

Kingdom of Tonga and Editor of the Chronicle v Mataele

Privy Council
App No 1/1974

21 February 1978

Defamation - innuendo - must be pleaded

Defamation - fair comment - must be statement of opinion and not statement of fact - facts on which comment is based must be indicated

- 10 Mataele brought proceedings in the Supreme Court against the owners and the editor of the newspaper the Tongan Chronicle in respect of a letter written to the editor and published in the newspaper which was critical of his conduct.

The Supreme Court held that a passage in the letter contained an innuendo that the plaintiff, who was an elected member of the Legislative Assembly, had obtained votes in a corrupt manner, and awarded damages in respect of it. On the other hand, the Supreme Court held that another passage which alleged that the plaintiff had used his position to get himself appointed as manager of a hotel was fair comment, and awarded no damages

20 in respect of it. The defendants appealed to the Privy Council.

HELD:

Allowing the appeal in part:

- (1) The plaintiff had not pleaded that the passage contained an innuendo, and so that could not be the subject of damages
 - (2) The statements in the passage about the use by the plaintiff of his position to get appointed as manager of the hotel was a statement of fact, not comment,
- 30 and therefore had to be proved, but had not been proved, by the defendants, and since it was defamatory, damages could be awarded in respect of it.

Privy Council

Judgment:

Respondent, who was Plaintiff in the Supreme Court, brought an action against both appellants claiming \$20,000 damages for libels which were alleged to arise from the publication of a letter in the issue of the newspaper "the Tongan Chronicle" published on September 6, 1973. The newspaper will be referred to as "the Chronicle". The Chief Justice found that the certain portions of the letter were fair comment and dismissed respondent's claim in respect of such portions. In respect of one portion of the said letter the Chief Justice found for respondent and awarded him \$500 damages together with costs. The appeal accordingly is confined to this portion of the said letter. This is important because we are limited to a review of only that part of the said letter which is relevant to the award of damages.

On August 9, 1973 the Chronicle published a speech made by a school girl. This speech had won a first prize in a school competition. It was political and criticised parliamentary representation in Tonga as being neither proportional nor an adequate representation of the common people. These views were severely criticised by one of the nobles, the Hon. Vaha'i in the Legislative Assembly. Respondent, as a people's representative of the Assembly for Tongatapu, addressed the Assembly in reply and apologised to the nobles for the contents of the school girl's speech and for the fact that it had been published.

This address of respondent to the Assembly was followed by publication in the Chronicle of the letter which became the subject matter of the action for damages. The letter reads as follows:-

"Dear Sir,

I wish to express my sincere support for the way you have carried out your duty and asked that this may be considered for publication.

Putting aside all the criticism that had been made regarding the winning speech by Lata Soakai, let's examine more closely methods the people's No 1 representatives for the Tongatapu districts had used in the House.

Firstly the criticise the Chronicle editor for allowing the speech concerned to be published which I am certain he did not grasp the full meaning of, and if he did why then did he apologise to the House? After all the speech was legal and in accordance with constitution. What he did, I thought, was being hypocritical or to be more exact, he was only trying to gain favour in the House.

In much the same way as he tried to gain favour in the House by condemning Lata and the editor, he had applied to the House to be manager of the Dateline Hotel. At first he criticised past managers then he made his application. I think this sort of thing had never occurred before since the establishment of the House and if the Government approved his application there must be something rotten somewhere. And who knows, may be next week some other member might

forward an application to be the manager of the new Bank of Tonga.

So I think may be it is quite natural for him to be elected by the people for their representative in the House, and in return, criticise heads of certain department whom he represents,

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This convinced me to believe why Joe Tu'ilatai apologised to the House for criticising the speech and the Chronicle editor. He was trying to prevent the people from knowing the truth, for this would do him good in the next election. I think for next election I'll shout everybody money and cigarettes to smoke so they would vote for me and I will go in to Parliament and apply to become head of one of the Government department.

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Let us refrain from hypocrisy and fraudulence, as this is what Lata and the editor is trying to prevent, and their way of showing true patriotism.

Sgd. Viliami Lilo"

It will be noticed that the letter dealt not only with speech of the school girl but also with the management of the Dateline Hotel and the conduct of respondent in relation thereto. In his judgment the Chief Justice dealt first with the claim in relation to matters concerning the speech of the school girl. The passages dealt with in the judgment under this head included the following parts of the said letter, namely:-

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"What he did, I thought was being hypocritical or to be more exact, he was only trying to gain favour in the House."

"This convinced me to believe why Joe Tu'ilatai apologised to the House for the criticism in the speech and the Chronicle editor. He was trying to prevent the people from knowing the truth for this would do him good in the next election".

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"Let us refrain from hypocrisy and fraudulent as this is what Lata and the editor is trying to prevent and their way of showing true patriotism."

These passages undoubtedly contain the sting of the attack on respondent. The Chief Justice found they were defamatory of respondent but that they were fair comment and appellants were not liable in damages. Since these findings cannot be disturbed because no appeal has been made in respect of them, the present appeal must be restricted to the portion of the said letter which refers to respondent in relation to the management of the Dateline Hotel. The Chief Justice set out this portion of the letter thus:-

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"In much the same way as he had tried to gain favour in the House by condemning Lata and the Editor, he had applied to the House to be Manager

of the Dateline Hotel.

At first he criticised past managers then he made his application. I think this sort of things had never occurred before since the establishment of the House and if the Government approved his application there must be something rotten somewhere. And who knows may be next week some other member might forward an application to be the Manager of the New Bank of Tonga I think for the next election I'll shout everybody money and cigarettes to smoke so they would vote for me and I will go in to Parliament and apply to become head of one of the Government's Department".

In this judgement the Chief Justice made the following finding on this people, namely:-

" This criticism is based on the allegation that the plaintiff strongly used his position as people's representative to obtain the position of Manager of the Hotel and that he applied for this position.

There is also the innuendo which might be understood to apply to all people's representatives in the Legislative Assembly but I consider that the average reader will interpret this in conjunction with the other criticisms against plaintiff and read the innuendo as being aimed at him, an unkind smear that plaintiff obtained votes in a corrupt manner".

Leaving aside the question of damages, counsel for appellants put forward two submissions in support of the appeal. They were:-

"(1) That the learned Chief Justice erred in fact in his translation of the Parliamentary Report No.32/73 in respect of the words spoken by the Plaintiff (Respondent) concerning the management of the Hotel in that the true import of the Plaintiff's (Respondent's) statement was that of an intention to apply for the job of manager. A diverse comment on such a proposal, whether the proposal was by way of challenge or otherwise, was justified and was in no way defamatory.

(2) That the learned Chief Justice erred in fact and in law in finding that there was a harmful innuendo contained in the letter from Viliami Lilo that the Plaintiff (Respondent) obtained votes by corrupt methods, in that no complaint was made in the pleadings or in the Hearings by the Plaintiff (Respondent) that there was such a harmful innuendo and no evidence was heard concerning it.

It is convenient to deal first with the question whether or not the Chief Justice was correct in finding that there was an innuendo which he described as an unkind smear, that respondent had obtained votes in a corrupt manner, or, as he later stated it, that there is the harmful innuendo that respondent obtained votes by corrupt methods.

The law as to innuendo is concisely stated in Halsbury's Law of England, 3rd Ed., Vol. 24 paragraph 154 at page 86. The passage reads:-

"An innuendo is an explanatory averment in the statement of claim defining the meaning which the plaintiff assigns to the words complained of or specifying the plaintiff as the person to whom they apply (c).

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If the words or matters set forth in the statement of claim are prima facie defamatory of the plaintiff, the statement of claim will show a good cause of action in this respect, though no innuendo is added (d).

If the words are not prima facie defamatory of the plaintiff, however, or if they have no meaning at all in ordinary acceptance, the statement of claim will not disclose a good cause of action (e) unless the plaintiff assigns therein a meaning to the words which is defamatory of him (f). In the absence of evidence of extrinsic facts and circumstances (g) which justify the defamatory meaning alleged in the innuendo, the case will be withdrawn from the jury (h)."

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The statement of claim pleaded this topic in paragraphs 2 & 3 which reads:-

"(2) Viliami Lilo stated that the Plaintiff (Tu'ilatai Mataele) a representative at the Legislative Assembly, is a person who is hypocritical and who behave towards in such a way as to gain favour.

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(3) Viliami Lilo also emphasized that the No. 1 Representative (Tu'ilatai Mataele) enters Parliament and thereby endeavour to apply for a job and that in his method of application, he employs hypocrisy and he also behave towards, in such a way as to gain favour."

Clearly respondent has not pleaded an innuendo to the effect that the letter meant that he obtained votes in a corrupt manner. Appellants will thus succeed on his second point of appeal so that respondent is not entitled to damages on that alleged innuendo.

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We find, with the greatest respect to the Chief Justice, that his judgement has not clearly set out the issues. The only point taken on appeal was that the Chief Justice was wrong in holding that respondent had applied for the job of manager of the Lateline Hotel. This is an oversimplification of the true issues. The claim is that the sting in the passage is that respondent wrongly used his position as people's representative to obtain the position of manager of the hotel. So, assuming that there was only an intention to apply, the allegation of wrongful use of respondent's position still remains. No appeal has been made against this finding so the question is whether this was fair comment on a matter which was defamatory of respondent.

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Fair comment is a defence which respondent must establish. It must be comment and not assertion of fact and a plaintiff (in this case the respondent) is entitled to particulars of the facts on which the comment is based. Fair comment is defined in Act (Cap.140) as follows:-

- "12. No criminal or civil proceedings shall be maintainable in respect of the publication contemporaneously and without malice in any periodical published at intervals not exceeding one month of -
- (b) fair comments upon facts truly stated and in reference to matters of public interest.

Provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter:

Provided also that the protection intended to be afforded by this section shall not be available as a defence in any proceedings if it shall be proved that the defendant has been requested to insert in the periodical in which the matter complained of appeared a reasonable letter or statement by way of contradiction or explanation of such matter and has refused or neglected to insert the same."

The only fact pleaded by appellant was set out in paragraph 1(b) of the defence which reads:-

- "(b) On the 22nd August 1973, in the Legislative Assembly, the (respondent) criticised the management of the Dateline Hotel.

We find that the plea of fair comment fails on two grounds, namely:-

- (1) To infer by innuendo as the Chief Justice has held, that respondent wrongly used his position as people's representative to obtain the position of manager of the hotel, is not comment but is a statement of fact, and
- (2) No fact has either been alleged or proved upon which such a statement could be justified as appellants claim in their notices of appeal. Respondent is accordingly entitled to damages on this part of his claim.

Damages assessed at \$500, were awarded for a finding which included an innuendo that respondent obtained votes by corrupt methods. This element was not sustained on appeal. In our opinion some reduction ought to be made but the allegation that a person in the position of respondent wrongly used his position is a serious reflection on respondent's character and an appropriate award must be made. It is not a matter of apportioning the sum of \$500 into two amounts which will represent each item taken into account by the Chief Justice. It is our function to award a proper sum for the libel we have found to be proved. We fix this at \$350.

The appeal is allowed to the extent that damages are reduced to \$350. Respondent has succeeded on the main issue so he will get his costs on appeal and in the Supreme