defendant plus any disbursements to be fixed by the Registrar. The plaintiff is also ordered to pay for the costs incurred by the defendant in travelling to Samoa for this case and by his sister in travelling from Sydney, Australia for this case.

I will fix the costs for the plaintiff as the defendant's counter-claim has also been dismissed at $250. These costs are to be deducted from the costs awarded to the defendant when fixed by the Registrar.

T.F.M. Sapolu
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CHIEF JUSTICE