IN THE SUPREME COURT OF SAMOA

HELD AT APIA

C.P. 2/98

BETWEEN: PACIFIC COMMERCIAL BANK LTD a duly incorporated company having its registered office at Apia:

Plaintiff

A N D: COMMISSIONER OF POLICE SERVICE

Defendant

Counsel: R Drake for plaintiff
G Latu for defendant

Hearing: 18 March 1998

Judgment: 13 May 1998

JUDGMENT OF SAPOLU, CJ

In these proceedings the Court has to deal with a motion by counsel for the defendant to strike out the plaintiff's statement of claim. For clarity, I will refer first to the relevant facts pleaded in the statement of claim before I refer to the grounds of the motion. For present purpose, I would have to assume that the facts pleaded in the statement of claim are true.

Now the plaintiff is a commercial bank carrying on the business of banking in Samoa. On 18 September 1996 a sum of $10,000 was found to be missing from the office of the plaintiff's head teller. It is then pleaded in paragraph 3 of the statement of claim:

> 3. THAT on the 20th of September 1996 the plaintiff reported the matter of the missing $10,000 cash to the defendant through constable Tulaniu Tuiala of the Criminal Investigation Branch.

I must say paragraph 3 of the statement of claim creates some uncertainty as to the meaning it is intended to convey. The defendant is the Commissioner of Police Service and it is not clear how the plaintiff reported the missing money to the defendant "through constable Tulaniu Tuiala". I say this because when a complaint of a suspected offence is made to a particular police officer, it is to that particular police officer alone the complaint is made and no one else. Therefore, a complaint of a suspected offence made to a particular police officer is not a complaint to the Commissioner of Police Service, unless the complaint was intended for the Commissioner and was conveyed to him by the police officer to whom the complaint was given. Thus, to simply allege that the plaintiff reported the missing money to the defendant through constable Tuiala does not sufficiently explain whether the complaint was actually intended for the Commissioner but communicated through constable Tuiala, or whether the complaint was made to constable Tuiala, himself, as a police officer.

Paragraph 4 of the statement of claim then alleges that on 29 October 1996 one of the plaintiff's managers requested the defendant to prosecute the member of the plaintiff's staff who was responsible for taking the missing money. Paragraph 5 of the statement of claim then says :

> 5. THAT on the 13th November 1996 the defendant's investigating officer, the said constable Tulaniu Tuiala, acknowledged in writing the receipt in to the police custody of the sum of $3,000 as a result of police investigations into the plaintiff's complaint.

What is said in paragraph 5 that constable Tuiala is the "defendant's investigating officer" is vague and ambiguous. Constable Tuiala might have been a member of the police service who was appointed by the Commissioner of Police Service under the provisions of the Police Service Act 1977, but he was in reality not an investigating officer of the defendant as Commissioner of Police Service.

Paragraph 6 of the statement of claim then says that an employee of the plaintiff who was charged with theft of the missing money pleaded not guilty to the charge. The statement of claim in paragraph 7 then goes on to say :

> 7. THAT the defendant by and through the said constable Tulaniu Tuiala advised the plaintiff that the aforesaid sum of $3,000 would be held by the police as an exhibit in the said criminal prosecution.

Here again it is not clear what is meant by the defendant as Commissioner of Police Service advising the plaintiff "by and through the said constable Tulaniu Tuiala". Either it was the defendant as the Commissioner of Police Service, or constable Tuiala, who advised the plaintiff that the sum of $3,000 would be held by the police as an exhibit in the pending criminal prosecution, unless what happened was that the defendant was conveying his personal advice through the constable to the plaintiff. In that case the advice would be that of the defendant, and it is immaterial whether it was constable Tuiala or some other police officer who actually conveyed the defendant's advice to the plaintiff.

Apparently the plaintiff's employee who was charged with theft changed her plea to one of guilty and the plaintiff was so advised on 21 July 1997 by the Office of the Attorney-General. It is then further alleged in the statement of claim that from 22 July 1997 to 17 November 1997 the plaintiff made numerous requests to the defendant for the return of the said money. And on 5 August 1997 the defendant gave a verbal assurance to the plaintiff that the police would reimburse the money. However, on 1 December 1997 the defendant, in response to a letter from the plaintiff's solicitors, advised that constable Tulaniu had been charged with theft of the money.

On those pleaded facts, the plaintiff has filed its present claim pleading two causes of action. The first cause of action seems to be based in negligence. Paragraph 12 of the statement of claim alleges :

12. THAT the defendant has breached his duty of care to the plaintiff in failing to exercise diligence and prudence in ensuring that the said sum of $3,000 was kept in safe custody.

It appears from paragraph 12 that the defendant is being sued in negligence for allowing a situation to exist which resulted in the plaintiff's money being stolen. I do not read paragraph 12 to be saying that the defendant is being sued for the act of theft alleged against constable Tuiala. What paragraph 12 seems to be saying, although it does not say so explicitly, is that the defendant owes the plaintiff a duty of care which the defendant breached by not exercising due diligence and prudence in ensuring the said sum of $3,000 was kept in safe custody. As a result of that breach the plaintiff has sustained loss. That seems to me to be the essence of what is alleged in paragraph 12. It does not, as it seems to me, allege that the defendant is being sued for any negligence or theft on the part of constable Tuiala. Whether or not the pleadings do disclose a cause of action in negligence against the defendant is a separate issue which was not raised in this case and I will, therefore, not deal with it.

For the sake of completeness, the second cause of action is a claim for interest on the said sum of $3,000. No dispute was raised in respect of that part of the statement of claim. I, therefore, have nothing to say about it in these proceedings.

Now, the strike out motion is based on the following grounds :

(a) Insofar as the defendant is sued on the basis that he is vicariously liable for the acts of his officers, that is not supported by law.

(b) The appropriate defendant should be constable Tulaniu Tuiala who is alleged to have stolen the money.

(c) The plaintiff's action was not commenced within one year after the thing was done or the act has been committed as required by section 45 of the Police Service Act 1977.

(d) The plaintiff has also failed, as required by section 45 of the Police Service Act 1977, to give at least a month's notice of its action to the defendant before its action was commenced.

I would deal now with the first ground of the motion to strike out. It is said that the defendant, as Commissioner of Police Service, cannot be sued on the basis that he is vicariously liable for the acts of his officers. This raises the question whether the defendant is in fact being sued as vicariously liable for the acts alleged against constable Tuiala. In my view he is not. Paragraph 12 of the statement of claim is clear that it is the defendant, personally, who is being sued for an alleged breach of a duty of care said to be owed by him to the plaintiff. Paragraph 12 of the statement of claim does not say that the defendant is being sued for the theft alleged against the constable. What is claimed is that the defendant was in breach of a duty of care owed to the plaintiff, namely, the alleged duty to exercise diligence and prudence in ensuring that the money was kept in safe custody. That is different from saying that the defendant is being sued for the act of theft alleged against the constable. If that were so, I would have expected the cause of action not to be in negligence, for theft by definition involves an intentional act of taking rather than a negligent act or omission. The fact that the cause of action against the defendant is in negligence clearly suggests that the defendant is not being sued for any alleged theft which is a deliberate and

intentional act.

I cannot help thinking that the first-stated ground of the strike out motion has been put forward because of the way some of the pleadings in the statement of claim have been framed. Paragraph 3 of the statement of claim alleges that the plaintiff reported the money that went missing from its premises to the defendant through constable Tuiala. Paragraph 5 then alleges that the defendant's investigating officer, constable Tuiala, acknowledged to the plaintiff receipt of the money in question into the custody of the police as a result of police investigations into the plaintiff's complaint. Paragraph 7 then alleges that the defendant by and through constable Tuiala advised the plaintiff that the money was held by the police as an exhibit in the pending criminal prosecution of the plaintiff's employee who had been charged with theft.

These pleadings, in my view, suggest that some of the acts of constable Tuiala are being attributed to the defendant as Commissioner of Police Service. Paragraph 7 of the statement of claim in particular, expressly states that constable Tuiala is the defendant's investigating officer. However, the pleadings do not show why some of the acts of the constable should be pleaded as the acts of the Commissioner of Police Service. What seems to be assumed here, on the plaintiff's behalf, is that in the circumstances of what happened in this case, the constable was either a servant or agent of the Commissioner of Police Service and, therefore, the acts of the constable are attributed to the Commissioner as master or principal. I do not accept that in the present circumstances the relationship of master and servant, or principal and agent, existed between the defendant as Commissioner of Police Service and the constable.

The usual situations where vicarious liability arises is an employment relationship where a master (employer) may be liable for the acts of his servant (employee) in the course of his employment, or an agency relationship where a principal may be liable for the acts of his agent. None of those two relationships applies in this case. A constable is not a servant. or agent of the Commissioner of Police Service. So the Commissioner of Police Service may not be liable as a master or principal for the acts committed by a constable. However, it has been suggested that a superior police officer is liable for the acts committed by a constable while acting by his direction. In ***Enever v The King (1906) 3 CLR 969*** there is an obiter dictum by Griffith CJ at p.980 that :

> "If a constable commits a wrongful act by direction of a superior officer, that "officer is no doubt personally liable".

That situation does not exist or pleaded in this case. And I prefer not to express any view on what was said in ***Enever's*** case as the point is not in issue in this case.

Turning to the provisions of the Police Service Act 1977, I am of the clear view that they do not make a constable or police officer a servant of the Commissioner of Police Service. The Commissioner of Police Service does not pay for the salaries and allowances of a constable or other member of the police service as a master would normally do in respect of a servant. The detailed provisions of the Act in relation to the appointment of and disciplinary action in respect of a constable would also clearly make it inappropriate to describe a constable as a servant of the

Commissioner of Police Service. The provisions of Articles 83(j) and 111(I) of the Constitution also make it clear that a police officer, which includes a constable, is in the service of Samoa. So, if a constable is in the service of Samoa by virtue of the Constitution, then he is not in the service of the Commissioner of Police Service so as to make him a servant of the Commissioner of Police Service.

I am also of the view that a constable is not an agent of the Commissioner of Police Service. Under the common law doctrine of agency, it would be inappropriate to describe a constable as an agent of the Commissioner of Police Service. The public nature of his office and duties would make it inappropriate to refer to a constable as an agent of the Commissioner. Certainly the provisions of the Police Service Act 1977 in relation to the remuneration, appointment and discipline of a constable would not support a contention that a constable is an agent of the Commissioner. The provisions of Articles 83(j) and 111(1) of the Constitution which place a constable in the service of Samoa and not in the service of the Commissioner of Police Service should put the matter beyond doubt.

It follows that a constable is not a servant or agent of the Commissioner of Police Service. Accordingly, the Commissioner of Police Service may not be held vicariously liable as a master or principal for the acts of a constable. The position would, of course, be different if there is a statutory provision to the contrary. I have found no such statutory provision in our law and counsel did not refer to any. The relevant position in England is stated in the following texts : In ***de Smith, Woolf and Jowell : Judicial Review of Administrative Action (1995) 5th edn*** at p.766 para 19-015 it is there stated :

"Police officers are neither Crown servants nor employees of the local police "authority; the Chief Constable for each police force in the U.K. is, however, "made by statute vicariously liable for the acts and omissions of his officers "and any damages awarded against an officer will be paid out of the police "fund".

In *Winfield and Jolowicz On Tort (1994) 14th edn.*, it is stated at p. 598 :

"Until 1964 no person or body stood in the position of 'master' to a police "officer, and accordingly anyone injured by the tortious conduct of the police "could have redress only against the individual officers concerned. Now, "however, it is provided by the Police Act 1964, s.48, that the chief officer of "police for any police area shall be liable for torts committed by constables "under his direction and control in the performance or purported performance "of their functions. This statutory liability is equated with the liability of a "master for the torts of his servants committed in the course of their "employment, but the chief officer of police does not, of course, have to bear "the damages personally. Any damages or costs awarded against him are paid "out of the police fund".

In *Salmond and Heuston Law Of Torts (1992) 20th edn*, where the English position is again expressed, it is said at p.416 :

"A constable is not a servant of the Crown in such a sense that the ordinary "law of master and servant determines the relationship of the parties. But "although a constable is a servant neither of the Crown, nor of the police "authority, nor of the chief constable, the Police Act 1964, s.48, provides that "the chief of police of any area shall be liable in respect of torts committed by "constables under his control in the performance of their functions in like "manner as a master is liable in respect of torts committed by his servants in "the course of their employment. The chief constable is a joint tortfeasor with "the delinquent constable, but the police fund is automatically charged with "the payment of any damages or costs awarded against a chief constable".

In Australia, Griffith CJ in *Enever v The King (1906) 3 CLR 969* which was concerned with an action of wrongful arrest against a police constable, said at p.976 :

> "It seems to have been always accepted as settled law that, although a peace "officer was himself responsible for unjustifiable acts done by him in the "intended exercise of his lawful authority, no responsibility for such acts "attached to those by whom he was appointed."

There was some suggestion that because the constable mentioned in the pleadings was appointed by the defendant as Commissioner of Police Service, therefore, the defendant should be vicariously liable for the acts of the constable. This is not correct. The usual basis on which vicarious liability is founded is either a master and servant relationship, or a principal and agent relationship. The mere fact that the defendant as Commissioner of Police Service may have appointed the constable under the provisions of the Police Service Act 1977 does not, of itself, make the constable a servant or agent of the defendant as Commissioner of Police Service. The decided cases are quite clear that at common law a police officer is not a servant or agent of the authority that appoints him, so that the appointing authority is not vicariously liable for a tort committed by a police officer in the performance of his duties : see *Stanbury v Exeter Corporation [1905] 2 KB 838*; *Enever v The King (1906) 3 CLR 969*; *Fisher v Oldham Corporation [1930] 2 KB 364*; *Attorney-General for New South Wales v Perpetual Trustee Co [1955] AC 457.*

Now, while the defendant is not vicariously liable for the acts alleged against the constable in this case, as I have tried to explain, it is clear to me that the defendant is being sued personally in negligence and not vicariously for the acts alleged against

the constable. However, paragraphs 3, 5 and 7 of the statement of claim should be repleaded with sufficient clarity for the reasons already discussed in this judgment.

It should be clear from what has been said already that the second ground of the strike out motion is also not sustainable. While the second ground of the motion is correct in law that the constable, and not the present defendant, should be sued for the theft alleged against him, I do not accept that that is what is shown in the pleadings. The defendant, as paragraph 12 of the statement of claim shows, is being sued personally for a breach of an alleged duty of care claimed to be owed by him to the plaintiff. Because of that breach, it is further alleged by implication that the plaintiff's money was stolen. Thus, the defendant is not being sued for the alleged theft, but for negligently allowing a situation to exist where the plaintiff's money got stolen. Furthermore, the plaintiff's suit being in negligence shows that the defendant is not being sued for the theft alleged against the constable. Theft involves a deliberate or intentional act of taking. Negligence, of course, is concerned with a negligent act.

As to the third ground of the strike out motion, namely, that the plaintiff's action was not commenced within one year of the act with which the plaintiff is suing the defendant, I am of the view this ground is also not sustainable. It is clear that the defendant is not being sued for the theft alleged against the constable. The defendant is being sued for his alleged negligence, which is claimed to have resulted in the theft alleged against the constable having taken place. Assuming that the limitation period of one year provided in section 45 of the Police Service Act 1977 applies to this case, the question then is at what point in time did the negligence alleged against the

defendant occur. This must be the point in time the plaintiff's money was stolen because that was when the plaintiff sustained loss. Negligence is not actionable unless a plaintiff has sustained a loss which must not be too remote.

From the pleadings it is not clear when the money was actually stolen. Paragraph 11 of the statement of claim alleges that it was in response to a letter from the plaintiff's solicitors that the defendant wrote on 1 October 997 saying that the constable had been charged with theft of the money. That was the first time, as it appears from the pleadings, that the plaintiff must have become aware that its money had been stolen. In early January 1998, the plaintiff filed in Court its present claim. On these pleaded facts, I am not able to conclude whether the claim was brought within or outside of the one year limitation period. The reason is that it is not clear when the money was actually stolen for that must be the time the plaintiff sustained loss and the claim in negligence became actionable. The limitation period would only start to run from that point in time.

There is also the question, which was not argued, whether in the present case where the whereabouts of the money were entirely within the knowledge of the constable, and perhaps the police, the limitation period should start to run from the time of the alleged theft, or from the time the defendant as Commissioner of Police Service informed the plaintiff that the money had been stolen and the plaintiff became aware of it. This question was not raised, so I do not have to deal with it.

Counsel for the plaintiff submitted that section 45 of the Police Service Act 1977 and the limitation period therein do not apply to this case. Subsection (1), which is the relevant provision of section 45, states :

> "For the protection of persons acting in the execution of this Act, all actions "against any person for anything done in pursuance of this Act shall be "commenced within one year after the thing has been done or the act has been "committed and not otherwise; and notice in writing of every such action and "of the cause thereof shall be given to the defendant one month at least before "the commencement of the action".

Counsel then referred to the case of ***Purua v Douglas [1927] NZLR 255*** in support of her submission. In that case a police constable was sued in damages for an unjustifiable assault he was alleged to have committed in the course of arresting the plaintiff. Section 31 of the Police Act 1913 (NZ) is in every respect identical to section 45 of our Police Service Act 1977 except for the limitation period it provides which was four months. The action against the police constable in that case was not commenced within the limitation period. To determine whether the limitation period and section 31 of the Police Act 1913 (NZ) applied, the Court had to consider the meaning of the expression 'acting in the execution of this Act'. It was held that the actions of the police constable in that case in using some force to effect a bona fide arrest came within the meaning of the words 'acting in the execution of this Act', so that the limitation period provided in the Act was held to apply to that case.

The facts of ***Purua v Douglas*** are quite different from the facts of this case. It was also not argued whether the acts of negligence alleged against the defendant, personally, in this case were committed or omitted while the defendant was acting in the execution of the Police Service Act 1977 or any of its provisions. That must be

the real issue for present purposes because in order to hold that the limitation period provided in section 45 of the Act does not apply to this case, it must be clear that the negligence alleged against the defendant did not take place while the defendant was acting in the execution of the Act. But that issue is not clear from the pleadings, nor was it specifically addressed or addressed with sufficient clarity. Therefore, I do not find it necessary to decide whether section 45 of the Police Service Act 1977 applies to this case, as submitted for the plaintiff.

I come now to the last ground of the motion to strike out, namely, that no written notice of the plaintiff's action was given to the defendant before its commencement. The relevant part of section 45 of the Police Service Act 1977 provides :

> "and notice in writing of every such action and of the cause thereof shall be "given to the defendant one month at least before the commencement of the "action".

As I see it, the issue that is being raised here is the dichotomy between a mandatory and directory statutory provision . There has been a number of decided cases on this issue but were not cited in the present case. Be that as it may, I am of the view that if section 45 applies, the defendant's non-compliance with the notice requirement provided in section 45 does not render the present proceedings a nullity, or bar the plaintiff from continuing with these proceedings. As the plaintiff has already filed a statement of claim, no useful purpose would be served by requiring the plaintiff to file a notice of its claim now. An award of costs to the defendant may be the appropriate remedy.

In all then, I will not strike out the statement of claim. Instead, the plaintiff is ordered to file and serve on the defendant within 7 days an amended statement of claim repleading with clarity paragraphs 3, 5 and 7 of the statement of claim, as explained in this judgment.

Question of costs is reserved.

This matter is adjourned to 8 June for re-mention.

TFM Sapolu
.....
CHIEF JUSTICE

Solicitors:
Drake & Co Law Firm, Apia, for plaintiff
Attorney-General's Office, Apia for defendant