VAOTUUA (TAUTAI) & OTHERS v ATTORNEY GENERAL & OTHERS

Supreme Court Apia
Maxwell, J
22 March, 29 April 1988

VICARIOUS LIABILITY - vicarious liability of employer for acts of employee - police officers - assault - motion to strike out.

HELD: Application to strike out allegations of vicarious liability of Attorney General and of the Commissioner of Police for assaults by police officers, refused prior to trial and the availability of trial evidence.

CASES CITED:

- Daniels v Whetstone Entertainments [1962] 2 Lloyd's Rep. 1 C.A.
- Beard v London General Omnibus Co. [1900] 2QB. 530
- Kay v I.T.W. Ltd [1968] 1QB 140
- Deatons Proprietary Ltd v Flew [1949] 79 CLR pp.381-382
- Ellis v Frape & Ors [1954] NZLR 341
- Takaro Properties [1976] 2NZLR 657 p.659

R T Faai'uaso for Plaintiffs
A Bell for 1st and 2nd Defendants

Cur adv vult

The first and second Defendants sought a number of orders by way of Notice of Motion. It is not necessary for me to deal with any but paragraph 4 of the Motion. For the sake of the record the following orders were made by consent effectively leaving me to deal with one issue only.

1. That the claim against the second Defendant insofar as the first Defendant is sued in right of the Head of State be struck out.

2. That the claim against the second Defendant be struck out.

3. That the Plaintiffs supply further and better particulars of the assaults alleged in paragraphs 35 and 37 of the Statement of Claim.

4. That the words "unlawful arrest, unlawful detention" be struck out from paragraph 41 of the Statement of Claim.

5. That leave be granted to file an amended Statement of Claim.

At this stage I merely observe that any deficiencies which may have arisen hereinafter might well be resolved by the filing of an amended Statement of Claim.

The sole matter with which I propose to deal is as follows: The first and second Defendants seek orders that paragraphs 4 and 41 of the Statement of Claim be struck out insofar as these paragraphs allege that the first and second Defendants are vicariously liable for the alleged assaults by the third Defendants alleged in paragraphs 27 and 34 inclusive of the Statement of Claim on the grounds that:

(a) not applicable;

(b) the acts of the third Defendants alleged in paragraphs 27-34 inclusive of the Statement of Claim were not acts committed by the third Defendants in the course of their employment;

Paragraph 4 of the Statement of Claim alleges -

That at all material times the third Defendants acted in pursuance of and in the course of their employment with the first and second Defendants.

Paragraph 41 of the Statement of Claim alleges -

That the third Defendants by their acts committed the torts of assaults and battery and false imprisonment, for which torts the first and second Defendants are vicariously liable.

I set out in brief the allegations giving rise to this application.

Certain policemen signalled the vehicle containing the Plaintiffs to pull over to the side of the road and this order was obeyed, after which the Plaintiffs were directed to alight. They were then lined up against a wall and searched. During the search a revolver was found and this discharged. The Plaintiffs were forced to lie on the ground with their hands behind their backs and were the subject of sustained kicking and punching, for something between 15 and 20 minutes. It is alleged that whenever they had tried to turn round they were attacked more vigorously.

In essence it is alleged that the acts of the third Defendants in attacking the Plaintiffs for such a sustained period of time meant they were not acting in the course of their employment. There are other allegations of an assault when the Plaintiffs

were ordered to disembark from the police vehicle at the police station, but counsel for the Attorney General frankly concedes that if the allegations were proved the first and second Defendants could be vicariously liable.

Counsel do not strenuously argue about the general principles governing vicarious liability. Essentially an employer is vicariously liable for a tortious act done by his employee in the course of his employment, that is while the employee is engaged in his employer's business and is performing either duties falling within the scope of his authority while he is employed [or] to perform a function which is at least incidental to his employment. The employer is not liable when the act which gives rise to the injury is an independent act unconnected with the employee's employment.

Perhaps one of the most difficult areas of vicarious liability arise[s] in cases such as the present where an assault occurs. Mr Bell submits the analogy of a club "bouncer" who commits a tort if he uses excessive force in rejecting a patron from a nightclub and I must say that I am attracted to the remarks of Harman L.J. in Daniels v Whetstone Entertainments [1962] 2 Lloyd's Rep. 1 C.A. where at page 10 he said:

> "I refer to that only in order to sound what seems to me to be a necessary note of warning that in my judgment the fact that an act is a private act of vengeance by itself is insufficient to protect the employer from liability if the act is one which takes place in the course of the employee's employment. The fact that the act may be the result of a desire for vengeance or is an act of spite on the part of the employee is, I think, irrelevant if on the true view of the facts the act is done in the course of the employee's employment. It may, however, well be a circumstance to be taken into account in determining whether in truth the act is in the course of the employee's employment or not."

The limit of the "course of employment rule is exceeded when instead of acting in furtherance of the assigned task the servant indulges in an unrelated and indefinite venture of his own, that is when he so acts as to be in effect a stranger in relation to his employer with respect to the act which he committed": Beard v London General Omnibus Co. [1900] 2QB. 530 as explained in Kay v I.T.W. Ltd [1968] 1QB 140.

In Deatons Proprietary Ltd v Flew [1949] 79 CLR pp.381-382 Dixon J said:

> "The truth is that it was an act of passion and resentment done neither in furtherance of the master's interest nor under his express or implied authority nor as an incident to or in consequence of anything the barmaid was employed to

> do. It was a spontaneous act of retributive justice. The occasion for administering it and the form it took may have arisen from the fact that she was a barmaid but retribution was not within the course of her employment as a barmaid."

It was held that an employee's act was an unlawful personal act which was not connected with or incidental in any manner to the work which she was either expressly or impliedly authorised to perform.

Ellis v Frape & Ors [1954] NZLR 341 is authority for the proposition that the Crown is liable for any tort committed by the police officers while carrying out their duties. I do not find it of any further assistance. The principles I believe are clear and consistent. I am satisfied that it is possible for police officers to so exceed their official powers that they would put themselves beyond either expressly or inferentially involving their employer under the principle of vicarious liability. Without justification to pull out a revolver and wound a person who was already well subdued would be a clear physical act not involving an employer, in the absence of anything else. But a single blow to the head while an individual was so subdued may well be sufficient to make an employer vicariously liable. It seems to me that the issue is one of degree and can only be determined by hearing the facts and making a finding on them.

In Takaro Properties [1976] 2NZLR 657 p.659 Beattie J said:

> "The Court will not grant the motion except in a plain and obvious case so that a judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the Plaintiffs to the relief for which they ask."

The Plaintiff has made an allegation of what, if proved can only be described as a brutal and sustained beating of the Plaintiffs. I am asked to say that much force is so great that no employer could possibly condone it or be liable for it. While that may be so the question I believe is one of degree and evidence should be called and adjudicated upon. When the totality of the evidence is before the Court then a ruling in law can be made on the liability of the first and second Defendants. It may well be that the issue is sensitively balanced, but the facts will establish that. The plaintiff has selected his forum and makes his allegations. It would not be proper in my view to strike out paras. 4 and 41. I believe it proper that all of the evidence be available before a finding in the law is made. The application to strike out paragraphs 4 and 41 is refused and costs reserved.

MILFORD BUILDERS COMPANY LTD v MILFORD CONSTRUCTION LTD AND ATTORNEY GENERAL

Supreme Court Apia
Ryan J
20 July 1988

PRACTICE AND PROCEDURE - Limitation Act S 21 not complied with - application for leave to bring proceedings - application to strike out claim as time-barred.

HELD: Application for leave to bring proceedings against Second Defendant refused.

CASES CITED:

- Milford Builders Ltd v Western Samoa Shipping Corporation et al

STATUTES:

- Limitation Act 1975; S 21
- Acts Interpretation Act 1974; S 5(i)

K Sapolu for Plaintiff
G Philipp for First Defendant
T Grace for Second Defendant

The Second Defendant has moved for the following orders:

(a) An Order that the Statement of Defence dated 17 June 1985, as amended by the Amended Statement of Defence dated 26 July 1985, be further amended to raise, as a matter of defence, the limitation bar under sections 21(1)(a), 21(3) and 21(4) of the Limitation Act 1975 and the prejudice suffered thereby by the Second Defendant;

(b) An Order that the action against the Second Defendant be struck out;

(c) If the action against the Second Defendant is not struck out, that the cause of action in respect of the Second Defendant be particularised;

(d) An Order that the Plaintiff pay $7,000 costs of the Second Defendant;

(e) An Order waiving the requirements of an affidavit in support of this application.

UPON THE GROUNDS that:

(a) The issue of non-compliance with the limitation provisions goes to jurisdiction and may be raised by the defence at any time, even on the eve of trial;

(b) The Plaintiff has failed to give the required notice under sections 21(1)(a), 21(3) and 21(4) of the Limitation Act 1975;

(c) The Plaintiff commenced its action prior to filing an application for leave under section 21(2) of the Limitation Act 1975;

(d) The Plaintiff has failed to prosecute its claim with due diligence and the Second Defendant has been prejudiced thereby;

(e) The Statement of Claim alleges no cogent theory of liability against the Second Defendant and has not been amended or further particularised (as is contemplated by clause 11) despite full discovery against the Second Defendant;

(f) The Second Defendant has been put to considerable expense in complying with discovery, arranging the examination out of Court of a material witness desiring to depart Western Samoa, and preparing this application;

(g) This application may be decided on the assumption that the allegations in the Statement of Claim are factually correct, that they may be expected to be amplified at the hearing of the action, but as pleaded give fair notice of the substance of the Plaintiff's claim.

The Plaintiff has filed an application for an Order to bring proceedings against the Second Defendant and for a further order that the Plaintiff is not time-barred for its failure to give notice to the Second Defendant under Sections 21(1)(a), 21(3) and 21(4) of the Limitation Act 1975.

The claim was first lodged by the Plaintiff against the 1st and 2nd Defendants in April 1985. There has been masterly inactivity on its part ever since. The Statement of Claim para 11 reads as follows:

"THAT until the Plaintiff can obtain full and comprehensive details by Discovery of the method of and manner of the payments made by the Second Defendant under the said contract, the Plaintiff is obliged to sue both the above

named First and Second Defendants to recover any amount due and owing to the Plaintiff by virtue of the payments made incorrectly to the First Defendant."

Discovery was duly made on 19 September 1985. Inspection followed but the Statement of Claim remains unaltered. Discovery was ordered against the Plaintiff in July 1985. An affidavit of documents was sworn by the Plaintiff on 9 April 1985 and notwithstanding the various allegations made by it in the Statement of Claim in relation to a contract between it and the Electric Power Corporation for $480,000 tala, the affidavit of documents of the Plaintiff is completely bereft of the mention of any documents discoverable or otherwise.

At the outset of the hearing of the motions Miss Sapolu for the Plaintiff sought an adjournment on the grounds that counsel for the Plaintiff Mr Lockhart Q.C. was not able to be present. it seems that Mr Lockhart had another fixture earlier this week and had hoped to combine both matters in the same journey from New Zealand. I refused the adjournment because of the history of this claim, the numerous adjournments and the failure by the Plaintiff to actively prosecute its claim. It really is not good enough that the Court should be virtually trifled with and that the parties other than the Plaintiff should be put to considerable time and effort to comply with the whims of the Plaintiff when and if it is disposed to do anything.

The relevant section in the Limitation Act 1975 is section 21. It reads as follows:

"21. Protection of persons acting in execution of statutory or other public duty --

(1) No action shall be brought against any person (including the Government) for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty, or authority, unless--

(a) Notice in writing giving reasonable information of the circumstances upon which the proposed action will be based and the name and address of the prospective Plaintiff and of his solicitor or agent (if any) in the matter is given by the prospective Plaintiff to the prospective Defendant as soon as practicable after the accrual of the cause of action; and

(b) The action is commenced before the expiration of one year from the date on which the cause of action accrued:

Provided that, where the act, neglect, or default is a continuing one, no cause of action in respect thereof shall be deemed to have accrued, for the purposes of this section, until the act, neglect, or default has ceased:

Provided also that the notice required by paragraph (a) of this subsection may be given, and an action may thereafter be brought, while the act, neglect, or default continues:

Provided further that any such person may consent to the bringing of such an action at any time before the expiration of 6 years from the date on which the cause of action accrued, whether or not notice has been given to the prospective Defendant as aforesaid.

(2) Notwithstanding the foregoing provisions of this section, application may be made to the Court, after notice to the intended Defendant, for leave to bring such an action at any time before the expiration of 6 years from the date on which the cause of action accrued, whether or not notice has been given to the intended Defendant under subsection (1); and the Court may, if it thinks it is just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it is just to impose, where it considers that the failure to give the notice or the delay in bringing the action, as the case may be, was occasioned by mistake or by any other reasonable cause or that the intended Defendant was not materially prejudiced in his defence or otherwise by the failure or delay."

It is common ground that notice under s.21(1) was not given. The Claim was filed on 2 April 1985. It alleges monies paid wrongfully in 1983. It seeks interest from 1 April 1983 and presumably implies that that was the date on which payment was due and then the cause of action arose. Notice therefore should have been given by 1st April 1984. In fact no formal notice has ever been given although clearly the 2nd Defendant was alerted to the claim when the documents were served on 29 April 1985.

Section 21(2) allows the Court to grant leave to an intended Plaintiff to bring an action against the intended Defendant within 6 years from the date on which the cause of action accrued, and accordingly it is still open to the Plaintiff to apply for leave within that 6 year time frame. The time which has now elapsed is 5 years and 3 months.

This is not the first occasion on which this particular Plaintiff has been involved in an application of this nature. In Milford

Builders Ltd v Western Samoa Shipping Corporation et al this Court rejected an application for leave. During the course of his exhaustive judgment which reviewed the authorities in this field Bathgate J noted that the intended Plaintiff had commenced its action in precisely the same manner as in this case viz. by service of a summons and statement of claim. Again in that case, as in this, the Government took steps in reliance upon s.21(1) and the Plaintiff sought leave by making an application under s.21(2). The application was refused and at page 20 the following passage occurs:

> "In the present case I have found that there was no notice at all given under section 21(1)(a). The question of the sufficiency of the notice does not arise. The provisions of section 5(i) of the Acts Interpretation Act 1974 apply. The true intent, meaning, and spirit of section 21 of the Limitation Act is to protect persons in the position of the second and third Defendants, acting in pursuance of any public duty or authority from stale claims and to ensure they have notice of the claim against them as soon as practicable after the accrual of the cause of action giving rise to that claim. For the Plaintiff to commence its action without any prior notice, and then to be able to get leave to continue with the action would in my opinion be contrary to the true intent, meaning and spirit of section 21. Except as provided in Kaihe's case the section does not authorise the Court to grant leave retrospectively in respect of the action already commenced. In my view I have no jurisdiction to grant the application now sought by the Plaintiff for leave under section 21(2) to enable the Plaintiff to continue with its action."

With that passage and decision I wholeheartedly concur. The present case differs not to any significant extent. Accordingly the application for leave is refused.

I think I should say in conclusion that my perusal of the papers indicates that the Plaintiff would be in great difficulty resisting the 2nd Defendant's claim to dismiss the Plaintiff's claim to strike out, both on the failure to prosecute ground and also the failure to disclose a cause of action. It is not necessary for me to make any finding in respect of either of those claims. The Plaintiff is refused leave to bring an action against the 2nd Defendant. The claim against the First Defendant is naturally enough still extant.

As to costs: The 2nd Defendant claims costs in the sum of $7000. With all due respect to the 2nd Defendant it does seem to me that much of that expenditure may well have been avoided had a motion based on s.21 been filed earlier in the piece. The 2nd Defendant is entitled to some costs however which I fix at $1500.00.