

## Clark v Pikokivaka & others

10 Supreme Court, Niuaotupapu  
Ward CJ  
Civil Case 90/93

19, 20, 21, 23 August & 10 September 1993

*Employer - vicarious liability - scope of employment*

*Negligence - breach of statutory duty*

*Statutory duty - breach of - proof required*

20 *Words - "receiver" - "wreck".*

The Plaintiff's schooner was holed and eventually sunk off Falehau, Niuaotupapu. Both before and after it sunk considerable property was unauthorisedly taken from the boat by a number of people.

The first Defendant was a Police Officer who failed to look after items from the yacht or to preserve the wreck or to recover property or to apprehend those involved.

The second and third Defendant were Customs Officer who not only failed to protect the wreck and property but joined in the looting.

30 The fifth Defendant (the Kingdom of Tonga) was sued as the employer of those Defendants and as vicariously liable.

Held:-

1. To succeed in negligence the Plaintiff had to establish a duty of care, breach and damage as a result.
2. To succeed in breach of statutory duty he had to show the injury was within the scope of a statute; the statute was directed at the Plaintiff; the duty imposed by the statute can give rise to civil liability; the duty was not properly carried out; damages resulted.
- 40 3. S. 162 Shipping Act imposed such duties on a receiver and by s. 166 of that Act, the first Defendant and later the second Defendant became in effect the receiver by taking over the powers of the receiver and were therefore subject to those duties. (Detailed discussion of those duties is set out in judgment).
4. They failed in those duties and damage resulted.
5. When they took up those duties they were acting within the scope of their employment and the fifth Defendant was vicariously liable.
6. As Customs Officers some of the actions of both second and third Defendants were oppressive and should be measured by an award of exemplary damages (but those particular actions were beyond the scope of their employment so

that the fifth Defendant was not liable for those).

Case Considered : Ann v Merton BC [1977] AC 492  
Tonga Flying Fish Co. v K.O.T. [1987] SPLR 372  
Cutler v Wandsworth [1949] 1 All ER 544  
Ministry of Housing v Sharp [1970] 1 All ER 1009

Statutes Considered : Shipping Act

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Counsel for Plaintiff : Mr Niu  
Counsel for Defendants : Solicitor General

### Judgment

The plaintiff is the owner and captain of a 78 ft, three masted, steel hulled schooner, "A Golden Dawn", registered in London.

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During the evening of Sunday 11th October 1992 whilst attempting to enter the passage opposite Falehau in Niuaotupapu, she touched and the plaintiff decided, therefore, to anchor outside the reef until morning. A brief inspection below revealed no damage and the plaintiff and his crew of two settled down for the evening. Two hours later the vessel was found to be taking a little water. By about 10.00 pm, following the failure in one way or another of three pumps, the water was coming in much faster and the situation was looking serious, so the men packed a few personal things and went ashore to look for a pump on the island.

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The people of Falehau were just finishing a church service and some agreed to help take things off the boat whilst others went to find a pump and to notify the only police officer on the island. Two boats each containing three or four people went out to the yacht. The plaintiff protested at the number of people but it had no effect. Once on board, it became apparent they were more concerned with taking things that interest them than in helping the plaintiff. Cupboards were opened and rummaged, clothes tried on for size and food taken. Once the boats were loaded, they returned to the jetty where the property was left before returning to the yacht.

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On one of these journeys the plaintiff was met at the jetty by the first defendant who had come from Hihifo and he introduced himself to the plaintiff as a police officer. The plaintiff asked him to look after the property on the jetty from the yacht and he agreed. He was told by the plaintiff there were guns on board and that people should be advised to stay off the yacht. The first defendant told the people around not to go but, despite that, they continued to go and act as they had previously.

A pump was brought from the shore but it had no inlet hose and, despite some desperate attempts by the plaintiff to fit one, it was useless. Whilst he was occupied in trying to save his vessel, the islanders continued to remove anything that took their fancy. Eventually the plaintiff, believing the vessel was in imminent danger of sinking, ordered everyone off and the boats returned to the jetty. By that time, there was little sign of the items that had been brought from the stricken yacht.

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The man who lived nearest the jetty offered the plaintiff and his crew shelter for the night in his home and they carried their personal things, which had remained all the time

in the care of one of the crew, and a few other things still on the jetty, into the house.

At one stage, the third defendant arrived at the jetty. He is the junior of the two Customs Officers on the island. He advised the first defendant the Customs shed could be used for storing the items but said it could not be secured and was badly infested with mice. He then left.

The first defendant told the Court he went to a kava party but returned to the jetty twice after the men from the yacht had gone to sleep and found the wharf deserted. He eventually went home in the early hours. I accept, on balance, he did make these later inspections.

In the morning the vessel was still afloat with about 1 1/2 feet of free-board and the plaintiff went out to see if there was anything he could still salvage. On reaching the yacht, he discovered it had been ransacked since he left it the night before. Cushions were ripped out, cupboards levered open, lockers rifled and the decks littered with discarded and damaged items.

One of the lockers on deck contained the plaintiff's diving equipment including a special helmet he had to use because of an ear injury. Some of the equipment was missing including the helmet. That helmet was never recovered and, as the plaintiff could not dive without it and the other two crewmen could not dive, no diving on the wreck was done by any of the men from the yacht.

Having seen the sorry state of the boat, the plaintiff left and, as he travelled back to the shore, the vessel finally settled in about 50 feet of water with a substantial portion of her masts showing.

The three men then went to Hihifo to clear customs and immigration formalities and they reported the sinking to the second and third defendants. The second defendant is the Senior Customs Officer on the island and radioed particulars of the vessel to Nuku'alofa but appears to have done very little more. The first defendant also told the second defendant of the events the night before.

The next day, Tuesday, the plaintiff saw a boat and signs of activity at the wreck and went across to find the second and third defendants in a boat with a number of a local divers working on the wreck. They had rigged a block from the boat on the topstay in order to bring up heavy items such as the spare propeller. These had been lowered into the yacht's inflated 25 man life raft which had also been looted. The central inflated column was cut so the canopy was lying in the life raft.

The local men had removed the sails from the spars and, in one case, this had been done by cutting the sail just below the headboard. One sail was in the boat and some others had already been placed on the jetty. When the plaintiff arrived, the men were actually diving and he saw one was wearing his wet suit from the yacht. It has never been recovered. The plaintiff was angry and told the men they had no right to do as they were. The Customs Officers told him they had been diving to recover the property for him. However, they stopped diving, left a number of items in the life raft by the wreck and went away.

The second and third defendants told the Court that the plaintiff had advised them there was a gun on board that had not been locked in the gun locker and they went to the yacht to recover it as part of their duty under the Customs Act. It is right to say they did recover that gun and some ammunition for the other weapons. They found them quite quickly and then continued removing other items.

The evidence as a whole satisfies me that these two defendants have not told the truth in relation to the events that Tuesday. I accept that the plaintiff did tell them on the Monday about the unsecured gun but the accounts given by the second and third defendants differ significantly. The second defendant said he was told by the third defendant that he had obtained the plaintiff's permission to dive on the wreck and look for the gun. They went to the wreck on a boat directly from Vaipoa without going to Falehau. He had with him one deep diver from Hihifo because he had been told by the third defendant that the gun had been thrown into the deep water by one of the villagers. The third defendant, on the other hand, said they went to Falehau by truck looking for the plaintiff in order to ask permission but failed to find him. It was only whilst there they heard the gun had been thrown in the deep water. If that was so, of course, they would not have known they needed a deep diver when they left Hihifo. Both defendants denied having taken, or having needed to take, any tools but I am satisfied the evidence shows they had a knife, screwdriver and iron bars at the very least.

Had they obtained permission as they claimed, it would seem obvious they should point that out to the plaintiff when he was angry at finding them diving on the wreck. Similarly they could have shown him the gun they had recovered as that was their reason for going there. This was not a case where they were tongue tied. They told him they were bringing up the items for him but failed entirely to mention the gun or the permission they claimed he had already given them.

When that was put to the third defendant he said he did not show the gun to the plaintiff because he had it over his shoulder on its sling and knew the plaintiff could see it. Unfortunately for the third defendant, two photographs taken by the plaintiff at the time showed no gun was visible on his shoulder or anywhere else. Whatever other items they may have left in the life raft, I am satisfied they concealed the gun and ammunition from the plaintiff and took them away without telling him. Despite their claim they were officially recovering the gun and ammunition, they only mentioned the latter to the plaintiff when he pointed out he had found a loose bullet in the life raft. It was later still before they produced the gun.

I also consider it significant that, although the customs officers on the island hire local boats for official duties and recover the hire charge from the Government, the cost of the boat they used that day has never been claimed even though it is now well past the end of the financial year. The second defendant said that was because they then went fishing whilst the third defendant said it was an oversight and he will still claim it. The same applies to payment for the divers. I do not believe either of them.

Whilst I accept, on balance, the second and third defendants went to the wreck that morning in order principally to recover the gun, I have absolutely no doubt, once there, if not before, they intended to steal and colluded with the divers to do so. Although they did not show the gun and ammunition to the plaintiff that day, I note they kept the gun in the Customs Office and gave the ammunition to the Police Officer to keep. On balance I am satisfied their intention was to retain those two items officially and not to convert them to their own use.

The first defendant is in a different position and has been generally truthful with the Court. He attended the scene on the Sunday evening when called. He agreed to look after the items from the yacht and I am satisfied on balance that he failed to do so adequately or at all. He advised people not to go to the sinking vessel but did nothing more to stop

them. He took no steps to preserve the wreck. It is also clear that, afterwards, he made no real attempt to recover the property or to apprehend the thieves. He had no investigation diary, he made no effort to contact the people he saw at the jetty that evening, he has searched no premises and he has filed no charges.

210 He agrees the plaintiff reported to him on Monday the loss of the property landed but he did not think it was up to him to ask the plaintiff to write a list of items. He recovered a few items from the owner of one of the boats used on the Sunday night; some video cassette, three lifejackets and a spinnaker bag that had been cut from its sail. The boat owner claimed he had found them in his boat the next morning and kept them. He knew he had no right to them but he has neither been charged nor asked the names of other people who were with him at the time.

220 The first defendant took no statement from the plaintiff until Thursday and even then only after he was told to do so by the Government Representative. It was interrupted and he has never asked the plaintiff to complete it. He claims to have looked for the property but, without a list, agrees he does not know what he is looking for. He says he could not search houses because there is no Magistrate on the island to issue a warrant. That shows an unfortunate ignorance of section 25 of the Police Act but, anyway, has not been remedied even though the Magistrate visited the island in February this year.

230 His subsequent conduct shows his attitude to the whole situation but it was principally his negligence on the Sunday night that directly resulted in the loss of most, if not all, of the plaintiff's property. Once he had relinquished his duty as receiver, he was required to act solely as a police officer. This was not a case of a failure simply to apprehend the thieves. That can happen in any investigation and would not make the officer liable. In this case, the officer failed to do anything and by his attitude showed he did not intend to do anything. As a result property that would no doubt have been recovered was not recovered.

230 He had a duty of care in the terms described by Lord Wilberforce in Anns v Merton London Borough Council [1977] 2 AllER 492 and applied by Martin J in Tonga Flying Fish Co. Ltd and others v Kingdom of Tonga and another [1987] SPLR 372. There was a sufficient relationship of proximity between him and the plaintiff that, in the reasonable contemplation of the first defendant, carelessness on his part would be likely to cause damage to the plaintiff.

240 The plaintiff claims the value of a number of items lost due to the failure or neglect of the first, second and third defendants, their collusion with the villagers of Niuatoputapu and the conversion of the property to their use. It is claimed the defendants were acting in the course of their duty and so the Government is vicariously liable. It is also pleaded that the second and third defendant were acting as receivers under the Shipping Act. During the trial it became apparent that the same claim was also being made in relation to the first defendant and the case proceeded on that basis.

The defence consists of a denial they were acting as receivers, that they had any duty to the plaintiff or were in breach of it. In addition it is averred that, by section 3, the provisions of the Shipping Act do not apply as 'A Golden Dawn' is a pleasure yacht.

What does the plaintiff have to prove if he is to succeed in this action?

250 The general principle in negligence is that there must be a duty of care, breach and damage as a result. Thus it is necessary to consider whether the Act imposes a duty on the Receiver and, if so, whether that extended to any or all of the defendants when and if

they acted under section 166. If as a matter of law that is the case, then the Court must pass on to decide as a matter of law and fact whether any or all of the defendants did take on the duties and whether they failed to perform them properly.

Although it is a form of negligence, breach of statutory duty is frequently considered as a 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.

Whether or not the first two will apply depends on the wording of the statute and, in this case, that requires consideration of Part X of the Shipping Act (Cap.136) which deals with wreck and salvage.

Section 160 provides that the Director of Marine is the receiver of wreck but allows him to authorise any person to act as a receiver of wreck for the time being in any assigned district. By section 208 such authorisation must be in writing and it has not been suggested by the defence that any such authorisation has been made in relation in Niuaupufapu.

"Wreck" includes flotsam, jetsam, lagan or derelict and "any articles or goods of whatever kind which belonged to or came from a vessel wrecked, stranded or in distress, or any portion of the hull, machinery or equipment of any such vessel" (section 160).

Section 162 sets out the duties of the receiver of wreck when a vessel is in distress:

"162. Where any vessel is wrecked, stranded or in distress at any place on or near any one or more of any of the islands, rocks, reefs and structures (whether artificial or natural) or anywhere in waters lying within the limits of Tonga, the receiver shall proceed there and upon arrival shall take command of all persons present, and give such instructions to each person as he thinks fit for the preservation of the vessel and of the lives of the persons belonging to the vessel ... and of the wreck."

Section 163-5 give him the necessary powers to enable him to carry out his duties.

At this point it is convenient to decide the position in relation to the first two requirements of breach of statutory duty set out above.

The damage claimed here is loss of property from the wreck and, by section 162, the receiver once he has taken command has to give instructions he considers fit, inter alia, for its preservation. Where action is taken against public authorities, the Courts have refused to entertain the action if the duty is only general or directed at the public as a whole. I consider the terms of Part X are clearly specific in both regards and the first requirement applies here.

In terms of the second requirement, many statutes contain an express provision whether or not a civil remedy is available and, in such cases, the answer to the second requirement is plain. Many, as in the case of the Shipping Act, do not. It has been held that where a statute imposes a duty but provides no remedy, either criminal or civil, for its breach there is a presumption that a person injured by the breach will have a right of action.

In *Cutler v Wandsworth Stadium Ltd.* [1949] 1 All ER 544 at 548, Lord Simonds explained it in these words:

"... if a statutory duty is prescribed, but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damaged by the breach. For, if it were not so, the statute would be but a pious aspiration."

That has been adopted in recent cases eg. *Ministry of Housing v Sharp* [1970] 1 All ER 1009 and I am satisfied the plaintiff has the right to a civil remedy if there has been a breach of duty.

310 None of the defendants was the receiver or authorised under section 160. However, the nature of shipwreck is such that extremely urgent action is often required. In such cases, even where there is a receiver, he may not be able to reach the scene and take command in the first critical hours. For that reason, section 166 provides:

"166. (1) Where the receiver is not present, the following persons in succession (each in the absence of the other, in the order in which they are named) namely -

- (a) the chief officer of Customs at any ports;
- (b) a police officer;
- (c) a commissioned officer in the naval or military service of His Majesty;
- (d) a district officer; or
- (e) a town officer;

320 may do anything authorised to be done by the receiver.

(2) Any person so acting for a receiver shall with respect to any wreck be considered as the agent of the receiver, and shall place the wreck in his custody but shall not be deprived, by reason of his so doing, of any right to salvage to which he would otherwise be entitled."

Clearly during the night of the 11th October, the first defendant was the person entitled to do anything authorised to be done by the receiver. The short visit of the third defendant did not supplant him because the third defendant is not the chief officer of Customs on the island. Rather than going himself to the scene, the third defendant may 330 have been wiser to advise his superior, the second defendant, of what was happening so he could attend the scene.

The provisions of our Act mirror many of the equivalent provisions of the English Merchant Shipping Act. Surprisingly, there appear to be no reported decisions on sections 511 or 516, the equivalents of our sections 162 and 166, explaining the meaning or scope of the duties of a receiver or a person acting as one.

I find no difficulty with section 162. The words are mandatory and impose a duty on the receiver. In this case, if the plaintiff is to succeed where the receiver was not present, he must first prove the defendants were subject to a similar duty under the 340 provisions of section 166 and, if so, that they failed in their exercise of those duties. It is certainly clear that the wording of section 166 gives the officers described the powers of the receiver but it is equally clear the assumption of those powers is optional.

Brice in his "Maritime Law of Salvage" 2nd Edition at paragraph 1-194 takes the same view when considering the English section 516 in relation to salvage rights:

"Clearly anyone undertaking such functions as a volunteer would in principle be entitled to a reward of salvage in the event of success: but the receiver performs those duties as part of his public duty and thus is not categorised as a volunteer."

350 In our section 166(2) the specific retention of salvage rights for a person acting under that section supports the same interpretation under our law for the receiver would not be

entitled to salvage.

However, the matter goes further. As has been said already, the plaintiff must demonstrate a duty on the defendants to act and a failure to perform that duty or to perform it properly. There is no reported authority on that but I consider the answer is clear. The wording of section 166 shows there is no obligation on any of the persons listed to take on the powers of the receiver but, once he has, he must perform them properly.

The principal duty of the receiver is to take command and, having done so, he is empowered to give all appropriate instructions for the preservation of the vessel, and the lives of the persons belonging to the vessel and of the wreck. All those things may be done by the persons listed in the section 166. The Court must first consider whether they have, by their words or actions, shown they have taken command. Once in command, I cannot accept they are entitled to give instructions and use their assumed powers to deal only with part of the situation but not the rest. They must either take command for the purposes set out in section 162 or not take command at all. Once they have taken command they must continue until the situation is resolved or someone of superior authority under the Act takes over command.

Approaching the matter from the opposite standpoint gives support for this interpretation. The duties are imposed on the receiver by section 162 as an agent of the Government. Through him, the Government takes responsibility for ensuring the safety of vessels in distress at sea. If the receiver fails to perform those duties properly both may be liable. Had the receiver himself or someone authorised under section 160 been on Niuatoputapu that evening and carried out the duties as inadequately as I have found the defendants did, he would be liable.

The Government should have authorised sufficient people under section 160 to ensure the receiver's duties can be properly performed throughout Tonga. I am told by counsel no such authorisations have been made. I cannot accept that, by simply failing to make authorisations under Part A of the Act, the Government is relieved of its responsibilities. Such an interpretation would be untenable. As the receiver or an acting receiver was not present, the Government's responsibilities could be performed by a volunteer under section 166.

Passing then to the last two requirements of breach of statutory duty, the Court needs to decide, in the case of each defendant whether he took on the duties and whether he failed to carry them out and, if so, whether the damage was caused by that breach.

The first defendant told the Court he had never been advised of the provisions of section 166. As the only police officer in Niuatoputapu that is singularly unfortunate. It is to his credit that, despite it, he went to Falehau as soon as he heard of the plight of the vessel. Once there he introduced himself as a police officer to the plaintiff, he gave directions to the Town Officer and told people not to go to the distressed vessel. He agreed to look after the property landed and later asked the third defendant about the use of the customs shed to store the items brought ashore. I am satisfied as a matter of law and fact that he was taking command of the situation and using his powers under section 166. In these circumstances he shoulders the receiver's duties and must perform them properly. Sadly, having made a prompt and proper start, he failed thereafter and I am satisfied the plaintiff's property was lost as a direct consequence.

Part of his duty was to place the wreck in his custody as agent for the receiver. There is no guidance in the Act as to how far this goes. I consider custody of the wreck

encompasses a duty to protect it and all that is included in that term under the definition in section 160. In this case, the plaintiff was clearly not intending to, and never did, relinquish his ownership of the vessel. Whether the receiver in such a case must take custody of the wreck is unclear. His claim is on behalf of the Crown but, in this case, the vessel was undoubtedly not derelict. However, I do not consider it necessary to resolve this for the purposes of this case.

The terms of section 166(2) suggest that if, and when, the receiver appears, he takes over the duties assumed by anyone under section 166 including, where appropriate, the custody of the wreck. The same must apply if another person higher up the list in section 166 appears subject, of course, to the requirement in such a case that he must accept the responsibility. Whilst the presence of the third defendant on the Sunday evening did not relieve the first defendant of his responsibilities, the following day when the first defendant and the plaintiff informed the second defendant of the sinking, the second defendant could take over the duties as the chief officer of Customs in Niuaotupapu. On hearing of the casualty, the second defendant cabled Nuku'alofa with details of the wreck as required under section 167 (although he failed to take these on oath) and he asked the police officer and the plaintiff about the whereabouts of the property from the vessel. That viewed with the evidence as a whole satisfies me on a balance of probabilities that he was taking over command. The duty to preserve the wreck passed to him and he failed to preserve it or to take any steps whatsoever to do so. In fact he went further. Whilst he was meant to be carrying out the duties of the receiver, far from preserving the wreck, he went with others to steal from it and his conduct and that of the third defendant was disgraceful.

The defence suggest that the Act does not apply in this case because of the terms of section 3(1)(e):

"3. Unless expressly provided otherwise in this Act or the regulations, this Act and the regulations apply to every Tongan ship on any voyage and in any waters, and to every ship in a Tongan port or harbour, but do not apply to -

- (a) a ship belonging to the defence forces of Tonga or of any other country, including but not limited to warships, naval auxiliaries, and any other ships owned or operated only on governmental non-commercial service;
- (b) a ship employed solely in navigation on lagoons, lakes, rivers and inland waters;
- (c) a ship of less than 15 metres in length;
- (d) a ship of traditional build;
- (e) a ship employed as a pleasure yacht or similar craft not engaged in trade;
- (f) a ship employed as a fishing vessel; or,
- (g) a ship lawfully exempted from any provision of this Act or the regulations, to the extent exempted."

That is a curious provision. It has no counterpart in the English Act. It was added as part of a major amendment in 1986 which, apart from making the Director receiver of wreck in place of the Collector of Customs, left Part X unaltered. In terms of Parts II to VIII of the Act it clearly applies and prevents the vessels listed having to comply with the provisions of the Act as to registration, navigation, safety etc. I see no problem with that but I cannot accept it applies to Part X. If it did it would mean that the receiver, exercising his duties under Part X, has only to discover the ship in peril outside a port or harbour or

not a Tongan ship and he can walk away with no duty to assist it or its endangered crew. Similarly if he sees it is a Tongan warship, a Tongan fishing vessel or it is less than 15 metres in length.

It is, perhaps, significant that the 1986 Act substantially amended Parts I-VIII. It did not, apart from the one minor amendment already referred to, alter Parts IX-XIII. Whilst there is no express provision in Part X to avoid the restriction imposed by section 3, if the provisions are taken as a whole, I consider such an interpretation may properly be made.

460 The definition of "wreck" in section 160 refers to "a vessel wrecked, stranded or in distress". "Vessel", as defined in section 2, "includes every description of water craft used or capable of being used as a means of transportation on the water". The duties of the receiver apply "where any vessel is wrecked, stranded or in distress". If the restrictions applied as suggested by the defence in this case it would also mean that the provisions for claiming salvage would not apply to the vessels listed in section 3. I am satisfied the term 'any vessel' demonstrates the intention of the Legislature to widen the scope of Part X.

Some support for this view may be found in Part XI where there is also no express provision widening the restriction of section 3 but, in section 194(1), paragraphs (a) and (b) refer to "Tongan ship" and paragraphs (c) and (d) refer to "any ship". Clearly it is 470 intended the latter description widens the scope of that provision and I find a similar intention in the use of similar words in section 162.

I am satisfied on a balance of probabilities that the first defendant failed properly to carry out his duties under the Act and the loss of the plaintiff's property resulted from that failure. I do not find he colluded with the islanders of Niuatoputapu or attempted to convert any property.

The second defendant took over as receiver and he failed to do anything apart from reporting the vessel's description to Nuku'alofa. He is also liable for the loss of the plaintiff's property. Had he as receiver and the first defendant, once he had relinquished 480 those duties, as a police officer, taken even modest steps towards recovering the property, it seems highly likely much would have been recovered. They did not and virtually nothing has been recovered.

At the time the first and second defendants were bearing the duties of the receiver and when the first defendant was thereafter acting as a police officer, they were servants of the fifth defendant. The right to assume the duties of a receiver under section 166 depends on their positions as police officer and customs officer respectively. At the time they were carrying out these duties they were within the scope of their employment and the fifth defendant is vicariously liable.

490 The third defendant owed no duty to the plaintiff under the Shipping Act.

The final question therefore, is the extent of the damage suffered by the plaintiff. The statement of claim lists a number of items that have been lost or damaged beyond repair. There is no claim for the items that were lost as a result solely of the loss of the yacht; only those that were or should have been salvaged and were then lost through the negligence of the first and second defendants.

In his evidence, the plaintiff explained how he ascertained the items that were missing. I do not need to go into detail as the accuracy of his list has not been challenged and I am satisfied the list is correct. However the list includes two categories of goods 500 lost. First there are the items that have actually been removed from the vessel and never

recovered. Second are items found by the plaintiff still to be on the wreck when he dived on it some months later but which he claims he would have been able to recover by diving the next day had he still possessed his diving mask.

I accept the items stolen from the vessel were lost as a result of those defendants' negligence. These items included the diving mask.

510 The items that the plaintiff claims could have been recovered in subsequent days had he not lost his mask are numbered 12-16, 43, 44, part of 46, 47 and 54 in the statement of claim. Some of these were electrical items such as the calculator and microwave oven that would anyway have been destroyed by even a short period of immersion in seawater but I consider the loss of all these items is too remote. The defendants are liable for the natural and probable consequences of their conduct although they may not have been necessarily foreseeable. It was a direct consequence of the first and second defendants' negligence that the items salvaged were lost and that includes the loss of the diving helmet. It is clear that loss affected the plaintiff's ability to dive but I do not consider it is even reasonably certain that, with it, he would have been able to recover the other items undamaged or at all.

520 It is important to remember that the plaintiff himself could have taken the mask ashore. No doubt in the emergency he did not think about it but, had the vessel sunk as he expected during the night, he would not have had the helmet anyway. In fact it did not sink until later but I consider the consequence of that loss coupled with the speculative nature of the question of the condition in which these items would have been recovered makes the damage too remote.

530 The first and second defendants are liable for the loss of the remaining items including all those added by the witness, Martin, and pleaded in the amended claim. Item 46 comprises various tools to a value of \$4000. For a vessel of the type and size in this case, I accept that is a reasonable value. The plaintiff said some were taken and some remained but he was not able to make an accurate assessment. I shall allow half the sum for those stolen.

Mention should also be made of item 1, the 25-man life-raft. This was an inflatable raft containing emergency provisions and packed in a container. Submersion of the whole thing would not have damaged it but I accept it was inflated by someone during or as part of the looting of the vessel. Once inflated, everything in it was removed and the canopy support was cut. Although the raft itself was recovered, its value was only as a complete unit and I allow the full value.

The total special damages were \$73,543.50 from which must be deducted the excluded items totalling \$14,245 leaving a total sum of \$59,298.50 special damages.

540 The plaintiff also claims general damages and exemplary damages.

550 The claim for general damage is based on the distress and frustration caused to the plaintiff by the attitude and failure of the defendants. He described how after the loss of his boat he "was devastated and it just seemed to get worse". He said the frustration of seeing things going to waste was enormous and the attitude of the defendants to his entreaties left him "feeling very alone and deserted". I accept all that. The loss of this vessel was clearly and understandably a terrible experience. On top of that the difficulties the plaintiff experienced through the unwillingness of the defendants, and the second defendant in particular, to assist must have been greatly magnified. Such suffering amounts only to distress of mind and I do not consider, in the absence of evidence of any

further effect, that is something that should attract damages.

The exemplary damages are claimed on the first of Lord Devlin's two categories in Rookes v Barnard, namely that their behaviour was oppressive, arbitrary or unconstitutional. Such a description would certainly not apply to the first defendant. In the case of the second defendant, his negligent conduct as a receiver was disgraceful but falls short of conduct meriting exemplary damages.

560 However, in the case of the second and third defendants, the visit to the wreck on the Tuesday takes the matter further. They went as Customs officers and, in the case of the second defendant, his negligent conduct as a receiver also. The evidence has proved no actual loss of property caused by their actions that day and so their conduct would only attract nominal damages in relation to the injury to the plaintiff. However such actions by public officers were oppressive and should be measured by an award of exemplary damages.

Such damages fall into a different category from purely compensatory damages and the means of the defendants should be taken into account as has been confirmed in Rookes v Barnard. In the case of the second defendant, the senior officer, I shall award a sum of \$750 exemplary damages and, in the case of the third defendant, \$500.

570 Their actions that day, although starting within the scope of their employment as Customs officers, went far beyond it and I do not consider the fifth defendant can be held liable.

Thus the order of the Court is:

1. Judgment for the plaintiff against the first, second and fifth defendants jointly and severally in the sum of \$59,298-50 special damages.
2. Judgment for the plaintiff against the second defendant in the sum of \$750 exemplary damages.
3. Judgment for the plaintiff against the third defendant in the sum of \$500 exemplary damages.
- 580 4. The first, second, third and fifth defendants to pay the costs of the plaintiff to be taxed if not agreed.

I have already given judgment for the fourth defendant and said I would consider the question of costs at the end of the trial. He should have his costs from the plaintiff to be taxed if not agreed.

590 This whole episode was one that should leave every right thinking person in Niuaotupapu with a profound feeling of shame. It is probable that only a very small number were directly involved but many others must be implicated by acquiescence. The Government Representative, who was the first official on the island to show any apparent concern, put out a notice asking for any property from the yacht to be returned. Many people must have known the whereabouts of these items and yet nothing was returned.

The community as a whole should reflect for a moment on what this incident has done. Anyone sailing off Tonga should be confident of a helping hand if he should be in distress. Far from that, in this case, the plaintiff and his crew were shown a large measure of deceit and an apparent total lack of any pity. There are notable exceptions, but they are few. The defendants were negligent but it was the actions of the dishonest members of the island community that finally caused the damage. As a result the Government has to pay. Unfortunately, this Court can do nothing in this action about the people who actually stole the items save to hope they will perhaps examine their own consciences.