

*- Criminal - Child*



*Physical Abuse - Claim  
for civil damages  
against state*

*R*

IN THE SUPREME COURT OF TONGA  
CIVIL JURISDICTION  
NUKU'ALOPA REGISTRY

MINISTRY OF JUSTICE  
NUKU'ALOPA  
TONGA.

Case No: 42 of 1989

B E T W E E N :

KENETI 'OTUAFI - Plaintiff  
an infant suing through  
his father and next friend  
Lisiate 'Otuafi

A N D :

- 1. MA'AKE SIPA )
  - 2. TILEMA ONEDERA )
  - 3. MINISTER OF POLICE )
  - 4. KINGDOM OF TONGA )
- Defendants

HEARD BEFORE MR JUSTICE WEBSTER WITHOUT A JURY AT NUKU'ALOPA ON 23RD, 24TH,  
25TH AND 26TH JULY, 1990.

D E C I S I O N

Preliminary

Keneti 'Otuafi, the Plaintiff, now aged 13, sues Ma'ake Sipa, the First Defendant, for damages arising from several brutal assaults on him on Saturday 8th April, 1989, when the First Defendant beat him on the buttocks with a cane knife and applied a hot iron to his face, chest and penis. The First Defendant was a police officer at the time and the Plaintiff also sues the Minister of Police and the Kingdom of Tonga as Third and Fourth Defendants as being vicariously liable for the torts of the First Defendant.

The Plaintiff was living with the Second Defendant, Tilema Onedera, and also sues her for false imprisonment for some 24 hours after the assaults.

The Plaintiff claims general damages of \$100,000 plus exemplary damages of \$100,000.

At the trial the First Defendant admitted the assaults, with the explanation that he was drunk or hungover at the time, but contested the amount of damages. The Third and Fourth Defendants denied vicarious liability for the assaults on the basis that the First Defendant was a Crown servant with independent statutory powers under the Police Act 1968 and not an employee, and in any event that at the time he was off-duty and acting outside the scope of his employment.

The Second Defendant denied that there was any detention or imprisonment of the Plaintiff after the assaults.

#### Evidence

Evidence for the Plaintiff was given by Dr. Sateki Tu'itavake, with 13 years experience in child health, who had examined the Plaintiff two days after the assaults and then again a month later; by the Plaintiff himself; by his father Lisiate 'Otuafi, who had seen his injuries the following day, as had his mother's sisters Ilio Leao and Ma'ata Tomu and his own sister 'Elenoa 'Otuafi, who were all also witnesses; and by Latanoa Fisi'ihoi who had taken photographs of the injuries two days afterwards. The First Defendant gave evidence himself. The Second Defendant did not give or lead any evidence. The Commander of Police, Sinilau Kolokihakaufisi, gave evidence for the Third and Fourth Defendants about the First Defendant's job in the Criminal Registry Office and the general nature and extent of a police officer's duty.

The Court also visited the Second Defendant's house and saw where the Plaintiff claimed to have been detained and where the burning assaults took place.

In general terms I found all the witnesses to be truthful, though in some places those for the Plaintiff were exaggerating events and the First Defendant was playing down his role. There was no major conflict of fact.

As the Second Defendant did not lead evidence and I believed the evidence of the Plaintiff and his witnesses, I am entitled on the balance of probabilities to accept their version of the events concerning her.

#### Basic facts

I find the following basic facts to have been established -

1. The First Defendant Ma'ake Sipa was on 8th April, 1989 a Police Constable in the Tonga Police Force. He was stationed at the

Central Police Station, Nuku'alofa with the Criminal Registry Office, where his duties were concerned with collecting criminal statistics and maintaining criminal records and fingerprints etc. His duties did not include receiving complaints of crimes. He wore plain clothes for his duties and his normal working hours were from 8.30 am to 4.30 pm. Monday to Friday, though he was also called on to work extra hours from time to time.

2. Under Section 20 (b) of the Police Act 1968 he was deemed "to be on duty at all times", with the additional duties under section 20(e) of preventing the commission of offences and section 20(f) of detecting offenders and bringing them to justice.

3. After finishing work at 4.30 pm on Friday 7th April Ma'ake went on a drinking spree. He drank almost continuously for the next 12 hours at the Tonga Club, the beach at the Friendly Islander Motel and the Motel itself, consuming at least a carton of beer, with spirits as well. After that he staggered to his home at Patangata, falling asleep at least once on the way and arriving home at daybreak between 6.00 and 7.00 am, when he went to bed.

4. On 8th April the Plaintiff Keneti 'Otuafi was aged 11 (his date of birth being 2nd June, 1977) and he had been staying with the Second Defendant, Tilema Onedera, for about 5 weeks at her home at Ma'ufanga. She was a first cousin of his father's and they both came from the village of Ha'alaufuli in Vava'u. She had asked if Keneti could stay as he played sometimes with her own children. Keneti's mother is overseas.

5. On the morning of Saturday 8th Tilema believed that Keneti had taken a gold watch of hers but he would not admit it nor say where the watch was. About 7.00 am she therefore took Keneti in her car to Patangata to Ma'ake, who also came from Ha'alaufuli and is a first cousin of both Tilema and Keneti's father, Lisiate. Keneti knew before-hand that Ma'ake was a police officer.

6. Ma'ake was roused from his sleep (at the third attempt) and questioned Keneti about the watch. He said he did so partly because he was a police officer and partly because he was related to Tilema. Although he had obviously had a great deal to drink, his recollection in evidence of the subsequent events was clear and he must have known what he was doing. Keneti denied taking the watch and Ma'ake kept on questioning him as Tilema said Keneti was lying. Ma'ake told him in the presence of Tilema that he would hit him with the cane knife if he did not admit it. Tilema did not

ask or tell Ma'ake to do this, but neither did she stop him.

7. Ma'ako took Keneti into the kitchen and beat him hard on the buttocks (while his trousers were on) from 6 to 12 times with the cane knife. Keneti cried but did not yell out. Tilema was not in the kitchen but could see the beating from where she was outside. Ma'ake was sure Tilema knew of the beating. After the beating Keneti lied to Ma'ake and said that he had hidden the watch in Tilema's house so that Ma'ake would stop hitting him.

8. Tilema then drove Ma'ake and Keneti back to her house and a fruitless search for the watch was carried out in the house, in the garden and then back under a bed in a bedroom. Each time the watch was not discovered in a place, Keneti told Ma'ake a new place because he was afraid Ma'ake might kill him.

9. The watch was still not found and Ma'ake was angry with Keneti, so he plugged in and then switched on an electric iron which was in the bedroom. When it was hot he first applied it to Keneti's face on his left cheek. Keneti still denied having the watch so Ma'ake made him kiss the iron with his lips. Keneti did this as he was afraid that Ma'ake would kill him, as he had threatened to dump him at Makeke (a high cliff). Keneti had just had a bath and had no clothes on. Ma'ake again questioned Keneti and when he still denied taking the watch Ma'ake put the tip of the iron on Keneti's penis. Finally Ma'ake applied the iron to Keneti's chest. Keneti did not cry out despite the pain because he was too terrified. Ma'ake had shut the door of the room when they went in and only the two of them were there. Tilema did not tell Ma'ake to burn Keneti, but at her house she must have known that Ma'ake was likely to assault Keneti again and cause him further injuries.

10. When none of these burnings produced any result, Ma'ake again produced a knife and made a wound on Keneti's chest which bled. Then Ma'ake lay down on a bed in the room to sleep and told Keneti to lie beside him and think hard where the watch was.

11. Keneti also claimed that at this time Ma'ake cut his tongue with scissors, but there was no corroboration of this.

12. Shortly afterwards Tilema called Ma'ake and drove him home, while Keneti remained in the room.

13. The whole incident at Tilema's house took between 1 and 2 hours. It caused Keneti very great pain and terror so that he was frightened for his life. It amounted to cruel and sadistic torture by Ma'ake. Tilema did not instruct this treatment but did not prevent it either and was clearly indifferent to what happened to Keneti. She was more concerned with her gold watch than with Keneti's welfare. No missing gold watch could ever have justified or excused what was done to Keneti.

14. Tilema returned from Ma'ake's house about noon, gave Keneti his clothes to wear and put some cream on his face, but he still felt pain. Tilema showed no pity when she saw the burns on Keneti's face. She told him to look for the watch and remain inside and that if anyone discovered the burns he was to say that he had been playing and fell on an iron. One or both of Tilema's daughters Kikui and Motoko were present when Tilema told Keneti these things. Tilema also told Keneti that if he did not find the watch they would go to Ma'ake again. The door of the room was not locked.

15. Tilema did not take Keneti to the hospital to have his injuries attended to. Keneti believed - and it is a reasonable inference - that this was so that nobody would know of his injuries. Keneti did not ask Tilema to take him to hospital, but it is the responsibility of the adult having care of a child to do this, not for the child to suggest it or decide it.

16. Keneti remained inside the house until it began to get dark, when Tilema told her son to take him to the store to have some ice-cream.

17. Meantime Tilema had sent a message to Lisiate by her youngest daughter Motoko about 3 p.m.. She asked Lisiate to come and speak to Keneti to tell where he had taken the watch. It was about 7.30 pm when Lisiate went there and Keneti was out in the car getting the ice-cream, so Lisiate sat and talked to Tilema on her verandah. When Keneti was brought back in the car close to 8 pm and came to them, Tilema stood up and crossed between Lisiate and Keneti, then kept Keneti out of the light. In this way Tilema hid Keneti's injuries from his father.

18. As if to explain Keneti's injuries in case they were discovered, Tilema told Lisiate not to hit him again, just to ask him properly. Lisiate asked Keneti where was the watch and did he take it and Keneti said he did not, so Lisiate went home. At that time Keneti was not able to tell his father about what had been done to him.

19. Next day, Sunday 9th, Keneti was again told to look for the watch in the house but could not find it so he had to remain inside the house. Tilema told him if he did not find it they would go to Ma'ake again. Keneti then escaped through the sliding door at the front of the house. He found that the gate was locked, so threw his jacket outside, climbed over the fence (5 - 6' high) and went home. When the Court visited Tilema's house, a padlock and chain were attached to the gate.

20. When Keneti arrived home his father and his mother's sisters were busy preparing a pola, but around 9 am. his elder sister 'Elenoa aged 17 saw him and saw the burn on his cheek and the wound on his chest. Later around 3 or 4 pm Keneti was seen by his mother's sisters, Ilio and Ma'ata, who saw all his injuries. About 6 pm Lisigate also saw Keneti and all the injuries. Keneti told him that Tilema had treated them so Lisigate was not too concerned.

21. The first thing that came to Lisigate's mind was to go to a lawyer to see Keneti's injuries, so that evening he went to Nukunuku to see Mr Laki Niu, but he was not available.

22. They returned to see Mr Niu the following morning, Monday 10th April, and after that Keneti was taken to Vaiola Hospital where he saw Dr Satoki Tu'itavake at 11 am. Dr Tu'itavake's evidence, confirmed by his report made at the time (Exh. 1), was that Keneti had the following injuries -

- (a) a weepy, infected 2nd degree burn on the whole of the left cheek (ie a burn which went under the top of the skin but not so far as the flesh);
- (b) dry scalding on the front of both lips (a 1st degree burn which was only on top of the skin);
- (c) dry scalding on the top of the penis (again a 1st degree burn);
- (d) circular bruises on both buttocks 3" by 3½" in size, reddish - black in colour, with abrasions of the skin at the summits: there was heavy bruising and slight swelling.

The injuries had been caused about 2 days previously and were consistent with the burns having been caused by a hot iron held against the skin for more than a passing touch, but not longer than 30 seconds; and with the buttocks having been hit with a heavy object such as a cane knife. Dr Tu'itavake's opinion was that the injuries had caused very, very much pain to Keneti.

23. Dr Tu'itavake confirmed that the photographs (Exhibits 3-20) wore of Keneti and showed the injuries as they were when he first examined him.

24. Keneti was treated with penicillin injections for 3 days and with a special cream called Silvergen. The 1st degree burns healed in about a week and the other injuries in 2 to 3 weeks. Keneti felt bad pain for about 4 days but could not sleep on his back or his side for 3 weeks and had to sleep on his knees. He had to stay off school for about 2 weeks as a result of the injuries.

25. Dr Tu'itavake saw Keneti again on 9th May, 1989 and checked on the marks left on the cheek, buttocks and penis. He estimated that they would disappear in about 12 months. (In fact the marks disappeared in about 6 months). He also recorded the injury to the chest wall as not being a fresh injury, though he had not noticed it on his previous examination. His report is Exh. 2.

26. Dr Tu'itavake had not examined Keneti medically since then but saw him on the first day of the trial. He said that the scar on his face was very well cured, with a slight mark which was healing very well: in view of Keneti's age it might disappear later. There was also a slight mark still on his chest. Dr Tu'itavake was of the opinion that the experience and injuries Keneti had received might affect his mental attitude as he grew up, but he could not be sure whether that would happen.

27. Lisiate said that Keneti seemed more afraid now than before the incident.

28. Dr Tu'itavake believed that a caring guardian would have brought Keneti to hospital immediately the injuries occurred, but did not consider that he was in grave danger because they were not treated as soon as possible.

29. After he had been to hospital Keneti was also taken on the same day to Tulua Studio in Tungi Arcade, Nuku'alofa where Latanoa Fisi'ihoi took 12 Polaroid photographs of his injuries (Exhs 7-18). Unfortunately the film was old and the photos came out with spots all over them, so Lupeti Tulua had taken new shots (being the other photo exhibits). Lupeti

did not give evidence but the other photographs were not contested by the Defendants. Latanoa confirmed that she had also seen all these injuries on Keneti, who also confirmed that the photographs showed the injuries and burns which he had received.

30. Words cannot adequately convey the horrible nature of the injuries inflicted by Ma'ake on Keneti, but the photographs showed this clearly. It is almost beyond belief that one human being should deliberately inflict these injuries on another here in Tonga, especially a small boy. Keneti is a small boy for his age and Ma'ake is a tall well-built Tongan man of 31: there was just no comparison between their sizes. What was done to Keneti went far beyond parental discipline or punishment. Ma'ake did not beat his own children with a cane knife and there was no evidence that Tilema did so either to her own children. In all the circumstances the only description that can be given to what took place is torture, and Ma'ake was frank enough to admit this in evidence.

31. The Plaintiff's Counsel acted very quickly and filed the Statement of Claim in this action on 11th April 1989. When it was served on the Third Defendant, Ma'ake was interdicted and suspended under the Police Act on 12th April and all his powers as a police officer suspended. He has remained interdicted until the present. Surprisingly, so far no criminal proceedings have been taken against him in respect of the incident.

32. On that same day, 12th April, Ma'ake and Tilema went to Lisiate's home along with Ma'ake's aunt Mele 'Akau'ola and his sister Keasi Fifita. They took with them a medium sized pig worth \$60, 2 baskets of yams worth in all \$50, a 12' long twin mat worth \$200, a 10' length of undecorated tapa worth \$105 and 2 kie worth \$300 in all. All of these were seen by the Court and the values agreed between the Plaintiff and First Defendant. They also took an envelope which it was agreed contained \$50. All these were provided by the First Defendant's family and there was no evidence that the Second Defendant contributed to them in any way. Ma'ake's family offered a formal Tongan apology to Lisiate's family for what had happened but Lisiate would not accept the apology and said the matter would be dealt with in Court. However the goods were kept by Lisiate's family. About 2 months later Ma'ake again visited Lisiate with an envelope containing \$200, and finally around Christmas he went again and handed over \$100. It was agreed between Counsel that the total value of the goods and money given by Ma'ake to Lisiate was \$1065.

33. The Police Commander gave evidence, which I accept, that, because police officers are on duty at all times, if a complaint of an alleged crime is made to a police officer at home he should first do whatever is possible at that time and should then contact the Charge Office to



take up the case and investigate it. Police Officers were taught about the way they should perform their duties when at home. If something happened after a police officer's daily spell of duty of 8 hours, he had to work on it in this manner. Such work at home on petty crimes was useful. Ma'ake himself essentially agreed with this, making it clear that if an incident happened when he was at home, after taking initial action he had to bring the offender to a Police Station as soon as possible. Ma'ake agreed that he had not taken Keneti to a Police Station as soon as possible.

34. The Police Commander also said that the photographs of Keneti's injuries showed things which should never be the result of any performance of police duties in any circumstances. Ma'ake had not been wrong to start investigating the alleged theft, but had gone beyond the stage when he should have stopped. The Police Commander said that all that had been done by Ma'ake, after the allegation was denied by Keneti, was not performance of police duty because it went over Ma'ake's powers of investigation.

Later when I apply the law to all these basic facts I shall make further findings based on mixed facts and law.

Applying the law to the facts

The assaults - the First Defendant

It is clear from the evidence that the First Defendant committed several unjustified and unlawful assaults on the Plaintiff. Even if the First Defendant had been drinking he could recollect clearly what he did and his condition was no excuse. He is therefore liable in damages in tort to the Plaintiff.

The only thing that can be said in the First Defendant's favour is that in Court he was a truthful witness and openly admitted liability. He and his family also offered formal Tongan apologies to Keneti's family within a few days of the incident.

The assaults - the Second Defendant

The Plaintiff brought no claim against the Second Defendant for the assaults so I make no finding against her in respect of them, but from the evidence I heard I believe that it is possible that she may have ratified the First Defendant's actions; or that she may have been negligent in her care of Keneti in putting him into the position where the assaults took place. I do not accept the submissions of Counsel for the Second Defendant, Mrs Vaihu, that the Second Defendant only played a minor role in these incidents.

Vicarious liability for the assaults - the Third and Fourth Defendants

Counsel for the Third and Fourth Defendants, Mrs Taumoapeau, submitted that police officers were neither servants of the Crown nor of the Minister of Police and therefore that in common law the only legal remedy lay against the officer himself (Clerk & Lindsell on Torts (16th Ed) para 3 - 11). However that reflects the English position on the organisation of police forces under county police authorities where the policemen are not national civil servants but are given statutory powers under national legislation. In any event the statement in Clerk & Lindsell that a police officer is not a servant of the Crown appears to contradict the next case cited in that paragraph, Fisher v Oldham Corporation (1930) All ER Rep 96.

In Tonga the position is different. Police officers are enlisted and appointed by the Minister of Police with the approval of Cabinet (sections 8(1) and 11 of the Police Act 1968) and so are arguably appointed directly by the Crown and are certainly appointed indirectly by the Crown. They are paid out of moneys provided by Parliament (section 5 of the Police Act and eg. the Schedule to the 1988-89 Appropriation Act 1988, Vote No.9 - Police - \$1,522,000). Police officers therefore fall within the general criteria for vicarious liability of the Crown given in Clerk & Lindsell para 2 - 04 on page 144.

In Tonga the relevant legislation is the Crown Proceedings Act, where section 4 states that -

"... the Kingdom of Tonga shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject -

(a) in respect of torts committed by its servants or agents; ....."

I believe that the factors stated above make it clear that police officers are servants of the Kingdom, and if I am wrong in that because of the extent of the statutory powers conferred on them, then police officers are certainly agents of the Kingdom.

I therefore find that in general the Third and Fourth Defendants can be vicariously liable for the torts of police officers. Indeed in cases before this, the Third and Fourth Defendants have accepted such vicarious liability and I am not aware that they have disputed it in recent years.

Turning to whether the Third and Fourth Defendants are vicariously liable for the tort of the First Defendant in the circumstances of this case, it is ultimately a question of fact whether a wrongful act was within the scope of an employee's authority. There is no simple test appropriate to cover all cases (Clerk and Lindsell para 3 - 17). It is clear that Ma'ake's assaults in this case were not authorised by the Third and Fourth Defendants. However an employer is liable even for acts which he has not authorised if they are so connected with acts which he has authorised that they may rightly be regarded as modes - although improper modes - of doing them. In recent years there has been a more liberal protection of third parties and the Court should not dissect a job into its component parts but should ask in a general sense "What was the job at which the employee was engaged for his employer?". An employer will not be liable where an employee has clearly departed from the scope of his employment (all para 3 - 17). The Court must take into account all the surrounding circumstances (para 3 - 19). Where an employee has acted on his own initiative, it must be established in each case that the employer has, expressly or impliedly, given the employee a discretion which he purports to exercise (para 3 - 24). In dealing with an assault by an employee, the correct approach is to consider the discretion, if any, vested in the employee: the employer will not be liable unless the employee did the assault in the wrongful exercise of a discretion (para 3 - 25).

The particular position of a police authority was considered in England in Makanjuola v Commissioner of Police (The Times 8th August, 1982) where it was held that the authority would be vicariously liable for acts done either in the exercise of or so connected with the performance of duties as a police officer that it could rightly be regarded as a mode, if an improper one, of carrying them out. In that case what the police officer did was a negation and not the performance of his duties. There was no ostensible authority and he was on an adventure of his own.

The relevant circumstances in this case were that, even although as a police officer Ma'ake was on duty at all times, he was not within his working hours when he did the assaults. He was in a semi-drunken or hungover state which rendered him unfit to work as a police officer. He had not been instructed to interview Keneti. He believed that what he did that day was at least partly because he was related to Tilema. Mutual assistance within the extended family is very common in Tonga.

Regardless of Ma'ake's condition, it was appropriate for him to do some initial work on Tilema's complaint, but when Keneti denied taking the watch he should have referred the matter to the Charge Office as soon as

possible. Ma'ake knew that he should have done this. As a police officer out of his working hours he was not authorised to do any more than to take initial action or make initial enquiries. He was not authorised to assault anyone (except possibly to use reasonable force to make an arrest).

In all these circumstances all the assaults on Keneti were not merely a wrongful mode of doing an authorised act, but were well beyond what Ma'ake was authorised to do at the time. So I find that the Third and Fourth Defendants are not vicariously liable for these assaults by the First Defendant.

The circumstances in this case must be distinguished from a case where a police officer within his working hours and in the execution of his assigned duty exceeds his authority and improperly assaults a person. In such a case, depending on the exact circumstances, the Minister of Police and the Kingdom of Tonga will most probably be vicariously liable.

The false imprisonment - the Second Defendant

False imprisonment is complete deprivation of liberty for any time, however short, without lawful cause. The prisoner may be confined within a definite space by being put under lock and key or his movements may simply be constrained at the will of another. Counsel for the Second Defendant, Mrs Vaihu, conceded this. The constraint may be actual physical force, or merely the apprehension of physical force. (all Clerk & Lindsell para 17-15)

"The law attaches supreme importance to the liberty of the individual and if he suffers a wrongful interference with that liberty it should remain actionable even without proof of special damage."

(Murray v Ministry of Defence (1988) 2 All ER 521 (HL))

It is clear that Keneti was imprisoned against his will by Tilema for a period of 24 hours after the assaults. Whether for the purpose of hiding the assaults or of finding her watch, Tilema imposed her will on him right from the time of the assaults. It is not relevant that the doors of the room or the house may not have been locked - although the high gate was locked on the following day. Tilema terrified Keneti into doing what she said by telling him that they would go to Ma'ake again. Keneti was so frightened that he could not even tell his own father about the assaults on the Saturday evening.

Nor was Tilema exercising control as Keneti's guardian when she restrained his liberty. The purpose of her restriction was not as punishment for the long-term good of Keneti, but for her own interests to hide

evidence of the assaults and protect herself and Ma'ake. Tilema had no proper power as a guardian in the circumstances in effect to stop Keneti going to his own father for parental help and comfort.

So Tilema is liable in damages to Keneti for the tort of false imprisonment for 24 hours.

The failure to get medical treatment - the Second Defendant

Where a person is in prison there is a duty of care on the prison authorities to provide or obtain medical assistance where the need for assistance is or ought to be apparent (Ellis v Home Office (1953) 2 All ER 149 (CA)). There is no reason why a similar duty does not lie on a person who detains someone against his will. The standard which applies is not that of the defendant, but of an ordinary person using ordinary care and skill and having regard to the probability of harm and the probable seriousness of harm (Halsbury's Laws (4th Ed) Vol 34 paras 10 and 11).

Also a parent - and consequently a person in the position of guardian - may be liable in negligence to his own child if he fails in his duty of care (Clerk & Lindsell para 10 - 91 and McCallion v Dodd (1966) NZLR 710 (CA)).

On the evidence Keneti's need for treatment for all his injuries must have been apparent to Tilema. It was she who gave him his clothes when she returned from taking Ma'ake home. She applied cream to the burn on his cheek, but that did not stop the pain, or the burn becoming infected by the Monday. She must have realised that Keneti ought to have been taken immediately for medical treatment, if only to relieve his pain. Dr Tu'itavake believed that a caring guardian would have taken Keneti to hospital immediately. So as a result of Tilema's negligence Keneti should be compensated for the extra pain and suffering he had to endure while he was detained by her.

There was also evidence that Keneti's own family did not take him to hospital immediately they discovered his injuries. While somewhat surprising, that does not diminish the duty of care on Tilema the previous day. In any event by the Sunday the pain from the injuries had lessened considerably and Keneti was over the worst and able to be playing: it was not as obvious as the previous day that he ought to have medical treatment at that time.

Damages - the assaults

In cases of trespass to the person such as assault and false imprisonment, actual damage need not be proved and a successful plaintiff is entitled at least to nominal damages. Substantial damages are recoverable for discomfort

and inconvenience and injury to dignity (Halsbury Vol 12 para 1158). In addition general damages are recoverable for physical injury for the plaintiff's pain and suffering, loss of amenity and enjoyment of life (para 1146): these constitute a conventional sum which is to be taken as the sum which society deems fair (para 1147).

Among factors to be considered in this case are the serious nature of the Plaintiff's injuries and the time they took to heal, but also that they have left no permanent physical after-effects. Any scar on the Plaintiff's face is slight and may completely disappear with time. Once the injuries had been inflicted they obviously caused him very great pain and suffering, discomfort and inconvenience. He had to miss school for 2 weeks. But above all there is the sheer terror which a small boy must have suffered during the assaults by a large policeman: this must be a major factor in assessing damages. Also, while the evidence of future mental or psychological effects on Keneti was not strong - and it has to be said that on the surface Keneti did not appear to be psychologically disturbed and gave his evidence with confidence - it is common sense that there may be future effects even after some lapse of time.

While there have been recent awards by Judges of this Court of damages for assault, the best yardstick, and I believe the only one in recent years, is the award in 1987 of \$6,000 by a Tongan jury in this Court for an assault with an iron bar by a police officer which broke the Plaintiff's arm and leg (Lotu v Government of Tonga & Others, Case 1/85). In the present case the award must be higher to take account of the sadistic brutality of the assault and the victim being just a child.

Counsel for the Plaintiff Mr 'Etika submitted that general damages of \$30,000 should be awarded against the First Defendant, and this was supported by Mrs Taumocepeau. The First Defendant's own Counsel Mrs Paloloi submitted that \$5,000 was a proper figure. I believe the balance lies between these two and I shall award \$8,000 general damages against the First Defendant. In doing so I must make it clear that this must not be interpreted as any lack of sympathy for Keneti or as reducing the horrific nature of the assaults. But it is necessary for the Court to take a cool, objective view of the proper compensation in all the circumstances, especially the absence of permanent physical injuries and the Tongan view of compensation for a similar kind of assault. As this Court made clear in Kaufusi v Lasa (Case No. 29 of 1989), it is also important for the Court to consider levels of ordinary income in Tonga and the value of money and general conditions here.

It was agreed by Counsel that the value of \$1065 of the goods and money presented to the Plaintiff's family should be deducted from whatever

sum is awarded, making the net award of general damages \$6935.

The Plaintiff also sought exemplary damages from the First Defendant and Mr 'Etika submitted that \$50,000 should be awarded. Mrs Palelei submitted the proper figure was \$1000.

These are damages awarded to punish a defendant and vindicate the strength of the law (Halsbury Vol 12 para 1190) and oppressive, arbitrary or unconstitutional action by servants of the government are one category where they may be awarded (Rookes v Barnard (1964) 1 All ER 367 (HL)). It is clear from Makanjuola v Commissioner of Police that exemplary damages can be awarded against a police officer even where he acted with no ostensible authority on an adventure of his own and the Commissioner was not vicariously liable.

Here the First Defendant himself said in evidence that the assaults were unconstitutional: they are clearly also arbitrary and oppressive.

While the power to give exemplary damages is a weapon that should be used with restraint, here I believe that the sum awarded as compensatory damages is not adequate also to punish and deter the First Defendant and that a sizeable sum is appropriate. I shall award a further \$4,000 as exemplary damages, making the total award against the First Defendant \$10,935.

#### Damages - the false imprisonment and negligence

As stated above, in all cases of trespass, including false imprisonment, nominal damages at least are recoverable. False imprisonment affects a person's reputation, and the damage continues until stopped by an avowal that the imprisonment was false (Halsbury Vol 12 para 1158).

Principal factors are the injury to liberty and the injury to feelings such as indignity, mental suffering, disgrace and humiliation (Mc Gregor on Damages (15th Ed) para 1619); also injury to reputation (para 1620). In addition there may be damages for any resultant physical injury, illness or discomfort (para 1620).

The evidence showed that Keneti suffered all these in some degree, even if it was only humiliation within Tilema's family. In particular it was clear that hanging over him during all the time he was detained was the threat that he would be taken back to Ma'ake, which Keneti thought would mean further assaults or that he would be killed.

It is also relevant that the Second Defendant has denied throughout the case that there was any false imprisonment, but presented no evidence

to support that denial. The Court must also consider all the circumstances of the case, especially the fact that when the Second Defendant detained the Plaintiff she was well aware that he had suffered these horrible assaults, which would never have happened if she had not taken the Plaintiff to the First Defendant.

It is appropriate to award one sum for the Second Defendant's false imprisonment of the Plaintiff and for her negligence in not getting medical treatment for him which prolonged his pain and suffering, all taken together.

Mr 'Etika submitted that general damages of \$20,000 should be awarded against the Second Defendant. Her Counsel Mrs Vaihu submitted that if I found against the Second Defendant \$1,000 would be a reasonable figure, but that is clearly too low in all the circumstances.

I shall award \$3,000 general damages to the Plaintiff against the Second Defendant.

Payment of damages

As the Plaintiff is still an infant, I shall direct that the damages be paid into Court to be held and administered on the Plaintiff's behalf until he reaches the age of 18. His father may apply from time to time for payments for his maintenance and education etc.

Costs

I shall award costs to the Plaintiff against the First and Second Defendants as agreed or taxed.

The Third and Fourth Defendants applied for costs against the Plaintiff if their defence was successful and I see no reason why these should be denied. I shall therefore award the Third and Fourth Defendants costs against the Plaintiff, as agreed or taxed.

Further proceedings

It is unusual that civil proceedings should precede criminal proceedings, but as a result of the horrific evidence I have heard I shall direct that the papers in this case shall be made available to the Hon. Attorney General, as the person in charge of prosecutions, for consideration of whether criminal proceedings should be brought against either or both the First Defendant or the Second



Defendant. Likewise this decision shall be made available to the Minister of Police in relation to the position of the First Defendant.

Dated 3rd August, 1990.

*R. M. Williams*

Counsel - Plaintiff - 'Etika

First Defendant - Mrs Palelei

Second Defendant - Mrs Vaihu

Third and Fourth Defendants - Mrs Taumoepeau

