

Muller v Manu, Minister of Police, Kingdom of Tonga

Supreme Court, Nuku'alofa

10 Lewis J
C.168/93

12, 13 October 1995, 12, 13, 14, 15, 18, 19, 20 & 27 March 1996

Tort - assault - wrongful arrest - false imprisonment
Damages - police officer - assault - exemplary
Evidence - failure put case

20 The plaintiff sued an individual police officer, the Minister and the Kingdom for assault wrongful arrest and false imprisonment allegedly committed in February 1993; the first defendant for his own alleged actions; the second defendant for negligence in failing to properly supervise the first defendant; the third defendant for vicarious liability for the first defendant.

Held:

1. There was no evidence before the court of the effects of alcohol on the human system.
- 30 2. The plaintiff, carrying both the probative and the evidentiary burdens must demonstrate that what the police did was unlawful on 2 bases namely:
 - (a) that there existed no belief on the part of the police officer purporting to arrest the plaintiff, that the plaintiff was drunk;
 - (b) that belief if held was not a reasonable one in all the circumstances.
3. One side must put its case to the other - to put differences affecting the other party. Any matter in which is proposed to contradict evidence in chief of a witness must normally be put to him/her and failure to do this may be held to imply acceptance of the evidence in chief.
- 40 4. To drink intoxicating liquor without a permit was no longer an offence, having been repealed in 1989 and the first defendant had no right to act and purportedly arrest on that basis.
5. The powers of the police to keep order, to arrest without warrant any person breaching the peace, or to arrest to prevent the commission of a public nuisance do not empower police to commit offences against members of the public in the name of duty.
6. The first defendant was liable as was the third defendant (vicariously liable) for assault wrongful arrest and false imprisonment.
- 50 7. But there was no evidence to support the claim of negligence against the second defendant and that claim must fail.

8. The plaintiff was entitled to prove special damages, general damages of \$10,000 given in particular a permanent residual disability to his left knee, and exemplary damages of \$1500 given the duty of the first defendant to look to the safety of citizens and not to cause injury and humiliation to them. He was to prevent breaches of the peace, not cause them.

(Note: an appeal from this judgment is reported as Manu v Muller [1997] Tonga LR).

- 60 Cases considered : Brown v Dunn (1893) 6 R 67 (HL)
Karidis v GM (Holden) Ltd [1971] SASR 427
- Statutes considered : Order in Public Places Act ss.3 & 4
Intoxicating Liquor Act
- Counsel for plaintiff : Mr Niu
Counsel for defendant: Ms Weigall

Judgment

This is a claim for damages for assault, wrongful arrest, and false imprisonment, torts which the plaintiff alleges were committed against him by the first defendant Kelepi Manu, a police officer, at or about 5.30 pm on Friday 12 February 1993 and thereafter.

The plaintiff, a former rigger by trade, also claims damages for loss of earnings, damages for pain and suffering, loss of enjoyment of life and punitive or exemplary damages. He alleges that the second defendant is negligent in having failed to supervise the first defendant and alleges the vicarious liability of the third defendant.

70 The plaintiff includes in his claims the allegation that he has been unable to recover a cash sum of \$1207 which had been in his shirt pocket at the beginning of the incidents of which he makes complaint but which he discovered was missing on the following morning thereafter reporting the loss to police.

The plaintiff last worked as a rigger in 1992. He had lived in Tonga for some years and had worked as a dump truck driver. At the time of the incident of which he makes complaint he was working on the construction of a dwelling house with his brother Hendrik and driving the dump truck earning \$20.00 per day 6 days a week for the driving. He was supervising the building of his brother's house "for love".

80 On the 13 February 1993, a Friday, the plaintiff drove his truck to Nuku'alofa from his brother's house site. It was his intention to purchase building materials and transport them to the site.

The defence case has always been that the plaintiff was at all material times "drunk" when first seen by the first defendant. There is no direct independent evidence, (i.e. independent of the police officers) of the sobriety or otherwise of the plaintiff. There are pieces of evidence. On all sides the plaintiff has consumed alcohol. He says so himself, he says three bottles of Royal Beer and I accept that it was consumed at between at the earliest shortly after 4.00 pm and at the latest shortly after 5.00 pm. The last alcohol was consumed by the plaintiff on his own account at the earliest 5.00 pm and at the latest 6.00 pm.

90 The plaintiff carries the obligation of proving that at the material time Constable Manu had no reasonable grounds for arresting the plaintiff or alternatively that the material witnesses to the grounds are either mistaken or not worthy of credit upon their oath concerning the grounds.

There is no evidence before this court of the effects of alcohol on the human system. There is no evidence of the volume of liquid which is contained in the kind of bottle referred to by the principle antagonists and there is no reference to the ratio of alcohol per unit volume of a bottle of "Royal Beer". There is no evidence of the effect of alcohol on the person of Mr. Muller therefore I am not assisted by reference to "three bottles of royal beer" made by the plaintiff in explanation of his sobriety. There is therefore a real need in this case to consider carefully the assessment of the police officers of the sobriety of the plaintiff at all material times for after all they were about to deprive him of his freedom on the basis that at least one of them, Manu, had formed the belief that he was drunk, (if one is to accept Manu.)

110 Until counsel were pressed to lead it there was no evidence of the criteria which Manu or indeed Piutau used to determine sobriety and drunkenness in a member of the public as a prelude to forming the belief that an offence was being committed by that person. It is as Mr. Niu put it in his address, for the officer to give evidence of the criteria

he applies in determining to arrest and it is for the court to say whether those criteria are reasonable in all the circumstances. The right to arrest is of course a conditional statutory right. In the present case the situation is governed as to the offence of public drunkenness by section 3(K) of the Order in Public Places Act 1988 Cap 37 as amended which provides:-

"3. Any person who shall commit any of the following acts shall be liable on conviction that is to say every person who - (K) in any public place is drunk and incapable, or is drunk and behaves in a disorderly manner therein."

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Section 4 of the act creates the right in the constable to effect an arrest.

"4. Whoever is found committing any of the offences specified in section 3 (K) may be arrested without a warrant by any constable ..."

Both the probative and the evidenciary burden in this trials is that of the plaintiff. He must demonstrate on the probabilities to the satisfaction of this court that what the police did here was unlawful on two bases:

- That there existed no belief on the part of the police officer purporting to effect the arrest of the plaintiff that the plaintiff was drunk or alternatively,
- If the Police Officer held such a belief then in all the circumstances of the case the belief was not a reasonable belief.

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The evidence of Manu is that he has arrested more than 30 people for the offence of drunkenness in the 9 years during which he has been a Police Officer, all of whom were convicted of the offence of drunkenness. The criteria which he uses generally to determine whether a person is drunk and which he says he used in the case of the plaintiff are that he would look for:-

- A reddish face,
- A smell of liquor when talking,
- An inability to "control themselves when they walk" and,
- Noisiness.

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In the case of the plaintiff and in the circumstances of the arrest of the plaintiff he agreed with Mr. Niu of counsel for the plaintiff that only two of his criteria were present namely, red eyes and a smell of alcohol. Assuming Manu's account to be true there was of course the added word "arsehole" which Const. Manu says had been directed at him by the plaintiff before he reached him - before he left the police vehicle.

The evidence of Constable Piutau is that he heard the word "arsehole" used by the plaintiff and having heard it told Manu to turn into the car-park. Piutau says that he was a Police Officer for 14 years and had arrested over 100 people for the offence of drunkenness. He told the court that his criteria for believing a person to be drunk were:-

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- swearing by that person and,
- staggering when walking.

Piutau concluded - "My feeling was that he was drunk but not very drunk". He gave no classifications of drunkenness, nor did Manu. Neither witness referred to any classifications used to determine the degree to which their suspect was affected.

Useful classifications widely used by Police Officers have included reference to the fact that a suspect was:-

- Mildly affected by alcohol,
- Moderately affected by alcohol,

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- Grossly affected and/or
- Unconscious.

I conclude that Piutau meant to say that the plaintiff was in his opinion in the first category - mildly affected by alcohol.

170 These two witnesses were experienced Police Officers. I accept that if believed then their opinions as to whether the plaintiff was drunk are acceptable and in all the circumstances admissible of the fact of drunkenness and assuming them to be telling the court the truth, the grounds they gave, even though in the case of Manu only two criteria existed, his statement of having had cause to believe in the drunkenness of the plaintiff was objectively a reasonable one.

The real question in this case is whether I believe that the two are truthful witnesses. Frankly I do not believe either of them about this matter. I am sure that they lied about a good many things. There is much about their evidence which I find unsatisfactory.

It is an appropriate point in this judgment to consider the need for one side to have put its case to the other. The defence did not merely fail to put its case to the plaintiff on just one occasion, there were many matters not put by the defence to the plaintiff. Conversely there were also matters which the plaintiff failed to put to defence witnesses.

180 Some examples the failures of the defence to put matters to the plaintiff include:-

- The conflicting accounts of the vehicle positions.
- The fact that Manu and Piutau say that the plaintiff was drinking beer from a bottle when police arrived.
- The fact that Manu says that he struck the plaintiff from the police vehicle.

190 The law and good sense requires that one party put to the other, differences affecting the other party, it is fair and right to do so, moreover the common law calls for it - Brown v Dunn (1893) 6 R 67 H.L. Any matter in which it is proposed to contradict the evidence in chief given by the witness must normally be put to him and failure to do this may be held to imply acceptance of the evidence in chief. It may be that in jurisdictions which permit evidence in rebuttal liberally, this rule will be applied less strictly:- Karidis v General Motors Holdens Pty Ltd. [1971] SA SR 422. There is no doubt that the jurisdiction of this court allows of liberal rebuttal evidence, however in this case no attempt was made by the defence to introduce any contradictory rebuttal evidence.

I conclude that Manu and Piutau were inventing evidence to suit the case of the defence as they went along. In every respect where issues arise between the plaintiff and defendants I prefer the evidence of the plaintiff and his witnesses. I find that there was no first close exchange as Manu has said there was between himself and the plaintiff.

200 I find that the plaintiff was supervising his son who had been urinating as Manu approached him. I find that Manu said words to the effect "When I tell you there is no drinking ... There is no drinking." Thereupon Manu struck a blow to the face of the plaintiff which contacted in the vicinity of the mouth of the plaintiff on the right side.

The finding requires comment. In her address, Ms. Weigall of Counsel for the defendants submitted that the law prevailing in February 1993 rendered unlawful any drinking in public or in private without a permit and referred me to the Intoxicating Liquor Act Cap.84 s.76. Ms. Weigall asked me to conclude therefore that to drink in the car-park in this case was to offend.

210 The content of part II of the Intoxicating Liquor Act was repealed by Act No.6 of 1989. The permit provisions of the Intoxicating Liquor Act did not exist on 12.2.93 s.76

went with it. If one were to assume that the plaintiff was seen by police to have been consuming liquor in the car-park it certainly would not have rendered Manu's belief as to the state of the law right. Manu's initial belief was flawed as was so much of his inexcusable behaviour following his approach to the plaintiff. Manu had no right at all to stop and require the plaintiff not to drink liquor in the car park on that ground alone.

Ms. Weigall suggested that Manu was empowered to keep order pursuant to the Police Act and to arrest with warrant any person who commits ... any breach of the peace in his presence, to keep order in places of public resort and to prevent the commission of public nuisance. I accept the submission. Those provisions of the Police Act are sensible measures without which Police generally would be in considerable difficulty, however on the facts as I have found them to be his arrest was unlawful.

It must be understood by the public and police alike that those laws do not empower police to commit offence on members of the public in the name of duty. The duty of police officers is to thoroughly know and understand the law which regulates their actions and to perform in accordance with those laws or suffer the consequences.

I find that the first blow delivered by Manu on the person of the plaintiff was delivered at a point at near the front left side of the bedford truck in which the plaintiff had been travelling. I find that the blow was unjustified and unlawful. In the circumstances then prevailing, the plaintiff was quite justified resisting the efforts of the officer to take him into custody and entitled to make every effort to escape from the officer subject to the law. It must be added that, apart from the evidence of Manu, there is no suggestion that the plaintiff offered violence to the Police from the commencement of the arrest.

I am sure that the plaintiff was more than alarmed by the behaviour of the officer and resisted instinctively. I accept that the recollection of the plaintiff is blurred by the violence used against him. I accept that he was struck a number of blows. I accept and find that at least on one occasion he went to the ground as a result of the force used against him by Manu.

I find that Manu delivered a kick to the right knee of the plaintiff thereby causing a subsequent development of a hemarthrosis in the plaintiff's left knee requiring lengthy investigation and treatment - (vide. exh. P12. Report of Dr Mcausland 28.6.95). Manu admits a kick to the left buttock of the plaintiff. I consider his evidence to be un-reliable. It is more probable that the kick he delivered was to the plaintiff's left knee.

I find that there were numerous other blows on the plaintiff by Manu which were associated with his unlawful detention of the plaintiff all of which were unlawful - the existence of which are supported by the injuries found by Dr. Puloka and recorded in exhibit P5 including bruising on his right chest and back.

I find that at a point in the meting out of violence by Manu against the plaintiff, Manu placed his arms beneath the arms of the plaintiff and then joined his hands in the manner described by the witnesses as a "Half-Nelson" and so holding the plaintiff drove his face into the side of the truck causing the lump in the vicinity of the plaintiff's forehead and the associated bruising. (vide exhs. P5 & P6 Dr. Puloka). I find that the plaintiff's shirt was torn by Manu during the incident.

I am satisfied that the child Kar cried out no doubt in fear and alarm at what was happening to his father and that his father showing considerable presence of mind in taking him into the to the police vehicle and with him to the station.

I find that at the station the plaintiff was released without being charged. The

defence says by reason of his agreement not to sue and because of the presence of his son. The plaintiff was under no obligation to "be a man and to keep his word" in the way suggested to him by the duty officer.

From the mere fact that the police felt constrained to have such an agreement signed by the plaintiff gives rise to the inference that the officer knew that something wrong had taken place. However any agreement of that nature may be regarded as an illegal and unenforceable one since the plaintiff had been unlawfully detained assaulted and arrested.

270 I find that the plaintiff had a sum of money which I find from his own evidence was a little less than \$1207.00 at the time when he was first struck by Manu. I find that at some point between then and the following morning the money disappeared, probably during the struggle or on the way to the Police Station. The plaintiff reported the loss to the police on discovering it was gone next morning.

THE LIABILITY OF THE SECOND AND THIRD DEFENDANTS

1. THE SECOND DEFENDANT

280 The plaintiff's claim against the second defendant is said to lie in a failure by the Minister of Police to supervise the first defendant and by that neglect thus breaching the duty of care the Kingdom of Tonga is said to owe to the plaintiff. There is no direct evidence of such failure. Any conclusions concerning such a failure must therefore necessarily be drawn from inferences.

Constable Manu was on duty, in uniform, under orders to patrol - probably to Police drinking on the foreshore area and patrolling with an officer higher in rank at the material time. I am simply unable to draw the inference of failure to supervise sought by the plaintiff.

In all probability and in the absence of evidence to the contrary there is and was nothing exceptional about the supervision constable Manu had and was being given. On that head of claim the plaintiff must fail.

2. THE THIRD DEFENDANT

290 The plaintiff claims that the liability of the third defendant sounds vicariously. Vicarious liability undoubtedly exists here. Manu was a Police Officer in the execution of his duty. I so find.

THE CLAIM FOR THE LOSS OF A SUM CASH BY THE PLAINTIFF IN THE INCIDENT

I find that the plaintiff had a sum of money which was a little less than \$1207.00 at the time when he was first struck by Manu. From the evidence about it the sum was about \$1200. Less about \$100 spent on down pipes. For present purposes \$1100.00

300 I find that at some point between encountering Manu and the following morning the money disappeared, probably during the struggle or on the way to the Police Station. The Plaintiff reported the loss to the Police on discovering it was gone next morning.

The causal connection between the unlawful detention and the loss is too remote for me to conclude that it was probably the fault of Constable Manu or the Minister of Police that the money was missing. The plaintiff fails on this head of claim.

SPECIAL DAMAGES

I allow the following items of special damage:-

- Medical expenses incurred in New Zealand	\$3,521.50
- Loss of earnings	\$1,560.00
	<u>\$5,081.50</u>

WITNESS FEES AND TRAVELLING EXPENSES

These expenses are conceded by the defendants as being payable in the event of the success of the plaintiff on the claim. The figure includes the air fares and expenses of the plaintiff associated in his travelling from and to New Zealand for trial and includes the costs of the attendance of Dr. Puloka \$1975

GENERAL DAMAGES

320 Being satisfied that the plaintiff suffered wrongful arrest and false imprisonment and being satisfied that as a consequence of the violence used against him in taking him into custody the plaintiff sustained shock and associated pain and suffering from the punches blows and kick delivered by the first defendant to his body, I am satisfied that the experience was an humiliating and distressing one.

I find that he, as a consequence of the kick to his left knee delivered by the first defendant, has suffered a permanent residual disability in the nature of a 5% permanent loss of function. I am satisfied that the plaintiff's left knee is now more susceptible to early onset of aching. (exh P12 - 11.12.95) I find that the plaintiff will experience from time to time a sensation of locking of the knee and the feeling that something is catching behind the knee cap. I assess general damages as a global award of \$10,000.00.

330 It is appropriate to make an award of exemplary or punitive damages in this case. The first defendant was an officer entrusted with a duty of policing the area of Nuku'alofa under consideration. His duty included looking to the safety of the citizens of the Kingdom not to cause injury and humiliation to them. He was to prevent breaches of the peace - not cause them. I award the plaintiff the sum of \$1500.00 by way of exemplary damages.

It is ordered that:-

1. Judgment be entered for the plaintiff in this action against the first and third defendants on the claim.

2. Damages be assessed as:-

340	General Damages	\$10,000.00
	Exemplary Damages	\$1,500.00
	Special Damages	\$5,081.50
	Witness Fees etc.	\$1,975.00
		<u>\$18,556.50</u>

3. The costs of these proceedings to be those of the plaintiff to be taxed or agreed.