Hsu & Hsu v Latu

Court of Appeal
Morling, Ryan and Quilliam, JJ
Appeal No.7/1991

29 May, 1991

Employment - liability of employer for acts of employee - scope of authority
Damages - assault by employee in course of employment
Damages - quantum higher than appellate judges would have awarded - not so high as to set aside

The appellants, proprietors of a night club, appealed against a jury's award of $8000 general damages given for an assault on a patron, the respondent, by a security officer employed by the appellants. It was argued that:-

1. On the evidence the jury should have found for the appellants;
2. The jury were not properly charged as to the circumstances in which the actions of an employee are within the scope of his employment
3. The damages were excessive

Held:

1. The jury was entitled to accept the respondent's version
2. The judge's directions on the scope of an employees duties were correct, and an employee may be liable if a security officer is authorised to use force to evict disorderly persons and if the officer oversteps this and assaults someone while doing his job i.e. if the employee is given a certain discretion but he wrongly exercises that discretion.
3. That although the damages awarded were high and the Court in its view thought a lesser sum would have been more appropriate, yet the award was not so high as to warrant it being set aside.

Counsel for the Appellants : Mr Hola

Judgment

Notwithstanding the able argument put to the Court by Mr Hola on behalf of the appellants, we do not think this appeal should succeed.

The appellants were the proprietors of the Phoenix Hotel at which they also conducted the business of a Night Club. For the purpose of conducting that business they employed one Filisione Vi as a security officer.

On the night of 13th January, 1989 the respondent attended the Night Club accompanied by some friends. There was some evidence before the jury, to some of which we have been referred, that the respondent had had rather more to drink than was wise. According to his account of the events of this evening, he was assaulted by Filisione Vi when he was requested to leave the premises. The assault was so serious as to cause his jaw to be fractured.

The appellants called evidence which, if it had been accepted, might well have justified the jury in finding against the respondent. However, the jury wa entitled to accept the version of the facts given by the respondent and his witnesses. Mr Hola has been unable to persuade us that on the version of the facts put to the jury on behalf of the respondent it was not entitled to find against the appellants.

What we have already said is sufficient to dispose of this argument. We are of the view that it was plainly open to the jury to accept the version of the facts given by the respondent. There was no obligation on the jury to accept the evidence called on behalf of the appellants.

It was also submitted on behalf of the appellants that the learned trial judge gave an erroneous direction of law to the jury when instructing them as to the circumstances in which the actions of an employee may fall within the scope of his employment.

In his charge to the jury the learned judge said:

> "Now Sione Toili Latu is not claiming against Filisione Vi, but against his employers the Hsu brothers. The law says that he can do this if the alleged wrongful act - the punch - was within the scope of his job or so closely connected with his job that it was a way of doing his job - even though a punch was the wrong way of doing his job. But having said that, I make the point that not every assault by an employee is the liability of the employer.
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> Where we are talking about an assault what we have to do is to consider what discretion if any the employee had. The employer is not liable unless the assault was done by the employee in the wrong exercise of his discretion.
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> In this case if a security officer was authorised to use force (not necessarily by punching) - to use force to evict disorderly persons and prevent their return - and he oversteps this and assaults someone while doing his job, the employer is liable."

We respectfully agree with this statement of the law as applicable to the facts of this case. We are not persuaded that there was any error in His Honour's directions to the jury.

In our opinion the facts made out a strong case that Filisione Vi was acting within the scope of his employment when he struck the blow which caused the respondent's injuries. This was not a case in wich the assault took place at a time or place remote from the employment situation. The assault occurred in the course of the overall operation of removing the respondent from the Night Club premises.

In our opinion therefore no error has been shown in His Honour's direction to the

jury. It was well open to the jury to come to the view that the assault took place in the course of Filisione Vi's employment with the appellants.

The other submission put in support of the appeal is that the damages awarded by the jury were excessive. This submission has caused us some concern. We agree with Mr Hola that the verdict is very high by Tongan standards. We ourselves would not have awarded general damages of $8,000. We would have though that a verdict in the order of $5,000 would have been more appropriate. But that is not to say that the verdict is so high as to warrant the Court setting it aside on appeal.

100 In a case of assault it is open to the jury to have regard not only to the actual physical damage to the plaintiff but also to the indignity suffered by the plaintiff. We think it was open to the jury to include some modest amount in its award to allow for damage of this kind. While we think the verdict is high we are of the opinion that it is not so high as to justify the making of an order that it be set aside.

In result, we are of the opinion the appeal should be dismissed with costs, and we so order.