

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 170 of 2014

BETWEEN : RONEEL PRASAD of 2/6 Parkwood Road, Holsworthy, New South Wales 2173, Sydney, Australia.

PLAINTIFF

AND : SHEREEN LATA of Talaiya, Ba in the Republic of Fiji Islands,

FIRST DEFENDANT

AND : ANA NAI NAVUNISINU of Sexual Offences Unit, Crime Investigation Department, Lautoka Police Station, Police Officer 23133.

SECOND DEFENDANT

AND : COMMISSIONER OF POLICE duly appointed by the government of the Fiji Islands under the Police Act, having its office at Police Head Quarters at Nabua, Suva in the Republic of Fiji Islands.

THIRD DEFENDANT

AND : ATTORNEY GENERAL OF FIJI ISLANDS in the Republic of Fiji Islands, Level 4, Suvavou Building, Victoria Parade, Suva.

FOURTH DEFENDANT

Counsel: : Mr Jadhav Prashneel Prakashan for the Plaintiff
: The First Defendant is absent and unrepresented
: (Ms) Olivie Manuliza Faktaufon for the Second, Third and
: Fourth Defendants - Attorney – General’s Chambers.

Date of Hearing : Friday, 4th May, 2018
Date of Judgment : Monday, 23rd July, 2018

J U D G M E N T

(A) INTRODUCTION

By a Writ dated 22nd October, 2014 the Plaintiff, 'Roneel Prasad', brought an action against the (a) First Defendant 'Shereen Lata' claiming damages for the false allegation of Rape (b) Second Defendant, 'Corporal 2313, Ana Nai Navunisinu' for negligent conduct of the criminal investigations.

(B) THE FACTUAL BACKGROUND

(1) The **Statement of Claim** which is as follows sets out sufficiently the facts surrounding this case from the Plaintiff's point of view as well as the prayers sought by the Plaintiff.

1. *THAT the Plaintiff at all material times was a resident of 2/6 Parkwood Road, Holsworthy, New South Wales 2173, Sydney, Australia.*
2. *THAT the First Defendant at all material times was a resident of Talia, Ba in the Republic of Fiji Islands.*
3. *THAT the Second Defendant at all material times is employed as a Police Officer in Sexual Offences Unit by the Third Defendant in the Republic of Fiji Islands.*
4. *THAT Third Defendant is duly appointed by the Government of Fiji Islands under the Police Act, having its office at Police Head Quarters at Nabua, Suva in the Republic of Fiji Islands.*
5. *THAT the Fourth Defendant is joined pursuant to the Crown Proceedings Act.*

6. THAT the First Defendant alleged on the 27th day of November, 2013 the Plaintiff raped her and reported the matter to Lautoka Police Station on the 29th day of November 2013.
7. THAT the Plaintiff was charged with the offence of one (1) count Rape under section 207(1) and (2) (a) of the Crimes Decree No.44 of 2009 vide High Court Criminal Action No. HAM 462 of 2012.
8. THAT on the 12th day of December, 2013 the Plaintiff was charged with the alleged offence and brought to Lautoka Magistrates Court.
9. THAT on the 12th day of December, 2013 the Prosecutions Department did not object to the bail application made on behalf of the Accused and obtained a stop departure order against the Accused since he was a flight risk and the investigations were still pending.
10. THAT the Plaintiff made an application before the High Court in Lautoka for variation of bail orders which was not heard as the application was filed within the legal vacation of the judiciary department and only certain number of Judges were presiding over matters which were urgent in nature.
11. THAT as the Plaintiff was released on bail this alleged offence became news in the daily newspaper being published in the Republic of Fiji Islands. Two articles were published in the newspaper namely the Fiji Sun on the 15th day of January, 2014 and the article read as follows:-

"CJ declines variation of bail

A motion for variation of bail to allow a person accused of rape to visit his home in Sydney was declined by the Chief Justice, Anthony Gates at the High Court in Suva yesterday.

Roneel Prasad had requested the High Court

Prasad, who is a permanent resident of Australia, was concerned he would lose his job.

He was also paying off a mortgage on a residential property and was afraid he would lose it if he was out of a job.

The accused has denied the offence and all elements of rape. He said this was not a cause of consensual sex as the incident did not happen.

The alleged offence occurred on November 27, 2013 and was reported on November 29. The accused was charged on December 12, 2013.

.....

.....She said the two had been drinking as she saw a few stubbies. She said the accused turned off the road and then raped her in the car while the other was asleep in the back seat.

.....

Justice Gates said the accused does present a flight risk and declined to allow variation.

.....

The case been adjourned to January 23 and will be called at the High Court in Lautoka."

12. *THAT as the news stipulated and circulated around the Island of Fiji and since the Plaintiff's fiancée was a school teacher in Ba and the Plaintiff was also from a settlement in Ba the news of the Plaintiff being charged for rape circulated around Ba settlement and other parts of Fiji Islands where the Plaintiff's family and/or descendants reside and this tarnished the reputation of the Plaintiff.*
13. *THAT the Plaintiff's bail variation was finally heard at the Suva High Court whereby the Prosecutions Department had highlighted that the Plaintiff was a flight risk and would not return to Fiji if the bail conditions are varied and opposed the application for variation.*
14. *THAT the Prosecutions Department also failed to interview all the witnesses to the criminal proceedings who willingly made themselves available to be interviewed.*
15. *THAT in the application for the variation of bail the Plaintiff under oath confirmed that he had a permanent employment and he was on the verge of being terminated as he did not resume work on time, that he had bought a house in Australia and he had mortgage to be paid, rent for the house that he was occupying and other financial obligations which the Plaintiff could no longer continue paying whilst in Fiji Islands.*

16. THAT on the 30th day of December, 2013 based on the grounds contained in the affidavit of the Plaintiff ordered a speedy trial for the criminal matter dates for the trial was fixed for 5th day of February, 2014 at 9.30am before Justice De Silva.
17. THAT from the date being charged for the offence of rape and the trial date being set in the matter the Plaintiff had already spent more than two months and the Plaintiff was facing financial difficulties as the Plaintiff had to pay for his lawyers services as well.
18. THAT on the 5th day of February, 2014 the First Defendant confessed to the High Court at Lautoka that she had lied in the caution interview and that the Plaintiff did not rape her and the complaint made against the Plaintiff was false.
19. THAT the High Court of Lautoka heard the application made by the First Defendant and the Prosecutions Department and acquitted the Plaintiff of the charge of rape.
20. THAT since the Plaintiff did not straight away return to work as per his leave he was terminated accordingly on the basis of failure to show up to work.
21. THAT to survive and to carry out his daily living the Plaintiff had to get monies held in his fixed account and seek help from his family members in Fiji and in Australia.
22. THAT as the Plaintiff did not make the housing loan repayment (mortgage) on time the interest rate accrued and the Plaintiff ended up paying high interest rate which the Plaintiff never anticipated.
23. THAT due to the false allegations made by the First Defendant the Plaintiff has lost trust, faith, reputation and standing in the society and the allegations has really defamed his character.
24. THAT due to the laxity on the part of the Police Department in not carrying out the investigations thoroughly and promptly the Plaintiff denied variation on his bail which accumulated in the Plaintiff losing out on monies which the Plaintiff would have earned.
25. THAT the Plaintiff's marriage with his fiancée broke up as well due to the stories circulating around the settlement in Ba and in schools where the Plaintiff's fiancée was a teacher and other organisations where she was associated.

26. THAT due to the breach of duty of care of the part of the investigating officer the Plaintiff had to attend to Court on many occasions and the Plaintiff further suffered loss of income, pain and suffering, emotional stress and trauma on every occasion the Plaintiff attended the Court on hearing dates.
27. THAT despite giving reasonable explanations for the alleged offence of rape the Second Defendant being a Police Investigating Officer and being employed in the Police Service since 1992 failed to exercise all reasonable skills required of a Police Officer to carry out artful and fair investigation to determine the truthfulness of the matter.
28. THAT there was satisfactory evidence that the Plaintiff did not carry out such an act (rape) as alleged and the witnesses made themselves available for the Second Defendant to interview them the Second Defendant refused to take their statement and turned them away.
29. THAT the Second Defendant charged the Plaintiff without carrying out a full and fair investigation and distorted, twisted and the First Defendant turned the facts to show that the Plaintiff was a rapist and done such an act.
30. THAT due to the actions of the First Defendant, the Plaintiff lost his status and the Plaintiff went through emotional stress and undue and unsustainable pressure as he was labelled as a rapist. The particulars of negligence of the Second Defendant are as follows:-

PARTICULARS OF NEGLIGENCE OF THE SECOND DEFENDANT

- (i) Failing to carry out free and fair investigation before laying the charges on the Accused [Plaintiff in this matter];
- (ii) Failing to check and verify the Plaintiff alibi and determining the effect of laying the charge with proper proof and evidence;
- (iii) Failing to exercise discretion reasonably and failing to use skills and knowledge to take and/or record the evidence of the witnesses who presented themselves at the Lautoka Police Station;
- (iv) Failing to exercise the duty of care reasonably in not executing a detailed investigation and failing to summon the additional witnesses to Court on the day of hearing.

31. THAT prior to being charged with the offence of rape the Plaintiff had a very healthy and pleasant life whereby he had employment etc.
32. THAT due to the action and/or inactions of the First and Second Defendant the Plaintiff failed to return to work within the specified timeframe whereby the Plaintiff lost his employment and faced financial difficulties.
33. THAT the Plaintiff hails from a respected family and after the false allegations and the rumours, the friends, colleagues, former workmates of the Plaintiffs and family members made several and continuous calls to the Plaintiff believing that the Plaintiff has done such an act "rape" and the Plaintiff is not worth trusting.

IMPUTATIONS OF THE MISLEADING CHARGE DUE TO THE FALSE STATEMENT OF THE FIRST DEFENDANT NEGLIGENCE OF SECOND DEFENDANT IN FAILING TO CARRY OUT INVESTIGATIONS THOROUGHLY

34. THAT due to the actions of the First Defendant by lying and having the Plaintiff charged with the offence of rape and the Second Defendant by not carrying out her work promptly and carrying out the investigations thoroughly draws the following inferential and ordinary meaning:-
 - i) That the Plaintiff is not trustworthy and dishonest;
 - ii) That the Plaintiff is a rapist and does not respect woman;
 - iii) That the Plaintiff does not respect the rights of another person;
 - iv) That the Plaintiff does not respect other person's right to security
 - v) That no person should have any association or dealings with the Plaintiff because he is not trustworthy and a rapist and if he sees another situation he would carry out such an act again given the chance;
 - vi) That nobody should marry and have any sort of relationship with the Plaintiff due to the act of the Plaintiff and him not respecting women.

EFFECTS OF THE FALSE COMPLAINT ON THE PLAINTIFF

35. THAT after false charge had spread particularly in the district of Ba, Fiji and in the Republic of Fiji Islands due to the article being published in the newspaper that the Plaintiff has been charged with an offence of rape the Plaintiff had to go through sleepless nights, emotional stress and trauma.
36. THAT due to the charge and the actions of the 1st Defendant and the 2nd Defendant in failing to investigate the case effectively this had drastic effect on the Plaintiff's long standing respect and dignity as the Plaintiff could not associate with people in parties, religious functions, communicating with family members and spend his holiday properly as they kept victimising and passing remarks directly and indirectly to the Plaintiff.
37. THAT the spreading news of the false charge were damaging as the Plaintiff went through the pain and suffering and continues to suffer and due to the false complaint the Plaintiff has lost his pride and dignity and respect in the society, with his friends, colleagues and family members and the Plaintiff still has nightmares till today.
38. THAT as a result the Plaintiff was unable to return to his work in Australia as the State had a stop departure order made against him, he had to be remanded in custody, he went through a scary situation being questioned by the Police Officers in respect of the charge as he had never appeared in Court nor being charged by the Police, the Plaintiff's house in Australia was seized by the bank as he was unable to pay the mortgage, the Plaintiff lost all his savings paying for Solicitors costs and paying rent for the house that he was renting in Australia, the Plaintiff's marriage broke up with his fiancée due to the false complaint by the 1st Defendant and this added more pressure, stress and sleepless nights for the Plaintiff.

WHEREFORE THE PLAINTIFF CLAIMS AGAINST THE DEFENDANTS JOINTLY AS FOLLOWS:-

- i) General Damages;
- ii) Special Damages;
- iii) Exemplary Damages;

- iv) *Punitive Damages;*
- v) *All costs incurred in defending Criminal Action No. HAC 227 of 2013;*
- vi) *All costs occurred in this action;*
- vii) *Any other or such relief as this Honourable Court may deem just and expedient.*

(2) The first Defendant did not enter an appearance to the Writ. She did not put in any defence. The Second, Third and Fourth Defendants in their **Statement of Defence** pleaded, *inter alia*, that;

1. *THAT the Defendants are not aware of and cannot admit or deny paragraph 1 of the Statement of Claim ('the claim') and further put the Plaintiff on strict proof.*
2. *THAT the Defendants are not aware of and cannot admit or deny paragraph 2 of the Claim and further put the Plaintiff on strict proof.*
3. *THAT as to paragraph 3 of the Claim, the Defendants admit that the 2nd Defendant is employed by the 3rd Defendant as a Police Officer in the Sexual Offences Unit within the Lautoka Police Station.*
4. *SAVE as to say that the Commissioner of Police is appointed by the President under the Constitution of the Republic of Fiji ; the Defendants admit the rest of the contents of paragraph 4 of the Claim.*
5. *THAT as to paragraph 5 of the Claim, the Defendants admit that the 2nd Defendant is joined pursuant to the State Proceeding Act.*
6. *THAT as to paragraph 6 of the Claim, the Defendants admit that on 29 November 2013, the 1st Defendant alleged that the Plaintiff raped her on 27 November 2013 and reported the matter to Lautoka Police Station.*
7. *THAT as to paragraph 7 and 8 of the Claim, the Defendants admit that on 12 December 2013, the Plaintiff was charged with one count of Rape under Section 207 (1) and (2)(a) of the Crimes Decree No. 44 of 2009. The Defendants further deny the rest of the contents of paragraph 7 and 8 of the Claim.*

8. THAT as to paragraph 9 and 10 of the Claim, the Defendants admit that on 12 December 2013, the Plaintiff made an application for bail which was granted on the condition that a stop departure order to be placed on the Plaintiff.
9. THAT as to paragraph 11 and 12 of the Claim, the Defendants submit that there was an article titled 'CJ Declines Variation of Bail' published on 15 January 2014 in the Fiji Sun newspaper but verily denies any knowledge of the Plaintiff's fiancée, the circulation of the Fiji Sun newspaper and that this article tarnished the reputation of the Plaintiff.
10. THAT as to paragraph 13 of the Claim, the Defendants repeats paragraph 7 and 8 of the Statement of Defence and denies all other contents of paragraph 13.
11. THAT as to paragraph 14 of the Claim, the Defendants verily deny the allegation that the Prosecutions Department failed to interview all the witnesses to the criminal proceedings and further submit that all necessary witnesses were in fact interviewed.
12. THAT as to paragraph 16 of the Claim, the Defendants submit that on 30 December 2013, the matter was fixed for trial on 5 February 2014 at 9.30am before Justice De Silva and deny the rest of the contents contained in this paragraph.
13. THAT as to paragraph 17 of the Claim, the Defendants admit that the criminal mater took two months to resolve but deny any knowledge of the rest of the contents of the paragraph and puts the Plaintiff on strict proof of the same.
14. THAT as to paragraph 18 and 19 of the Claim, the Defendants submit that on 5 February 2014, the complainant (1st Defendant) retracted from her original statement and was badly discredited during cross examination where she admitted lying to police as well as in court and as such the Plaintiff was discharged after a Nolle Prosequi was entered by the State.
15. THAT as to paragraphs 20, 21, 22 and 23, the Defendants deny any knowledge of its contents and puts the Plaintiff to strict proof of the same.
16. THAT paragraph 24 is verily denied and the Defendants further state that investigations into the complaint were thoroughly conducted. The Defendants puts the Plaintiff to strict proof of all the other contents of this paragraph.

17. THAT paragraph 25 and 26 is verily denied and the Plaintiff is put to strict proof of the same. The Plaintiff further submits that all investigations into the complaint were thoroughly conducted and as such, a case in the High Court was initiated.
18. THAT as to paragraphs 27, 28 and 29, the Second Defendant dispatched duties under the Police Act, Cap 85 and that the Investigating Officer collected and communicated intelligence affecting the complainant, brought the offender to justice, and investigated all persons whom she thought was relevant. The Defendants further submit that the complaint was heard by the high Court and subsequently dismissed.
19. THAT paragraph 30 of the Claim is denied and the Defendants put the Plaintiff to strict proof of all the contents of this paragraph. In particular the Defendants:
 - a) Deny subparagraph i.
 - b) Deny subparagraph ii.
 - c) Deny subparagraph iii.
 - d) Deny subparagraph iv.
20. THAT as to paragraphs 31, 32 and 33, the Defendants deny any knowledge of the contents of the paragraphs and put the Plaintiff to strict proof of the same.
21. THAT paragraph 34 of the Claim is denied and the Defendants put the Plaintiff to strict proof of all the contents of this paragraph. In particular the Defendants:
 - a) Deny subparagraph i.
 - b) Deny subparagraph ii.
 - c) Deny subparagraph iii.
 - d) Deny subparagraph iv.
 - e) Deny subparagraph v.
 - f) Deny subparagraph vi.
22. SAVE as to admitting that there was an article titled 'CJ Declines Variation of Bail' published on 15 January 2014 in the Fiji Sun newspaper, the Defendants deny all the contents of paragraphs 35, 36 and 37 and put the Plaintiff on strict proof of the same.
23. THAT as to paragraph 38 of the claim, the Defendants repeat paragraph 8 and 9 of this statement of defence and denies all the other contents of this paragraph and puts the Plaintiff on strict proof of the same.

24. THAT the Defendants reserve the right to amend this Statement of defence upon service of further and better particulars.

25. WHEREFORE the Defendants pray that:

a) The Statement of Claim be struck out with costs;

b) Any other or such relief as this honourable court may deem just and expedient.

(3) The Plaintiff's Reply to Statement of Defence is as follows;

1. THAT paragraph 1 is denied and the Plaintiff further states that in the Record of Interview taken on the 28th day of November, 2013 the Plaintiff provided his address in Australia and it was on the basis that the Plaintiff was a resident of Australia stop departure orders were imposed.
2. THAT paragraph 2 is denied and the Plaintiff further states that First Defendant did provide her address as Talaiya, Ba in the Police Statement form recorded on 3rd of December, 2013.
3. THAT paragraphs 3, 4, 5 and 6 are admitted by the Plaintiff.
4. THAT as to paragraph 7 save to admit that the Plaintiff was charged with one count of rape on the 12th day of December, 2013 and denies the rest of the contents therein.
5. THAT paragraph 8 is admitted.
6. THAT as to paragraph 9 save to admit that there was an article published in the newspaper titled 'CJ Declines Variation of Bail' and further submits the Plaintiff's name and his residency was published as well as the nature of the offence was duly published.
7. THAT as to paragraph 10 the Plaintiff repeats paragraphs 4 and 5 herein above.
8. THAT paragraph 11 is denied and the Plaintiff further states that other witnesses who were associated with the alleged offence made themselves available to the Police to record their statements.

9. THAT as to paragraph 12 save to admit that this matter was fixed for trial on 5th day of February, 2014 and the Plaintiff further states that this was done based on the grounds stated in the affidavit of the Plaintiff.
10. THAT as to paragraph 13 save to admit that the criminal matter took two months to resolve and the rest of the contents is denied.
11. THAT paragraph 14 is admitted by the Plaintiff.
12. THAT paragraph 15 is strictly denied by the Plaintiff.
13. THAT paragraph 16 is denied and the Plaintiff further states that the Police Department failed to conduct thorough interviews and investigate prior to laying charges on the Plaintiff and further the Police failed to interview the people who were present at the time of the alleged incident.
14. THAT paragraph 17 is denied and strict proof of the same is required hereof that the investigations carried out was thorough.
15. THAT paragraph 18 is denied and strict proof is required hereof.
16. THAT paragraph 19, 19(a), (b), (c) and (d) are denied and the Plaintiff further states that the investigation not being carried out in a proper manner by the Second Defendant which led to the Plaintiff being labelled as a rapist.
17. THAT paragraph 20 is denied by the Plaintiff.
18. THAT paragraph 21, 21(a), (b), (c), (d), (e) and (f) are strictly denied and the Plaintiff further state that these were the contributing factor of the First Defendants false statement and the Second Defendant being negligent in not carrying out the investigations in a proper manner.
19. THAT as to paragraph 22 save to admit that there was an article in the newspaper published on 15th day of January, 2014 and the Plaintiff denies the rest of the contents hereof.
20. THAT paragraph 23 is denied by the Plaintiff.
21. THAT the 2nd, 3rd and 4th Defendants have failed to respond to paragraph 15 of the Statement of Claim in their Statement of Defence filed herein.

WHEREOF the Plaintiff submits as follows:-

1. THAT the Statement of Defence filed by the 2nd, 3rd, and 4th Defendants be struck out with costs in favour of the Plaintiff.
2. Any further order that this Honourable Court think fit and just.

(C) The Minutes of the Pre-trial Conference record, inter-alia, the following:

PRE-TRIAL CONFERENCE MINUTES

1.0 AGREED FACTS

- 1.1 The Second Defendant was employed by the Third Defendant as a Police Officer in the Sexual Offences Unit within the Lautoka Police Station.
- 1.2 The Third Defendant is appointed by the President under the Constitution of the Republic of Fiji.
- 1.3 The Fourth Defendant is joined pursuant to the State Proceedings Act.
- 1.4 The First Defendant had reported to the Lautoka Police Station on 29 November 2013 that the Plaintiff had raped her on 27 November 2013.
- 1.5 The Plaintiff made an application for bail on 12 December 2013 which was granted on the conditions that a stop departure order be placed on the Plaintiff.
- 1.6 That on 30 December 2013, trial was fixed on 5 February 2014 at 9.30am before Justice De Silva.
- 1.7 On 5 February 2014, the First Defendant retracted from her original statement during cross examination.
- 1.8 That a *nolle prosequi* was entered by the State.

2.0 ISSUES FOR DETERMINATION

- 2.1 Whether the Second and Third Defendant owe any duty of care to the Plaintiff.
- 2.2 Whether there was any breach of statutory duties on the part of the Second and Third Defendant?
- 2.3 Whether the Plaintiff is entitled to damages against the Second and Third Defendant as enumerated in the Plaintiff's claim and if so, on what scale?
- 2.4 Whether the Plaintiff is entitled to costs under (v) and (vi) of the Plaintiff's claim and if so, on what scale?

(D) DOCUMENTARY EVIDENCE

The following documents have been put in evidence by the parties.

Plaintiff

- PEX. 1 - Ruling on bail in Criminal Case No. HAM 462 of 2012L, dated 14th January, 2014.
- PEX. 2 - Fiji Sun News Paper Article dated 11th January, 2014.
- PEX.3 - Fiji Sun News Paper Article dated 15th January, 2014.
- PEX.4 - Email dated 20th January, 2014.

Defendants

- DEX.1 - Lautoka Police docket No. CR1198/13.
- DEX.2 - First Defendant's Medical Examination Form.
- DEX.3 - Charge Sheet in Lautoka Magistrates Court Case No. 761/13.

- DEX.4 - Record of Police Interview of the Plaintiff.
- DEX.5 - Police Statement of Bala Mani in Criminal Case No. 1699/13.
- DEX.6 - Lautoka Police Instruction Sheet dated 11th December 2013.
- DEX.7 - File Minute.
- DEX.8 - DPP Memo dated 23rd January 2014.
- DEX.9 - Statement of the Investigating Officer of the traffic case.
- DEX.10 - Statement of the Second Defendant dated 29th January, 2014.
- DEX.11 - Summary of Facts in Lautoka Magistrates Court Case No. 1698/13.

(E) **DISCUSSION**

- (1) Whilst most grateful for the benefit of written submissions and research of Counsel, I venture to state that I have given my mind to the written submissions and the judicial authorities referred to therein.
- (2) As against the first Defendant (the victim of the alleged rape) the claim for damages was for making a **false complaint** to the Police.

Of course, the first Defendant set the law in motion on a criminal charge. But to be actionable as a tort, the process must have been without reasonable and probable cause and must have been carried on **maliciously**. This is not specifically averred in the Statement of Claim against the first Defendant. Therefore, the Plaintiff's action against the first Defendant fails as disclosing no cause of action.

- (3) As I understand the **pleadings**, the action brought against the Second Defendant, Corporal 2313 Ana Nai Navunisinu is founded principally on the **common law duty of care**. Let me add this. No breach of **statutory duty** (as contrasted with breach of a **common law duty of care**) is specifically pleaded against the second

Defendant and no particulars were given in the Statement of Claim. To be more precise, I can find nothing, expressly pleaded in the Statement of Claim against the second Defendant which points to the existence of statutory duty imposed by an Act of legislature and the provisions or regulations, to investigate a complaint by a member of the public against another member of the public. Thus, I do not regard this as an occasion where it is necessary to explore a breach of statutory duty.

One final word. It is trite law that not every statutory duty is owed to, and gives rise to private rights, those who are affected by breach of that duty. A private right to right of action for damages for breach of statutory duty is not an unalloyed blessing. I feel compelled to add that Order 53, r.7 allows an applicant for judicial review to include a claim for damages.

The negligence alleged on the pleadings are; (Reference is made to paragraph 30 of the Statement of Claim)

30. *THAT due to the actions of the First Defendant, the Plaintiff lost his status and the Plaintiff went through emotional stress and undue and unsustainable pressure as he was labelled as a rapist. The particulars of negligence of the Second Defendant are as follows:-*

PARTICULARS OF NEGLIGENCE OF THE SECOND DEFENDANT

- (v) *Failing to carry out free and fair investigation before laying the charges on the Accused [Plaintiff in this matter];*
- (vi) *Failing to check and verify the Plaintiff alibi and determining the effect of laying the charge with proper proof and evidence;*
- (vii) *Failing to exercise discretion reasonably and failing to use skills and knowledge to take and/or record the evidence of the witnesses who presented themselves at the Lautoka Police Station;*
- (viii) *Failing to exercise the duty of care reasonably in not executing a detailed investigation and failing to summon the additional witnesses to Court on the day of hearing.*

The pleadings go on to allege that; (Reference is made to paragraphs 26, 27, 28 and 29 of the Statement of Claim)

26. *THAT due to the breach of duty of care of the part of the investigating officer the Plaintiff had to attend to Court on many occasions and the Plaintiff further suffered loss of income, pain and suffering, emotional stress and trauma on every occasion the Plaintiff attended the Court on hearing dates.*
27. *THAT despite giving reasonable explanations for the alleged offence of rape the Second Defendant being a Police Investigating Officer and being employed in the Police Service since 1992 failed to exercise all reasonable skills required of a Police Officer to carry out artful and fair investigation to determine the truthfulness of the matter.*
28. *THAT there was satisfactory evidence that the Plaintiff did not carry out such an act (rape) as alleged and the witnesses made themselves available for the Second Defendant to interview them the Second Defendant refused to take their statement and turned them away.*
29. *THAT the Second Defendant charged the Plaintiff without carrying out a full and fair investigation and distorted, twisted and the First Defendant turned the facts to show that the Plaintiff was a rapist and done such an act.*

The Plaintiff's Statement of Claim in substance alleged that the Second Defendant, Corporal 2313, Ana Nai Navunisinu was negligent in failing to interview the alibi witnesses.

- (4) By her Statement of Defence, the Second Defendant, Corporal 2313, Ana Nai Navunisinu denied the alleged negligence and also pleaded, *inter alia*, that;
 - ❖ She owed no duty of care actionable in tort of Negligence.

AND

 - ❖ That there was no reasonable cause of action in Negligence.

In the alternative

- ❖ As a matter of Public Policy the Police are ordinarily immune from actions for Negligence in respect of their activities in the investigation and suppression of Crime.
 - ❖ An action for damage in Negligence should not lie against the Police in the circumstances.
- (5) Therefore, the primary question for determination against the second Defendant in this case is legal. Do the averments made by the Plaintiff in his pleadings, if true; disclose a cause of action at common law for alleged negligence? This, in my view is a matter which goes to the jurisdiction of the Court to hear his claim. Since the matter will be decided on a preliminary point of law, all the facts in the Statement of Claim, must be assumed to be true.
- (6) What is the criminal case? Before turning to the law, let me refer briefly to the evidence. Following an investigation conducted by the Second Defendant, Corporal 2313, Ana Nai Navunisinu, the Plaintiff was charged for **Rape**, contrary to **Section 207 of the Crimes Decree**. The matter came on for hearing in the High Court of Lautoka. The Plaintiff was discharged of all criminal proceedings before the High Court pursuant to a *nolle prosequi* entered by the Director of Public Prosecutions pursuant to Section 49 of the Criminal Procedure Decree 2009, following the First Defendant's evidence before the High Court that she had lied to the Police. Despite this, the First Defendant (the virtual complainant) still maintained her allegations against the Plaintiff and attributes her conduct in the High Court trial due to the fact that she was confused during the trial by State Counsel's questioning (exhibit DEX-II). The Plaintiff then commenced this action. The Plaintiff now claims damages for anxiety, vexation and injury to reputation and special damages for loss of overseas employment on the basis that these were caused by the negligent conduct of the criminal investigation by the Second Defendant, Corporal 2313, Ana Nai Navunisinu. The Plaintiff's complaints really fall into distinct two categories. The first is loss of overseas employment. The second is injury to his feelings and reputation. Here I suspect that his real sense of grievance is that the first Defendant's complaint of Rape was not dismissed at the stage of police investigations.

The Plaintiff claims the investigation has been one sided. His alibi witnesses, or witnesses of where he was and what he was doing that afternoon and evening have not been recorded. Three potential witnesses presented themselves at

Lautoka Police Station to make a statement in relation to the Defence of alibi. The Plaintiff says that the Investigation Officer refused to take their statements. The Plaintiff says that this is irresponsible and the Investigation Officer was negligent. He says that the Investigation Officer should have interviewed the *alibi* witnesses. The Investigating Officer, Corporal 2313, Ana Nai Navunisinu admits she has only recorded the complainant's statement and "the people she mentioned in her statement." She went on to testify that the complainant's evidence "as far as her reasons for travel and time of travel are concerned has been corroborated by other witnesses (family members)."

One word more, the Investigating Officer herself did not see fit immediately to inquire what other witnesses present at events that day at which both the suspect and the complainant were in the same company, might have to say. She said she was directed by the State Prosecutor to interview further 5 witnesses from the suspect's side or who were mentioned in his story.

- (7) I must stress here that, it is not enough to prove the Second Defendant, Corporal 2313, Ana Nai Navunisinu to be negligent in her process of criminal investigation. At the cost of some repetition, I state that the Plaintiff's claim against the second Defendant is principally founded on common law duty of care. The fundamental question which this Court is concerned to underline is this: Does she owe to the Plaintiff a duty of care at common law the breach of which can give rise to an action? Obviously if no such duty existed, the failure to interview the alibi witnesses could not found a cause of action.

Negligence does not entail liability unless the Law exacts a 'duty' in the circumstance to observe care. (See; The Law of Torts, John G. Fleming, 09th Edition, Para 149).

The liability for negligence whether we style it such or treat it as in other systems as a species of 'culpa' cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstance carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequences of a breach of that duty.

A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them. See; Le Lievre v Gould (1893) 1 A.B 491 at 497 per Lord Esher MR.

The primary question thus is whether, taking all the circumstances into account and assuming the Plaintiff's complaint to be justified and the facts alleged in the Statement of Claim are true, is it just and reasonable that the Criminal Investigating Officer, 'Corporal 2313 Nai Navunisinu' should be under a duty of care at common law to the person under investigation, the Plaintiff?

In Curran v Northern Ireland Co-ownership Housing Association Ltd [1987] 2 All ER 13 and 17, [1987] 2 AC 718 at 724 Lord Bridge said:

'My Lords, Anns v Merton London Borough [1977] 2 All ER, [1978] AC 728 may be said to represent the high-water mark of a trend in the development of the law of negligence by your Lordships' House towards the elevation of the "neighbourhood" principle derived from the speech of Lord Atkin in Donoghue v Stevenson [1932] AC 562, [1932] All ER Rep 1 into one of general application from which a duty of care may always be derived unless there are clear countervailing considerations to exclude it.'

In his Lordships speech in Anns v Merton London Borough [1977] 2 All ER 492 at 498, [1978] AC 728 at 751 in a famous passage Lord Wilberforce said:

Through the trilogy of cases in this House, Donoghue v Stevenson [1932] AC 562, [1932] All ER Rep 1, Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 All ER 575, [1964] AC 465 and Home Office v Dorset Yacht Co Ltd [1970] 2 All ER 294, [1970] AC 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is

necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise (see the Dorset Yacht case [1970 2 All ER 294 at 297-298, [1970] AC 1004 at 1027, per Lord Reid)'.

(Emphasis added)

In more recent authorities a somewhat different approach has been adopted. In Yuen Kun-yeu v A-G of Hong Kong [1987] 2 All ER 705 at 710, [1987] 3 WLR 776 at 783 Lord Keith commented on Lord Wilberforce's formulation. Lord Keith said:

'Their Lordships venture to think that the two-stage test formulated by Lord Wilberforce for determining the existence of a duty of care in negligence has been elevated to a degree of importance greater than its merits, and greater perhaps than its author intended. Further, the expression of the first stage of the test carries with it a risk of misinterpretation. As Gibbs SJ pointed out in Sutherland Shire Council v Heyman (1985) 60 ALR 1 at 13 there are two possible views of what Lord Wilberforce meant. The first view, favoured in a number of cases mentioned by Gibbs CJ, is that he meant to test the sufficiency of proximity simply by reasonable contemplation of likely harm. The second view, favoured by Gibbs CJ himself, is that Lord Wilberforce meant the expression "proximity or neighbourhood" to be a composite one, importing the whole concept of necessary relationship between plaintiff and defendant described by Lord Atkin in Donoghue v Stevenson [1932] AC 562 at 580, [1932] All ER Rep 1 at 11. In their Lordships' opinion the second view is the correct one. As Lord Wilberforce himself observed in McLoughlin v O'Brian [1982] 2 All ER 298 at 303, [1983] 1 AC 410 at 420, it is clear that foreseeability does not of itself, and automatically, lead to a duty of care. There are many other statements to the same effect. The truth is that the trilogy of cases referred to by Lord Wilberforce each demonstrates particular sets of circumstances, differing in character, which were adjudged to have the effect of bringing into being a relationship apt to give rise to a duty of care. Foreseeability of harm is a necessary ingredient of such a relationship, but is not the only one. Otherwise there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forbears to shout a warning.'

In Governors of the Peabody Doantion Fund v Sir Lindsay Parkinson & Co Ltd [1984] 3 All ER 529 at 534, [1985] AC 210 at 240 Lord Keith, having set out the passage quoted above from the speech of Lord Wilberforce in **Ann's v Merton London Borough**, said:

'There has been a tendency in some recent cases to treat these passages as being themselves of a definitive character. This is a temptation which should be resisted. The true question in each case is whether the particular defendant owed to the particular plaintiff a duty of care having the scope which is contended for, and whether he was in breach of that duty with consequent loss to the plaintiff. A relationship of proximity in Lord Atkin's sense must exist before any duty of care can arise, but the scope of the duty must depend on all the circumstances of the case. In Home Office v Dorset Yacht C Ltd [1970] 2 All ER 294 at 307-308, [1970] AC 1004 at 1038-1039 Lord Morris, after that at the conclusion of his speech in Donoghue v Stevenson [1932] AC 562 at 599, [1932] All ER Rep 1 at 20 Lord Atkin said that it was advantageous if the law "is in accordance with sound common sense" and expressing the view that a special relation existed between the prison officers and yacht company which gave rise to a duty on the former to control their charges so as to prevent them doing damage, continued: "Apart from this I would conclude that in the situation stipulated in the present case it would not only be fair and reasonable that a duty of care should exist but that it would be contrary to the fitness of things were in not so. I doubt whether it is necessary to say, in cases where the court is asked whether in a particular situation a duty existed, that the court is called on to make a decision as to policy. Policy need not be invoked where reason and good sense will at once point the way. If the test whether in some particular situation a duty of care arises may in some cases have to be whether it is fair and reasonable that it should so arise the court must not shrink from being the arbiter. As Lord Radcliffe said in his speech in Davis Contractors Ltd v Fareham Urban District Council [1956] 2 All ER 145 at 160, [1956] AC 696 at 728, the court is 'the spokesman of the fair and reasonable man''. So in determining whether or not a duty of care of particular scope was incumbent on a defendant it is material to take into consideration whether it is just and reasonable that it should be so.

- (8) With these considerations in mind, I have come to the clear conclusion that no duty of care is owed by a police officer investigating a suspected crime to a civilian suspect and therefore the Plaintiff has no right of action against the second Defendant for damages for common law negligence.

The direct authority is 'Calveley and Others v Chief Constable of the Merseyside Police and other appeals', (1989) 1 All .E.R. 1025. It is directly in point against the Plaintiff.

In the illuminating judgment of Lord Bridge of Harwich in 'Calveley and Others v Chief Constable of the Merseyside Police and other appeals' (*supra*) contained the very significant passage following;

Negligence

Leading counsel for the Plaintiffs submitted that a Police Officer investigating any crime suspected to have been committed, whether by a civilian or by a member of a police force, owes to the suspect a duty of care at common law. It follows, he submits, that the like duty is owed by an officer investigating a suspected offence against discipline by a fellow officer. It seems to me that this startling proposition founders on the rocks of elementary principle. The first question that arises: what injury to the suspect ought reasonably to be foreseen by the investigator as likely to be suffered by the suspect if the investigation is not conducted with due care which is sufficient to establish the relationship of legal neighbourhood or proximity in the sense explained by Lord Atkin in Donoghue (or M'Allister) v Stevenson [1932] AC 562 at 580-582, [1932] All ER Rep 1 at 11-12 as the essential foundation of the tort of negligence? The submission that anxiety, vexation and injury to reputation may constitute such an injury needs only to be stated to be seen to be unsustainable. Likewise, it is not reasonably foreseeable that the negligent conduct of a criminal investigation would cause injury to the health of the suspect, whether in the form of depressive illness or otherwise. If the allegedly negligent investigation is followed by the suspect's conviction, it is obvious that an indirect challenge to that conviction by an action for damages for negligent conduct of the investigation cannot be permitted. One must therefore ask the question whether foreseeable injury to the suspect may be caused on the hypothesis either that he has never been charged or, if charged, that he has been acquitted at trial or on appeal, or that his conviction has been quashed on an application for judicial review. It is, I accept, foreseeable that in these situations the suspect may be put to expense, or may conceivably suffer some other economic loss, which might have been avoided had a more careful investigation established his innocence at some earlier stage. However, any suggestion that there should be liability in negligence in such circumstances runs up against the formidable obstacles in the way of liability in negligence for purely economic loss. Where no action for malicious prosecution would lie, it would be strange indeed if an acquitted defendant could recover damages for negligent investigation. Finally, all other considerations apart, it would plainly be contrary to public policy, in my opinion, to prejudice the fearless and efficient

discharge by police officers of their vitally important public duty of investigating crime by requiring them to act under the shadow of a potential action for damages for negligence by the suspect.

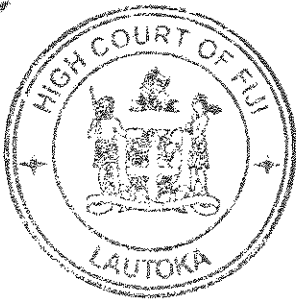
If no duty of care is owed by a police officer investigating a suspected crime to a civilian suspect, it is difficult to see any conceivable reason why a police officer who is subjected to investigation under the 1977 regulations should be in any better position. Junior Counsel for the Plaintiffs, following, put the case in negligence on a very much narrower basis. He submitted that in the case of a Police Officer subject to investigation a specific duty of care is owed to him to avoid any unnecessary delay in the investigation precisely because the officer is, or is liable to be, suspended from duty until the investigation is concluded. The short answer to this submission is that suspension from duty is not in itself and does not involve any foreseeable injury of a kind capable of sustaining a cause of action in negligence. The effect of regs 35 and 69 of and Sch 6 to 1979 regulations is that an officer who is suspended, unless either he has been convicted of a criminal offence and is held in custody or he has absented himself and his whereabouts are unknown, is entitled during suspension to receive his full pay and rent allowance, supplementary rent allowance or compensatory grant. On return to duty he receives any other appropriate allowances to which he would have been entitled during the period of suspension. It is true that while suspended he cannot earn overtime as a Police Officer. As against this, the effect of reg 12 of the 1979 regulations is that, subject to giving notice to the chief constable, the suspended officer is at liberty during the suspension to engage in any gainful employment which is not incompatible with his membership of the police force. The question of compatibility is determined in the first instance by the chief constable with a right in the officer to appeal from an adverse decision to the police authority and, if they affirm the decision, to require a reference to the Secretary of State. In the light of these considerations, suspicion is not a foreseeable cause of even economic loss.


(Emphasis added)

In the face of the dicta of Lord Bridge of Harwich in **'Calveley and Others v Chief Constable of the Merseyside Police and other appeals'** (*supra*) I have no recourse open to me but to dismiss the Plaintiff's action and the proceedings against the second Defendant as disclosing no cause of action.

(F) ORDERS

- (1) The Plaintiff's action and the proceedings against the Defendants are hereby dismissed as disclosing no cause of action.
- (2) The Plaintiff is ordered to pay costs of \$1500.00 (summarily assessed) to the Second Defendant within 14 days hereof.




23/07/2018
Jude Nanayakkara
Judge

At Lautoka
Monday, 23rd July 2018