

Taumoepeau & others v Pohiva

10 Supreme Court, Nuku'alofa
 Dalgety J.
 Civil Case Nos. 44-47/91

11, 12, 13, 14, 22 May 1992, 27, 28, 29 January & 16 April, 1993; 14 January, 1994

20 *Constitution - privileges of members of Legislative Assembly*
Practice & procedures - pleadings - amendment - principles.
Privileges - members of Legislative Assembly.
Defamation - defences - truth for comment - onus of proof
Damages - duty to mitigate
Cooperative Societies - executive committee - gratuitous services
Cooperative societies - duties of Registrar - annual account.

30 The Plaintiffs sued the Defendant for damages for defamation for articles published in the "Kele'a" (edited and published by the Defendant) alleging improper and unlawful payments to the Plaintiffs by or on behalf of a Cooperative Society for services rendered by the Plaintiffs, they being members of the Society's Executive Committee.

Held:-

1. Amendment to a Defence should be allowed, even mid-trial, if such were in the interests of justice and would enable proper determination of the issues in the case.
2. Clause 75 of the Constitution prevents a judgment being given against a member of the Legislative Assembly whilst the Assembly is sitting.
- 40 3. Under the Cooperative Societies Rules 1974 a member of an executive committee can not be paid for his services.
4. Under the Cooperative Societies Act (cap.118) the Registrar has a duty to obtain audited accounts from a Society once at least in every year.
5. Defences of truth and fair comment require to be proved by a defendant pleading them. The Defendant failed in that regard here, on the evidence.
6. The articles were defamatory; damages should follow but a Plaintiff has a duty to mitigate his loss and damage.
- 50 7. In that regard account may be had as to whether a Plaintiff had sought a retraction, published his own denial and (in one instance where the Defendant

had published a retraction and apology to one Plaintiff who had sought it) terms of any such retraction and apology.

8. Various awards of damages were made (from \$2,500, to \$11,300).

Cases referred to : Rex v Pohiva (1988) Martin CJ

Statutes referred to : Constitution Clause 73
Cooperative Societies Act s.39
Defamation Act s.2, s.12, s. 14.

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Rules referred to : Cooperative Societies Rules 1974, rr. 56, 64

Counsel for Plaintiffs : Mr Paasi
Defendant in person

Judgment

Four actions of defamation were raised against Samiuela 'Akilisi Pohiva as Defendant in early May 1991. The Plaintiff in each case was different being Doctor Makameone Taumoepeau in Case number 44/91, Mr 'Aisake Tu'iono in 45/91, Mr Tupou Malohi in 46/91, and H.R.H. Prince Mailefihī Tuku'aho in 47/91.

Evidence was led over four days (11-14th May 1992) when the Trial was adjourned to 22nd May 1992 to enable the Defendant to consider whether or not to amend his defences. He duly lodged an amendment which I allowed, for the following reasons recorded by me at the time in note form -

1. This is a series of four actions arising out of two articles in the Newspaper "Kele'a" in which it was reported that the four Plaintiffs had each received payment of \$3,000 pa'anga for their services as members of the Executive Committee of the Tongan Growers Multi-Purposes Co-operative Society Limited. The Plaintiff Taumoepeau has an additional claim, in respect of an allegation that he had been paid \$40,000 pa'anga expenses for a visit to Japan.
2. The factual issue upon which the subsequent comment was based, was that there had been such payments. It is important in the context of whether or not to allow the Minute of Amendment tendered this morning by the Defendant to have regard to the law. The Defendant in this case has pled that his factual statements published in "Kele'a" were true, and in any event that his commentary amounted to fair comment. "Fair comment" in law requires that the facts upon which the comments are based, are substantially true. The truth or otherwise of the factual issue of payment is the central issue I require to decide in this case. For the avoidance of any doubt I would note the comment of Chief Justice Martin in 1988, Rex -v- Pohiva in which he said -

"If a Newspaper believes that wrong has been done, it is right that it should report it. But it must first take careful step to ensure that what it alleges is true."

I endorse these comments unreservedly. The truth or otherwise of the allegations is the essential ingredient of this civil case.

3. As a matter of principle I dislike adjourning trials. I also dislike amendments which are made at a very late stage of the proceedings and I will not grant a request to adjourn a trial or allow an amendment to be received unless there are convincing reason for so doing. This is a case which was raised in May 1991 and has now come to trial one year later, which is a remarkably quick time in Europe but is longer than I want to see in Tonga in the future. The Defendant had represented himself throughout for a reason which he has very fairly described to the Court. Friends have given him assistance, but the responsibility for his pleadings and the conduct of this case are his alone. This Defendant's case was pled and went to trial on the simple basis that payment have been made of the same specified in "Kele'a". At the trial the Tonga Development Bank and the Bank of Tonga produced their records which tend to show that there were no direct payment to the Plaintiffs as alleged in "Kele'a". In the course of his cross-examination of a witness Mr Pohiva elicited evidence that there may in fact have been indirect payments. In his own evidence-in-chief

he made the same point. He has no Record on which to examine anyone on indirect payments. I am satisfied that the absence of such averments in his pleadings was not a deliberate mistake, but the result of him, as a layman, not understanding what was required. He has now produced an Amendment which states in terms that indirect payments were made. He alleges that Tu'iono, and Tuku'aho were paid indirectly for their services out of commission on the 18th December 1990. He also alleges that Tu'iono, Tuku'aho and Taumoepeau received payments by, in effect, devious dealings in the foreign exchange market. Whether or not he can prove these allegations is not an issue I am concerned about in the meantime. They are of course only allegations. Today, I am concerned only with the justice of whether or not this Amendment should be allowed.

4. If these monies were paid as alleged then the factual report in "Kele'a" was substantially true, and if the comments thereon were regarded as fair there may be no defamation. As the facts now averred are essential for a proper determination of this case, therefore and with the greatest reluctance, in the interests of justice I shall allow the proposed Amendment of the Defences. It follows that this diet of trial requires to be discharged to another day."

I fixed a further adjourned Trial for 27th to 29th January 1993. I heard further evidence then. (the judge then dealt with other incidental matters and went on). I proceeded to prepare a first draft of my judgment. This was ready by early June 1993. Unfortunately by then the Legislative Assembly was in session. The Defendant is a Member of Parliament. This gave rise to difficulties because of the terms of Section 73 of The Act of Constitution of Tonga (cap.2) which provides that -

"The members of the Legislative Assembly shall be free from arrest and judgment whilst it is sitting except for indictable offences and no member of the House shall be liable for anything he may have said or published in the Legislative Assembly."

This case was not concerned with anything said in the House. The exception about indictable offences does not apply either. The Section does however prohibit judgment being issued against a member whilst the House is in session. "Judgment" in my opinion encompasses orders disposing in part or whole of the merits of a case, whether the jurisdiction be civil, criminal, family, commercial or admiralty. It therefore applies to this case. It is not clear to me whether the draftsmen of the Constitution really intended the privileged protection given by Section 73 to cover all actions, or only criminal cases. The side-note is entitled only "Immunity from Arrest". The same description is given in the Index at the front of the Act. That side-note is inconsistent with the terms of the section although I require to follow the language of the latter in such circumstances. I would urge an early rethink of the ambit of this provision for there is much truth in the saying that justice is denied. After Parliament closed in November 1993 I revised my draft judgment. Due to the intervening Christmas Court vacation and a serious shortage of Court secretaries the Judgment was unavailable for issuing until today. So much for procedural issues.

The basis for this action was the publication in the newsheet "KO E KELE'A" in January/February 1991 of two articles concerning all four Plaintiffs and a further two articles concerning Dr. Taumoepeau alone:-

Firstly,

"Committee members received payment in December.

It was reported to the Kele'a that Mailefihī, Makameone, Tevita Liti, Tupou Malohi and 'Aisake Tu'iono, the five executive officers of the Mailefihī Squash Export Co. were all paid in December. Each received 3,000 pa'anga as payment for the service the executive contributed to the company. According to Fononga Tu'ipeatau that payment is contrary to the rules of the Co-operative Societies. That payment was also unknown to most of the growers. One grower says that it was unfair for the leaders of the group to receive such payment in December and hold the payment of the growers until January." : and,

Secondly,

"3,000 pa'anga paid to each Committee member in December. Each of the five members of the Executive Committee of the Mailefihī Squash Export Co. were paid 3,000 pa'anga in December 1990. According to Fononga Tu'ipeatau this payment was improper as it was contrary to the Co-operative Societies Act. The growers received their money in the third week of January. Most of the growers were not aware of these payments. They were in respect of the work carried out by the Committee." : and,

Thirdly,

"Committee Members milk the Growers"

Makameone Taumoepeau, one of the five executive members of the Tonga Squash Export Company was awarded 40,000 pa'anga as his per diem to pay for his expenses in Japan towards the end of last year. The purpose of the trip is unknown to most growers who gained nothing from the last year squash shipments to Japan and who says that Makameone should account for his expenses in Japan. He must also report to the squash growers the purpose of his visit to Japan and what benefit the growers had gained from the visit." : and,

Fourthly,

"40,000 pa'anga per diem

The Mailefihī Squash Company has paid the sum of 40,000 pa'anga to MAKAMEONE TAUMOEPEAU as per diem for his trip to Japan in connection with the 1990 squash export season. Makameone is one of the five members of the Committee that managed the Mailefihī Squash Company. The payment of this per diem to Makameone is amongst the highest paid for a single trip by a GOVERNMENT OFFICIAL to an overseas country."

The evidence of Mr Graeme Paul Swinburn, Manager of the Taulua Press and Printer of the Kele'a, Miss Filisi Savieti of the Taulua Press, and Mr David Graeme Main, Manager of the Friendly Island Bookshop satisfied me that the said edition of Kele'a was printed by the Taulua Press from a proof prepared by the Defendant and handed by him to his printers and thereafter sold to the public through outlets such as the Bookshop; and that 900 copies of that edition was received for sale by the Bookshop in February 1991. It was admitted in Court by the Defendant that this publication which he edits was published bi-monthly. I am also satisfied that the persons referred to in the articles are the four

Plaintiffs

Defamation of the character of a person may be effected by the spoken word or by writing and the statement so made must be damaging to the character or reputation of that person, or must expose him to hatred, contempt or ridicule or cause him to be shunned: Section 2(1) of the Defamation Act (cap.33). The Plaintiffs in this case allege that the said newspaper articles were defamatory of them and, in my opinion, they undoubtedly were. The two articles affecting all four Plaintiffs clearly suggested that the payment for services rendered by the Plaintiffs as executive committee members of a squash company were illegal or improper; and that they looked after their own interests rather than those of the growers by paying themselves first, some weeks in advance of payments made to growers in respect of the 1990 squash season. Mr 'Aisake Tu'iono is a Chartered Accountant whose main employment is as Chief Accountant to the Tonga Electric Power Board. As such he is a public servant. Like so many others in Tonga he supplements his income from public funds by extra - mural remunerative activities in the private sector, in his case as an accountant. He is also the Secretary of the Tonga Growers Multi Purpose Co-operative Society ("the Society"), the body commonly known as Mailefih'i's Squash Company. He read the articles concerning himself. He denied receipt of the alleged payment of 3,000 pa'anga. He was very surprised to read this article for not only had he not received this payment, but the suggestion was that he had obtained it illegally. He felt "ashamed" to read these articles - albeit he had done nothing wrong - and was physically afraid that growers registered with the group would do violence to his person. As an Accountant he regarded it as vital that the public have trust and confidence in him. He felt that the articles were suggesting wrongdoing contrary to the ethics expected of a professional man. In his own words "here I was with clean hands accused of doing something wrong." Family and friends contacted him about these articles. Because it had been published in a newspaper many of his family and so - called friends were disposed to believe he had done something wrong and seemed reluctant to accept his denial. In the circumstances, he said, his "spiritual life" was affected. As an indication of the opprobrium visited upon him his close friend Doctor Mapa Puloka told him that he no longer had any trust in him as he had cheated the people. The Auditor General, Mr Pohiva Tu'ionetoa then Secretary of the Tonga Society of Accountants, informed him that his conduct was unprofessional and that because of him the accountancy profession had received a "bad name". Mr Tu'ionetoa confirmed this in evidence. He listened to Mr Tu'iono's denial but said it did not matter whether the article was true or not, there had been publication of an article imputing illegality to an accountant and he did not like that. He did not regard it as "good" for an Accountant to have his name in a newspaper in such circumstances. In addition at the time he "still did not believe" Tu'iono's denial. He wanted the matter put right, publicly and without delay, and told Tu'iono this. It is unfortunate this helpful advice was not followed! One of Mr Tu'iono's clients was Jewett Cameron (South Pacific) Limited. Their managing director Mr Tevita Havili informed him that his conduct was not that commensurate with being their auditor, though in fact he still retained that position at the date of the trial. I had the benefit of hearing the evidence of Mr Tevita Stone Havili. He regarded the article as saying that Mr Tu'iono, his Auditor, had received an illegal payment, something that deeply concerned him and that he intended looking for a new Auditor. He did, but the fee proposed exceeded his budget and, reluctantly, he was stuck with Tu'iono. Mr Tu'iono did however lose two commercial

clients including O.K. Toutai Company Limited as a result of the said publication, and has acquired no new clients since then. The fees he lost from the two companies amounted to 7,000 pa'anga per annum. His other accountancy fees bring in about 6,000 pa'anga annually at present, but he cannot guarantee that this income will continue in the future due to the reaction of people who have read these articles in Kele'a. There is no doubt that under the Co-operative Societies Rules 1974, a Secretary who was a member of the executive committee of a Co-operative Society such as Mailefihii's Squash company could not be paid for his services as such: they had to be gratuitous [Rule 56(2)]. Rule 64(3) also provide that if there is no Treasurer, as was the case here in 1990, then the duties of Treasurer were to be performed by the Secretary. If approved by the General Meeting the Treasurer may be paid an honorarium in accordance with the Society's By-Laws, but not apparently if he is also the Secretary. Mr. Tu'iono confirmed that he has never received a cent from the Society. I have no evidential basis for disbelieving any part of this witness's testimony. The allegations published about him have not been substantiated, were hurtful to him and in the circumstances defamatory. This Plaintiff however deliberately elected not to complete his preparation of the 1990 Accounts of the Society. He felt that as a member of the Executive Committee he should no longer perform any professional accountancy services, and that he no longer had any incentive to do this work until his position has been vindicated in Court. I am prepared to accept that this genuinely is how he felt, but in so doing he was not acting to mitigate his loss nor really in his own best interests. Audited accounts accepted by the Registrar of Co-operative Societies would have been a compelling adminicle of evidence in this case, but I have been denied the benefit of such evidence given the curious stance adopted by Mr. Tu'iono to the preparation of these accounts. They are now three years late. While I appreciate Mr Tu'iono's position (unacceptable though it is) there is no excuse whatsoever for the object failure of the Registrar to insist on the production of accounts. It is his legal duty Section 39(1) of the Co-operative Societies Act (cap.118) to audit or cause to be audited the accounts of every registered society "once at least in every year." He was not called as a witness to explain his inactivity in this regard. I did however have the benefit of hearing Mr Sione Tangi, the Assistant Registrar of Co-operative Societies and Credit Union. He confirmed that the 1990 Accounts have been asked for, that they have not been lodged, and that neither he nor the Registrar have pursued the matter further. There is no other Society he said which has not produced 1990 Accounts. He said he was aware of the law but still he has done nothing. I heard from him no valid excuse for not taking steps to demand the accounts. In their legal duty this Department has patently failed. As guardians of the interests of Society members they are a toothless watchdog. Mr Tu'iono issued no public statement denying the allegations (see also paragraph 5 hereof). Privately, the Defendant was given an opportunity to publish a retraction but failed to do so. Mr Tu'iono seeks an award of damages. In his pleadings he suggests 30,000 pa'anga as an appropriate figure. For the wrong done him by the article I would not regard 10,000 pa'anga as unreasonable compensation. In addition he has undoubtedly lost income as a result. He did not produce any documentary evidence to vouch his loss, such as Audited Accounts for the years ending 30th June 1990, 1991 and 1992, and a Statement of Account as an 16th April 1993. This he should have done. I am however prepared to accept his evidence that he lost income of 7,000 pa'anga in the fiscal years 1990/91 and 1992/1992; beyond that I can only speculate which I am not prepared to do. After tax, his loss of income would

be 12,600 pa'anga. Everything else being equal his loss amounts to 22,600 pa'anga. However as already indicated he took inadequate steps to minimise his loss. He should have completed the accounts. He should have issued a public statement rebutting the allegations and requested it's publication. He did neither. In the circumstances I do not consider that he is entitled to a full award of damages. In the whole circumstances I consider that the correct quantum of damages is 11,300 pa'anga.

Mr Tupou Malohi was a District Officer at the time of publication, a member of the Council of Churches and Chairman of the Board of the Handicapped Children Society. He was also a member of the Executive Committee of the Society. He read the offending Kele'a articles. He denied receiving the payment alleged, which he called "a lie" and "unjustifiable". The articles offended him. He felt as if he had been "murdered" or "killed", that his status in public life had been lost. He noticed the trust his district placed in him "slipping away", nevertheless he successfully stood for re-election as a District Officer. Many people contacted him about these articles and expressed surprise that he had taken part in what they obviously regarded as unpardonable conduct. He regarded the articles as saying in effect that he had stolen the money from the growers, for at law he was not entitled to this payment. Perversely people seem to believe what a newspaper says, and are skeptical of denials even from someone hitherto utterly trustworthy. His nephew Ika Finefeuiaki gave evidence that he spoke to his uncle after he had read the Kele'a articles as he was concerned about what he read. In fact he was "ashamed" to see his uncle's name there. The article seemed to be accusing him of misusing money. Mr Malohi had the common sense after publication to contact the Defendant. The outcome was a fulsome apology published by the Defendant and prominently displayed in a subsequent edition of Kele'a (Production 9) namely -

"The Editor of the Kele'a wishes to apologise to Mr Tupou Malohi the District Officer of the District of Lapaha on account of what was published in the Kele'a, Volume VI number 1 of January, February 1991.

On page six it states that five members of the Mailefifi Squash Growers Company were each paid 3,000 pa'anga for work done by them for the company as committee members.

I state here that Mr Tupou Malohi did not receive any payment as stated in the above mentioned Kele'a. Therefore I wish to apologise to Mr Tupou Malohi for our error in the Kele'a. We now know for sure that he did not receive any payment."

As a result Mr Malohi has regained his trusted position in public life. He has also quite properly minimised the loss he suffered as a result of the publication of the two offending articles. As with Mr Tu'iono I have no reason to doubt the veracity of his testimony. Mr Malohi does not regard the apology as enough and still seeks damages for the wrong done to him by the publication of said two articles. In the whole circumstances I shall award him damages of 2,500 pa'anga. But for the apology I would have awarded him 10,000 pa'anga.

H.R.H. Prince Mailefifi Tuku'aho is a member of the Royal Family, the son of H.R.H. Prince Tu'ipelehake sometimes Prince Regent and former Prime Minister of Tonga. As such he is expected to set an example to the people of his country in his conduct. It is a very serious matter to suggest that someone in his position of honour would cheat the growers who had registered with his Society or knowingly breach the law to enrich

himself unjustifiably. That however is precisely what the two articles did. On the evidence the allegations therein have never been proved. Therefore, I accept the denial of impropriety by Mailefihi. He is not an avid reader of Kele'a, or indeed any newspaper it would seem unless it has a significant sporting content. The articles in question were brought to his attention. He was quite emphatic that their content was untrue. Publication had a profound effect upon him. Some of his close friends in Government - for he was then nominally Director of Marine - ostracised him; he was denied the chance to travel overseas in Government delegations; his wife in America telephoned him to tax him about these articles; he was called into the presence of his father to answer the charges impliedly laid against him in the articles; and colleagues, growers and others he came into contact with all raised this subject with him. The prevailing undercurrent was a tendency to believe these articles and not Mailefihi's denial. Why neither he, Tu'iono or Taumoepeau followed Malohi's sensible approach of immediately contacting the Defendant with a denial and requiring a retraction will just never be known. At the very least they could have issued a denial for publication. That is not the same as an apology but would have been a contemporaneous and public statement of their position. It might well have had an effect on public opinion. One of the reasons for publishing such a denial is to disarm potentially hostile elements and to inform those with a legitimate interest to know of their position. Instead like self appointed martyrs they were all prepared to suffer longer than necessary simply to avoid having to make any public statement. I find this attitude incomprehensible. In this material respect Tu'iono, Taumoepeau and Mailefihi did little to minimise their loss. That must affect the award of damages. They did however instruct counsel to seek an apology and on 8th March 1991 Mr Paasi wrote to the Defendant stating that none of the Plaintiffs had received the sums stated in the articles, that the articles were untrue, requiring a retraction in the next edition of Kele'a and an apology, failing all which litigation would ensue. There was no reply. That letter however was never made public. Nor did Mailefihi, as president of the Society insist upon a contemporaneous audit, but instead supported Tu'iono's desire to do nothing until this case was disposed of, thus only encouraging continued malicious speculation. Mailefihi did make it clear in evidence that had there been an acceptable apology to him, Tu'iono and Taumoepeau their actions would have been withdrawn. I am sure that would have been the case. Mailefihi also seeks damages of 30,000 pa'anga. Had he taken all proper steps to minimise his loss I would have awarded him 10,000 pa'anga but in the whole circumstances I shall restrict my award to 5,000 pa'anga.

Doctor Makameone Taumoepeau is a Government medical officer of some twenty years standing and in 1990 was a member of the executive committee of the Society. He read of the references to him in Kele'a. He denied the truth of these allegations. I believed him. He satisfied me that he received no payment whatsoever for his services as a member of the Committee and only 3,422 pa'anga for subsistence when on a business trip to Japan for the Society. Mr Inoke Vala, a loan Officer employed by the Tonga Development Bank, and in charge of the Bank's agricultural division, gave evidence that in 1990 the Bank paid out all Society expenses on application therefor, provided always that the payment application was accompanied by sufficient supporting information. All payments he said were by Bank cheque. Nevertheless there are payments for which vouchers are now unavailable. He confirmed that none of the Plaintiffs were paid 3,000 pa'anga, or indeed any sum, by the Bank for their services as Committee members, a fact confirmed

by their Acting Managing Director's letter of 13th May 1992 (Document 12-A4 page 1). As for Mr Taumoepeau's visit to Japan, by Bank cheque the sum of 3,422 pa'anga was paid to him as subsistence expenses on 22nd November 1990. He also received a return air ticket which cost 5,339.25 pa'anga, and an entertainment allowance of 3,663-50 pa'anga. Thus the total cost of his marketing trip to Japan was 12,424-75 pa'anga (Document 12-A4-page 3). Mr. Kalafi Moala the Editor of the "Times of Tonga" gave evidence that Japan is a very expensive country and that a per diem of 3,422 pa'anga would not go far. Mr. Hasloni Fangavai the Bank's Finance Manager confirmed Vala's evidence as to the bank's role in 1990. Dr Taumoepeau considered that the articles had been written with intent to injure him, as the Defendant had not sought out his comment prior to publication. He "got mad and depressed" because of the publication of these articles. Publication adversely affected his relationship with fellow squash growers, some of whom stopped talking to him at all. The articles succeeded "in creating contempt" against him by members of the Society, friends and "ordinary people". Thus family and relatives asked him if he could prove his innocence. His uncle, the Solicitor-General Mr 'Aisea Taumoepeau gave evidence that having read the offending Kele'a articles "they were not to my satisfaction" and he became very angry, so angry in fact that he could not speak to his nephew for several days. When he did he was told the articles were untrue. He also confirmed that from his experience as a result of publication of the articles his nephew's status" was greatly affected, both as a squash grower and as a public servant (medical officer)". Dr Taumoepeau's relationship with colleagues at work was affected and one of them abused him verbally in public and blamed him for misusing growers money. This incident was also spoken to by Mr Siieli Heleta who recalled that one night at the Ambassador night club Dr Pusiaki 'Ake repeatedly told Dr Taumoepeau that he had given doctors a bad name by misusing the "grower's money" and attempted to attack Dr Taumoepeau physically but was restrained by Mr Heleta. Dr Taumoepeau felt that he had been exposed to contempt by his family, colleagues and "fellow men" and that his reputation had been irreparably damaged. The two articles about his Japanese expenses suggested to him that he was squandering the Society's funds for no good reason. He made it clear he went to Japan to negotiate with importers a price for baby squash and achieved a price of 85-95 seniti per kilo which he regarded as satisfactory: this visit and its purpose he said was known to growers. There was no acceptable contrary evidence and I accept his evidence as reliable and truthful. He did however fail to issue a denial for publication and for the reasons given in the immediately preceding paragraph he has failed to minimise his loss. Accordingly damages shall be fixed at 5,000 pa'anga.

This case is not an enquiry into the workings of the Society. Much of the evidence gave one grounds for concern about the administration of this body's finances but I am not required in this case to decide whether that was the product of an amateur administration or indicative of something more sinister. I am however particularly concerned about the failure to produce Accounts timeously and the apparent lack of supporting vouchers for every payment. This may be due to the fact the Society had no Treasurer, that all its officials were extremely busy men performing gratuitously services for the Society in their leisure time, and the diversity of financial control this being vested partly in the committee and partly in the Tonga Development Bank. If the Registrar had done his job properly many of my concerns would have been met and this trial would have been significantly curtailed. Hopefully someone in authority will now compel him to carry out

his legal responsibilities!

All this case is concerned with is determining whether or not the Plaintiffs have been defamed, whether there is any valid defence, and if appropriate the quantum of damages. I have already commented in the evidence in respect of each Plaintiff. One final comment, indicative of the approach taken in Tonga to what appears in newspapers, was given by Mr Kalafi Moala of the "Times of Tonga" who said that after a letter to him about the matter which is the subject of these actions had been published in the Times and he received no response from any of the Plaintiffs he "thought may be there was some truth" in what was suggested. This only goes to show that in Tonga people who are accused of something which is untrue really must without delay deny the allegations publicly, ideally in print, otherwise "the no smoke without fire" mentality will prevail to their continued loss, injury and damage. In this series of actions the Defendant averred two grounds of defence, Truth and Fair Comment. As to the former Section 14 of cap.33 enacts that in any civil claim for defamation "proof of the truth of the defamatory matter complained of shall be a complete defence." The onus of proof lies on the Defendant. In this he has failed. He had no evidence that the Plaintiffs were paid 3,000 pa'anga for their Committee services or that an expenses allowance of 40,000 pa'anga was paid to Dr. Taumoepeau. He himself realised that he had no direct evidence of this. He says the payments were indirect having been received upon "the conversion from United States Dollars to Tonga Pa'anga" of the proceeds of two shipments of squash by the Society to Japan in 1990 or by way of Commission on the three squash shipments. The Defendant could not speak to the foreign currency dealings at first hand. He produced no documentation to support this allegation. He says he was given this information, presumably by a "spy" in the employment of the Tonga Development Bank, but refuses to name that individual. That is his privilege. It means quite simply that he cannot discharge the onus of proof incumbent upon him in respect of this allegation. He attempted to obtain the necessary information in his cross-examination of Mr Inoke Vala however that witness's evidence in this regard, at best, was equivocal. He started with an emphatic denial that there had been any indirect payments of the nature alleged but followed this up by adding that "if indirect payments (were) made, I could be wrong." This witness really ought to know for certain, but that was not the effect of his evidence. It was not however enough to prove to my satisfaction that such indirect payments had been made from the foreign currency conversions. The Bank and the Society had lodged in process all financial vouchers in their possession, but there were obvious gaps in these records, in part not unconnected with foreign exchange conversions, which gave rise to the concern I expressed earlier. But the onus is clearly on the Defendant to prove his case and this he has not done. I cannot infer the truth of his allegation simply because certain records are missing. Something more is required. There are any number of reasons why documents can go missing, not all of which suggest the deliberate weeding of compromising evidence. Of course there is no doubt the Defendant was hampered in his defence by the absence of an audited account, a matter I have already commented upon. Presumably if any documentation had been missing at the time of the audit this would have been highlighted in the audit report. Then again at that time all supporting vouchers might have been available. But the failure to prepare accounts at the time and to enable an audit to take place contemporaneously is a serious matter and is a factor I have taken into account in assessing the award of damages.

As to the allegation that the payments were directed through Commissions, the Defendant avers that 127,977.73 pa'anga was paid to Tu'iono and Mailefihi by cheque issued by the Bank of Tonga between 18th and 31st December 1990. This allegation was not put to either Tu'iono or Mailefihi in Cross-Examination by the Defendant. Even after his amendment was allowed he did not seek their recall to answer questions about this allegation of indirect payment via Commission. I have not seen that cheque. Mr Tupou Palu an officer with the Bank of Tonga was called by the Plaintiffs. He spoke to the Society having a current account and a deposit account with the Bank of Tonga and produced the relevant bank statements (Document 13). The current account had been
520 opened in 8th November 1990 and remained open as at 31st March 1992 during which periods there had been five debits of 7.50 pa'anga and credits respectively of 44 pa'anga; 1,595.16 pa'anga; 488.74 pa'anga; and 114 pa'anga, leaving a credit balance of 2,204.40 pa'anga. The deposit account had been used even less. It was opened on 28th June 1990 and had a modest credit balance of 294.58 pa'anga. He was unable to inform the Court of payments made by the Bank of Tonga to the Tonga Development Bank. Certainly he was unable to either confirm or deny payment to the two Plaintiffs aforesaid of a cheque for 127,977.73 pa'anga in late December 1990. The Society's own records kept by the
530 Tonga Development Bank (Document 12-A4-page 4) shows a total commission payment for the 1990 squash season of 128,426.73 pa'anga but no documentary or oral evidence was available at the trial to demonstrate the basis upon which this commission was calculated or the recipients of this bounty. There was however no evidence of a cheque paid to the Society or any of its officers for 127,977.73 pa'anga. The Defendant, in the circumstances, has not proved that any part of the commission was diverted to any of the Plaintiffs to reward them for their services as committee members or to pay subsistence expenses for visiting Japan. The Defendant was honest enough to recognise the difficulty he was in when giving evidence. He had been through all the financial records produced
540 "with a toothcomb" and required to concede that "As to indirect payment most of them are not shown on files". I would substitute the word "none" for "most" to reflect the evidence actually available. Later he stated that there was "no evidence in file to prove or deny that (there had been) no indirect payment." That is precisely his difficulty. He must prove in evidence that had been indirect payments before his defence based on Truth could succeed, and he has not done so. Newspaper editors and publishers really must take all reasonable steps to confirm information reaching them before agreeing to publication, perhaps by the simple expedient of asking the person to whom the information relates for his comments. To ignore such an elementary precaution is to invite retribution unless of course the editor or publisher has evidence which he is prepared to disclose which
550 genuinely leads him to believe that the information he has received is true.

Turning now to Fair Comment, for this defence to succeed Section 12 of cap.33 requires the Defendant to show that -

- (a) the facts upon which his comments are based are substantially true;
- (b) the comment on these facts is fair;
- (c) the comment is on a legitimate matter of public interest;
- (d) the comment was published contemporaneously and without malice; and
- (e) the publication was made in a periodical published at intervals not exceeding
560 one month.

These requirements are cumulative. All must be satisfied before the defence of Fair Comment can succeed. Undoubtedly the squash industry and the activities of squash exporting companies is a legitimate matter of public interest in Tonga. The Defendant's comments about the 1990 season were published contemporaneously. Unfortunately he has not proved that the facts upon which his comments were based were substantially true. Nor is Kele'a a publication which satisfies the requirements of Section 12(e). It is not published monthly, but at a greater interval namely bi-monthly. In the circumstance this defence cannot succeed. Nor is it necessary for me in this case to consider whether the

570 comments made were fair and free of malice.

The Plaintiffs have not asked for any interest, so I shall not make any such award. Costs will follow success.

I shall therefore pronounce an ORDER in the following terms -

IT IS ORDERED AND ADJUDGED THAT the Defendant do pay (1) damages of 5,000 pa'anga to each of Doctor Makameone Taumoepeau and H.R.H. Prince Mailefihi Tuku'aho; 2,500 pa'anga to Mr Tupou Malohi, and 11,300 pa'anga to Mr 'Aisake Tu'iono; and (2) the Costs of each Plaintiff as same shall be agreed which failing as taxed.