IN THE SUPREME COURT OF WESTERN SAMOA C.P. 42/97

BETWEEN **TOFILAU ETI ALESANA** of Apia, Prime Minister

Plaintiff

AND **SAMOA OBSERVER COMPANY LIMITED**, a duly incorporated company having its registered office at Vaitele, Western Samoa

First Defendant

AND **SAVEA SANO MALIFA**, Publisher of Apia

Second Defendant

Counsel: M.S. Jacobs QC and S. Jacobs for Plaintiff
R.E. Harrison QC and H. Schuster for First and Second Defendants

Hearing: 20, 21, 22, 23, 24, 27, 28, 29 and 30 April and 1, 2, 3 and 4 May 1998

Judgment: 6 July 1998

JUDGMENT OF SIR GORDON BISSON

This is an action brought by the Prime Minister of Samoa, Tofilau Eti Alesana, against Samoa Observer Company Limited and Savea Sano Malifa claiming $400,000.00 general damages for defamation in an editorial published in the *Sunday Samoan* on 8 December 1996. According to the evidence of the second defendant, he is the managing director of the first defendant which is the printer and distributor of both the *Samoa Observer* and *Sunday Samoan* newspapers and he as the

Editor-in-Chief is the publisher of both newspapers in terms of the Newspapers and Printers Act 1992/93.

As the defendants contend that the two paragraphs giving rise to the plaintiff's claim of defamation must be read in their context and are in their context not defamatory, I set out the full text of the editorial:

> **"PM's saying no one is indispensable**
>
> Prime Minister Tofilau Eti Alesana is reminding his cabinet and the public that he is still the boss. By demoting the Minister of Public Works, Leafa Vitale, to Post Offices and Telecommunications, he is saying that no one - not even someone who has been widely considered his right hand man - is indispensable.
>
> Leafa, as we all know, has been the get-things-done man. He has been widely heralded as the one who got the country's roads quickly rebuilt after the extensive damage done to them by Cyclones Ofa and Val. His road construction company, Axis, has resealed roads in the Apia area at the reported cost of $US47,000 ($WS112,800) a mile.
>
> He has also championed the water drilling campaign in the villages receiving a lot of good publicity in the process. As Minister of the Electric Power Corporation, he was the man in the forefront of the drive to build the multi-million dollar hydro power plant at Afulilo, Aleipata, now providing electricity for most of Upolu.
>
> The Public Works Department under his leadership pushed for the beautification of the Apia waterfront by tarsealing the frontage of the government's office complex on Beach Road, the area behind the old Savalalo Market, and reclaiming the sea in front of the Tusitala Hotel.
>
> It also helped build Tofilau's Savaiian Hotel at Lalomalava, Savaii, in preparation for the visit of Prince Edward from Britain. Prince Edward came to hand over funds made by a pass-the-ball fundraiser in the wake of Manu Samoa's successful debut in the 1991 World Cup tournament. Those funds were to build a rugby playing field in the big island.

In parliament later, Tofilau admitted that the government gave $250,000 towards the construction of his hotel because Prince Edward was going to stay there during his visit. But Prince Edward did not do so. He returned to Apia after the presentation ceremony and stayed at Aggies Hotel.

So whatever drove Tofilau to demote his right-hand-man to the Ministry of Post Offices and Telecommunications is not clear. What is clear is that he has been doing more than building roads and water drilling. He had threatened to kill a number of people, got the EPC to buy a generator from his company at a profit of $81,000, and named a stage built for the recent Pacific Arts Festival behind the government's office complex on Beach Road, after him.

But many believe that being the Minister of Posts and Telecom might turn out to be a blessing after all. Bear in mind that most of the roads and other major public projects have been built, so there has not been much to keep the government's top troubleshooter occupied. But the cellular phone project coming up in Posts and Telecom could require the man's forceful drive.

By the way, the most recent acquisition by the government's "can-do" man is the up-market bar and restaurant built on public land behind the government's Human Rights Protection Party headquarters at Mulinu'u. Is he out to take over the HRPP? Time will tell. But both the HRPP's headquarters and this bar/restaruant are on land leased from the public.

So why is the government giving villages such as Vaiusu, Vailoa and others, such a hard time over the land at Tuana'imato? It seems as though the government and its cabinet ministers can have all the public land they want and never mind the ordinary folk, the rightful owners of these lands. Think seriously about this Samoa and have a peaceful Sunday."

The statement of claim cited the three paragraphs which have been underlined in this judgment. The paragraphs to which offence is taken are underlined paragraphs two and three. The plaintiff pleads that in their natural and ordinary meanings the words in paragraphs two and three meant and were understood to mean that:

(a) The Prime Minister acted corruptly and inappropriately in allowing the Public Works Department to help build the Savaiian Hotel for his personal gain, in regard to the hotel at Lalomalava, Savaii.

(b) The Prime Minister acted corruptly and inappropriately in accepting $250,000 of public funds for his personal gain in regard to the hotel at Lalomalava Savaii.

(c) The Prime Minister admitted to Parliament to having accepted $250,000 of public money for his personal gain in regard to the hotel at Lalomalava, Savaii.

The argument of the plaintiff was that paragraphs two and three should be read together and amount to a statement of corruption on a massive scale by the Prime Minister, namely that he had received $250,000.00 from the government towards the construction, that is, to help build his hotel at Lalomalava. In fact it was not his hotel nor had he received any sum for that purpose. The opposing argument of the defendants was presented in detail in ten pages of Mr Harrison's closing submissions. Their case was that the passage of the editorial sued upon is not defamatory in the context of the editorial as a whole nor even when viewed in isolation. The particular edition of the newspaper had on pages 1 and 2 the news item headed "Cabinet Reshuffled". This dealt with various changes in portfolios held by Cabinet Ministers which changes were solely the prerogative of the Prime Minister and included demoting Leafa Vitale from Minister of the Public Works Department to Minister for Post Office and Telecommunications. This particular cabinet change gave rise to the editorial in question under the heading "PM's saying no one is indispensable". Mr Harrison says that what the editorial is effectively doing is to make the point that Mr Vitale has done a great many good things for Samoa as Minister of Public Works, including one thing which may perhaps be thought to have indirectly benefited the

Prime Minister. Mr Jacobs described "indirectly benefited" as a "euphemistic gloss" when paragraphs two and three are read together. But, Mr Harrison points out, paragraph two does not assert what was the nature, extent or value of the "help" provided. He claims paragraph two is all true with one exception, namely that the hotel is not the Prime Minister's but his daughter's and son-in-law's. Then as to paragraph three, Mr Harrison says that it does not state that the plaintiff "allowed" the Public Works Department to do anything and linking the work done by the Public Works Department to the preparation for the Prince's visit and proposed stay at the hotel, read with the preceding paragraph as part of an overall list of the Public Works Department's achievements, it conveys an implication of legitimacy rather than the converse. There may be an implication of the converse if one reads the paragraph next after para. 3.

Mr Harrison submitted that the innuendoes pleaded by the plaintiff are to be drawn from the first sentence of paragraph three, namely, that the Prime Minister admitted in Parliament that "the government gave $250,000 towards the construction of his hotel ..." To overcome the innuendo of corruption, Mr Harrison argued that there was no assertion or hint of impropriety on the part of the Prime Minister in the Prince not staying at the hotel and that the "admission" alleged to have been made by the Prime Minister in Parliament was not an admission that he had done something but an admission that the government did something for a stated reason or purpose. Mr Harrison says that the Prime Minister "stands accused of no action in relation to the matter" whereas two innuendoes pleaded allege that the Prime Minister "acted" corruptly and inappropriately in allowing the Public Works Department to help build

the hotel for his personal gain and "acted" corruptly and inappropriately in accepting $250,000.00 of public funds for his personal gain. I cannot accept that line of reasoning. Allowing work to be done on what was alleged to be his hotel and thereby accepting a benefit show how the Prime Minister "acted". Mr Harrison further argues that there is no suggestion in the editorial that the Prime Minister was in any way involved in any decision-making leading to the provision of help by the Public Works Department to build the hotel, which, Mr Harrison stresses, was for the legitimate purpose of assisting to provide suitable accommodation for a Royal visitor. The editorial does not state, Mr Harrison says, that the government gave $250,000.00 to the Prime Minister.

In answer to the first main issue in this case, whether the passage sued upon bears any of the defamatory meanings pleaded and thus (whether true or false) defames the plaintiff, Mr Harrison concluded as follows:

> "Submitted therefore that overall and in particular when read in the context of the editorial as a whole, the passing references to the plaintiff in the passages complained of, forming an integral part of a review of the performance of Mr Vitale and the Public Works Department under his leadership, simply do not in their natural and ordinary meaning convey to the reasonable ordinary reader any message defamatory of the plaintiff. Far less do they convey the particular pleaded meanings. A key reason why this is so, is that the editorial is not actually about corruption or impropriety on the part of the plaintiff (or anyone else for that matter), at all. It is all about the other matters already identified. It would therefore require a complete shift of focus, by the ordinary reasonable reader of the editorial as a whole, to move from those matters praiseworthy even to thoughts of impropriety, far less corruption. The editorial does not in any way invite such a shift, and it is straining at a gnat to suggest that the ordinary reasonable reader, reading through the editorial as an opinion piece dealing with the cabinet reshuffle/demotion issue, would make the leap to the plaintiff's pleaded innuendoes."

Admittedly "matters praiseworthy" are referred to in the editorial but there were apart from the allegedly defamatory paragraphs, other matters raised which have a flavour of criticism of the government ending with the words, "Think seriously about this Samoa ...."

My task is to decide whether or not the words complained of are reasonably capable of bearing the meaning defamatory of the plaintiff as alleged, and if they are, whether they did in fact bear such a meaning. It is clear that the words in question relate to the plaintiff and I have no doubt that the natural and ordinary meaning of the words in question would be likely to convey to the ordinary person that the Prime Minister had benefited from public funds in a way which would lower him in the estimation of right-thinking members of society generally

What springs to mind when one reads paragraphs two and three is that the Prime Minister is said to be the owner of a hotel, that the Public Works Department helped build (not just decorate) that hotel in preparation for Prince Edward's visit, and that $250,000.00 had been given by the government towards the construction of his, the Prime Minister's hotel, which the Prime Minister admitted in Parliament to be true. Here was a revelation that the Prime Minister had benefited to the tune of a quarter of a million tala spent by the government in helping build his hotel. There was evidence that the minimum wage in Samoa is 1.25 tala an hour and that the average level of income per adult is 10,000 tala a year. The ordinary person reading paragraphs two and three would think it outrageous that the Prime Minister should personally benefit by such a very substantial amount from public funds being spent whether helping build

or towards the construction of his hotel, whatever the reason or purpose of such expenditure might be. It would be quite inappropriate for him to allow such a thing to happen without an undertaking to reimburse the public purse. There was no such qualification to the alleged expenditure. It smacks of corruption on a grand scale.

This matter had first been raised in Parliament by the Leader of the Opposition on 13 July 1994 when the Prime Minister denied he had used government funds to construct his hotel at Savaii. He said this "allegation is unfounded and is wrong". The matter was not raised again in Parliament until 5/6 March 1996.

On 7 March 1996 the *Samoa Observer* (the defendants' newspaper) on its front page carried the headline "PM denies $0.25m spent on his hotel" and the following text referred to the Prime Minister's denial in Parliament that public funds had been spent in building "his children's hotel" in Savaii. That this was a correct report of Parliament is confirmed by the affidavit of Mr U.N. Petana, Chief Hansard Editor and Assistant Clerk of the Legislative Assembly, who deposed (Vol 1, p 137, para 9):

> "9. ... I remember being present in the proceedings of the Legislative Assembly when Honourable Letiu Tamatoa accused the Honourable Prime Minister of using $250,000 of public funds for the construction of the hotel at Lalomalava. I also recall the Prime Minister emphatically denying the allegation with words to the effect that no government money was used to build his children's hotel."

He also confirmed that the report and translation in Hansard of the debate on 6 March 1997 is accurate. Contrary to that newspaper report of what the plaintiff

had said in Parliament in March 1996, the editorial in question claims in December 1996 that the plaintiff later "admitted" that the government gave $250,000.00 towards the construction of "his hotel". Here we see a switch from a denial to an admission and a switch from "his children's hotel" to "his hotel" made by the second defendant.

The second defendant admitted that there had been no public discussion that he was aware of, of the issue of government assistance with the construction of the Savaiian hotel, in the period immediately preceding his editorial. It came out of the blue in an editorial, in which he says he was conducting an historical review and assessment of the performance of Mr Vitale and of the Public Works Department under him. He further says that while he understood at the time he wrote the editorial, that the Prime Minister had denied in parliamentary exchanges that he had received or used government funds to construct the hotel, the Prime Minister had not denied the use of Public Works Department labour and materials nor had he clearly and unambiguously denied that he had an interest in the hotel. There appears the following paragraph (24) in the second defendant's sworn brief of evidence which he confirmed when called as a witness:

> "ALTHOUGH it seemed to me at the time I wrote the editorial and still seems to me that the plaintiff had said different things at different times concerning assistance with the construction of the hotel and in particular had been mainly concerned to deny the receipt by him or his family of actual public funds (as distinct from the provision of assistance by way of labour and materials), I must now acknowledge after having reviewed the material and in particular the 5 March 1996 Hansard report of the debate and my own report on it in the *Samoa Observer* of 7 March 1996, that, contrary to my belief and recollection at the time I wrote the editorial, the plaintiff did not make the admission in

> Parliament reported in the first sentence of the quoted third paragraph of the editorial. The defendants therefore apologise to the plaintiff for the error contained in that passage. But they do not accept that the passage in the context of the editorial is defamatory of him; nor do they accept that his reputation was damaged by the publication of that passage or indeed the editorial as a whole.

I do not accept his evidence that he made an error contrary to his belief and recollection at the time. The second defendant claims that at the time he was writing the editorial he had a clear recollection of having heard, during a radio broadcast of proceedings in Parliament on Radio 2AP, the Prime Minister make the admission, which he set out in his editorial, in the course of denying an allegation by a member of Parliament that one million tala had been given by the government towards the construction of his hotel. His introduction to the topic with the words, "In Parliament later" signifies he had in mind an earlier denial and now refers to a later admission. I do not accept his evidence that there was any such broadcast from Parliament of an exchange between a member and the Prime Minister in which the Prime Minister denied an allegation that it was one million but admitted it was a quarter of a million that was given towards the construction of his hotel. I do not accept that the second defendant had an honest belief that he had heard any such broadcast. It is surprising that the editorial made no reference to a member accusing the Prime Minister that $1 million had been given towards the construction of the Prime Minister's hotel as, according to the second defendant, that gave rise to the Prime Minister's admission. Hansard has been searched and there is no record of any such exchange in Parliament. The second defendant named the member of parliament whom he says he heard take part in such an exchange. He has not called him to testify to such an exchange taking place and has not called any witness to say that they heard such an exchange.

Mr Jacobs made it very clear that his case was "there was never any broadcast and he (the second defendant) didn't hear anything like that" (Vol. 14(2), p 202). I agree.

Mr Harrison submitted that although there is no corroboration that there was any such broadcast, and although the defence of justification was partially withdrawn, the second defendant nevertheless maintained that he had an honest belief in having heard such a broadcast when he wrote his editorial. This raises the question of his credibility on this issue. I do not accept his protestation of an honest belief. I see it as an attempt to cling to a defence of "honest belief". I simply do not accept his evidence of honest belief in what he now admits was a non-existent admission in a Parliamentary debate. I have not reached this conclusion without careful consideration nor without support for my view of Mr Malifa as a witness.

In his sworn brief of evidence, after referring to his clear recollection of having heard the plaintiff's admission in Parliament which he cited in his editorial, the second defendant continued in the same paragraph (20) to say:

> "To the best of my recollection I did not make any written notes of the plaintiff's statements on that occasion. Any such notes if they had existed would have been destroyed by the April 1994 fire in any event."

He admitted that was a mistake on his part as the fire of April 1994 would have been long before the alleged broadcast on which he says he relied in writing his editorial and which was on a date which he could not specify between 7 March 1996 and 7 December 1996 (Vol. 14(1), pp 19/20). I regard it as a telling mistake.

A mistake by a man desperately trying in some way to support his statement that he had heard such a broadcast, a statement for which there is no support at all.

The second defendant did not impress me as a witness. At times he refused to face reality and was evasive. An example was his efforts to apply a meaning to the words "helped build Tofilau's Savaiian hotel" and "towards the construction of his hotel" which would include Mr Naulu's evidence that the Ministry of Works had only carted sand and scoria and done levelling work outside the hotel building. I set out the following passage from the cross-examination, at Vol. 14(2), p 121:

> "Q. I take it that by the word "build", you understand that building is also like construction, to build onto a structure or build a structure, is that right?
> A. Similarities in meanings. Meaning to create something, to build something new or add addition to something that is already there.
> Q. You don't regard the works referred to in Mr Naulu's affidavit as building, do you?
> A. Anything in my opinion, when I use those terms, that requires additional work can be called building, can be classified as construction.
> Q. So you would say that what Mr Naulu says the department did in 1992 was building work?
> A. I would say that."

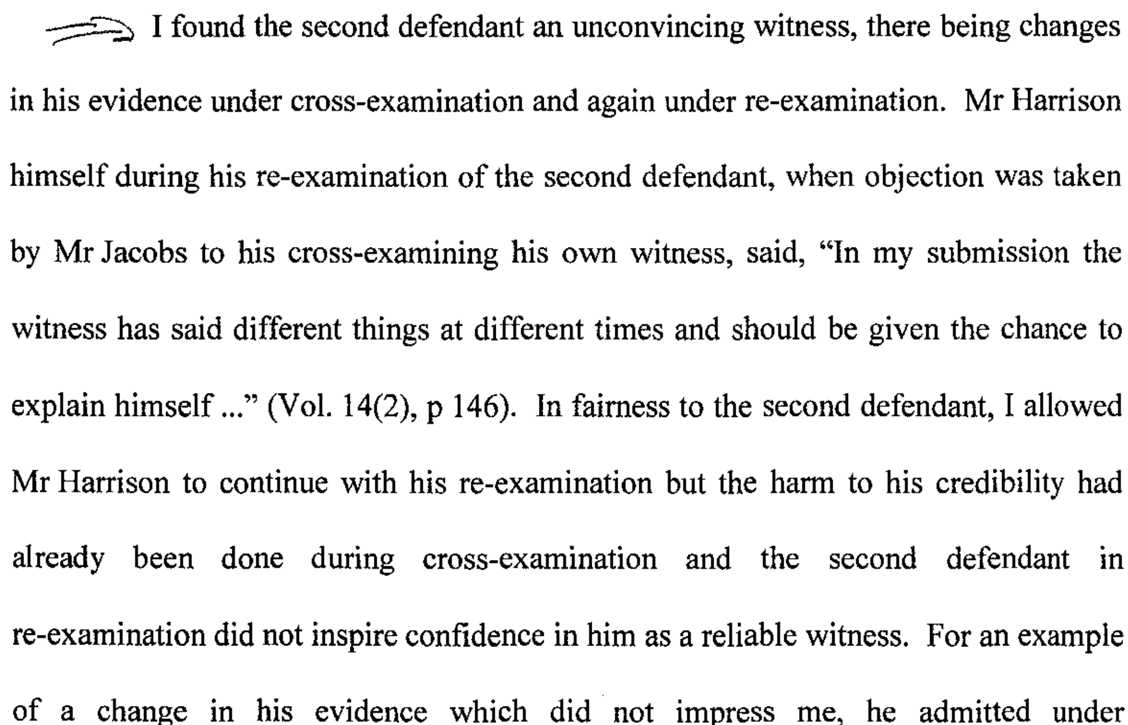
I do not accept that a man who had studied engineering in New Zealand, has been employed in journalism since 1974 and an author of a novel and two books of poetry could seriously understand the work done by the Public Works Department to improve the approach to the hotel as coming within his own words in his editorial of helping to build a hotel or towards construction of a hotel. Reading paragraphs two and three together, which relate the building and construction work to government expenditure of $250,000.00, I have no doubt that the ordinary reasonable reader and

any jury would understand that the government had spent a substantial sum of money in helping build or construct the hotel building, that is, the structure itself.

In his brief of evidence the second defendant refers more than once to Samoa having a serious problem as regards corruption in public life and he says it requires the provision of both investigative journalism and editorial comment. But in this case there was no investigation by the second defendant into the ownership of the hotel nor into what work the Public Works Department actually did, if any, in helping to build or towards construction of the hotel nor as to what authority Mr Vitale had to spend $250,000.00 on such work. The second defendant no doubt has the good intention of fighting any corruption in Samoa but in this instance he got carried away and chose the occasion of his editorial to raise the spectre of corruption against the Prime Minister without any foundation after the matter had been laid to rest with the Prime Minister's denial which was published by the defendants some nine months previously. This editorial was not investigative journalism inspired in the public interest. In all the circumstances I can only regard the false statements in paragraphs two and three as an expression of ill will towards the Prime Minister. It speaks for itself. That he does bear ill will to the Prime Minister is manifested in my view by his raising, in mitigation of damages, the Prime Minister's convictions in a minor matter thirty years ago, about which more later in this judgment.

In the context of his claim to being an investigative journalist, he was cross-examined about why he did not investigate matters raised in the Parliamentary debate he claimed to have heard before he referred to the Prime Minister's

"admission" in his editorial. He said that, when he wrote the editorial on Saturday 7 December 1996, he had a deadline for publication the next day so there was not time nor the opportunity to investigate the matter. I do not accept that argument. The editorial could have been published without the reference to the Prime Minister. If there had been any such broadcast it could have been investigated before or after the publication of the editorial. It would be irresponsible journalism to report such a turnaround on the part of the Prime Minister without some further enquiry. Why should the Prime Minister admit the government gave $250,000.00 towards construction of his hotel when no such sum had been given and it was not his hotel? To make such an admission after a denial nine months earlier is extraordinary, surely calling for the second defendant to give the Prime Minister an opportunity to comment before he published the editorial. The simple answer is that there was no investigation as there was no such broadcast.



I found the second defendant an unconvincing witness, there being changes in his evidence under cross-examination and again under re-examination. Mr Harrison himself during his re-examination of the second defendant, when objection was taken by Mr Jacobs to his cross-examining his own witness, said, "In my submission the witness has said different things at different times and should be given the chance to explain himself ..." (Vol. 14(2), p 146). In fairness to the second defendant, I allowed Mr Harrison to continue with his re-examination but the harm to his credibility had already been done during cross-examination and the second defendant in re-examination did not inspire confidence in him as a reliable witness. For an example of a change in his evidence which did not impress me, he admitted under

cross-examination that when he heard by radio the allegation by the Opposition in Parliament that "the Prime Minister had received .25 million tala for his hotel" he understood that to be an allegation that the Prime Minister was corrupt and he was asked:

> "And you believed that the allegation was that this was corruption on a massive scale at the highest level, that is what you understood?"

He answered:

> "That is true".

However, in re-examination he said his own view of the matter was that there was nothing wrong if the government gave the Prime Minister $250,000.00 towards the building or construction of his hotel for the particular purpose for which it was allegedly given and he said that if the funds were approved properly for upgrading of the hotel in anticipation of the visit by the Prince, then that would not in his mind be corrupt.

That endeavour to extricate himself from his acceptance that the Opposition's allegation that the Prime Minister had received .25 million tala for his hotel amounted to an allegation of corruption and that it was massive corruption at the highest level, an acceptance by him which obviously rebounded on him as he had made without any foundation the same allegation in his editorial, was not a successful recovery in re-examination as he had to qualify his response, that he saw nothing wrong in the expenditure of $250,000.00 for the particular purpose of the Prince's

visit, by the qualification if the funds were properly approved for the upgrading of the hotel. If he had investigated the matter he would have found that there had been no such expenditure and that the only work done by the Public Works Department in preparation for the Prince's proposed stay at the hotel could not be described as "helping to build" or "towards construction" or even upgrading the hotel. Mr Toia Naulu, employed by the Public Works Department as superintendent at Savaii, gave evidence that the work done by the Public Works Department in preparation for the Prince's visit was carting sand to the hotel to cover rocks on the foreshore, carting scoria to level and pave the path leading up to the hotel and levelling the surrounds. The costs he gave for this work totalled $1860.00 of which the owner of the hotel paid $150 for the scoria. This work I would describe as cosmetic and what one would expect the government to do before a Royal visit. The witness further testified that the Public Works Department did not undertake any work to assist in the building and/or construction of the hotel. The minor work proved by Mr Naulu to have been done is not alleged by the defendants to be an improper expenditure by the Public Works Department nor does it involve the plaintiff in any suggestion of corruption. In fact in cross-examination the second defendant made it clear that he did not intend to allege or accuse the Prime Minister of any corruption or impropriety (Vol.14(1), p 75).

By way of introduction to his closing address, Mr Harrison, repeating what he said in opening, submitted that the main issues for determination were as follows:

1. Does the passage sued upon, read in the context of the editorial as a whole, bear any of the defamatory meanings pleaded and thus (whether true or false) defame the plaintiff?;

2. If so, are the defendants entitled to rely on either their defence of qualified privilege or their alternative defence of constitutional right of free speech in relation to political affairs?;

3. If so, is their defence of qualified privilege or constitutional free speech vitiated on the basis that the plaintiff has proved that they were motivated by "malice" in the writing of the editorial?;

4. If the foregoing questions are answered in favour of the plaintiff, what if any damages should be awarded for damage to his reputation?

Issue 1 - Defamation

I have already answered issue 1 in the affirmative. Before addressing issues 2 and 3, I should mention that the defendants had also pleaded justification as a defence to the extent that if the words in the editorial did bear, in their ordinary and natural meaning, any of the alleged defamatory meanings, they were true (amended at trial by inserting "in part") in substance and in fact. A further and alternative defence was that the said words, in so far as they consisted of statements of fact, they were true in substance and in fact and, in so far as they consisted of expressions of opinion, they were fair comment made in good faith and without malice in respect of facts which were a matter of public interest. These defences of justification and fair comment were not included by Mr Harrison in the main issues which he listed. In referring to the defence of justification he conceded that the evidence did not reveal any interest held by the plaintiff in the hotel. As to the alleged admission by the plaintiff that the government gave $250,000.00 towards the construction of his hotel, Mr Harrison said that as that admission occurred in the context of an incorrect paragraph which the defendants have not sought to justify overall, this was at best a matter of partial

justification going if need be to mitigation. This defence of justification must fail as on the evidence I find that the defamatory statements in paragraphs numbered two and three in the editorial are not true. I also hold against the defence of fair comment as there were no comments, only alleged facts, in the said paragraphs.

Issue 2 - Qualified Privilege or a Constitutional Defence

Mr Harrison chose first to argue the defence of constitutional free speech in relation to political affairs. He regarded the case as important "if not ground-breaking" for freedom of the press and for democracy in the Independent State of Samoa.

The Constitution of Western Samoa was enacted on 28 October 1960. In Part II which deals with Fundamental Rights, Article 13(1) provides that:

> "All citizens of Western Samoa shall have the right -
>
> (a) to freedom of speech and expression;"

That provision must be read subject to the next subclause (2) which, after omitting words irrelevant for present purposes, reads:

> "Nothing in subclause (a) of clause (1) shall affect the operation of any existing law ... in so far as that existing law ... imposes reasonable restrictions on the exercise of the right (to freedom of speech and expression) ... in the interests of ... public order or morals ... for preventing ... defamation ..."

"Existing law" is defined in Art. 111(1), unless the Constitution otherwise provides or the context otherwise requires, as meaning:

> "Any law in force in the Trust Territory of Western Samoa or any part thereof immediately before Independence Day (1 January 1962):"

and "law" means:

> " any law for the time being in force in Western Samoa; and includes this Constitution, any act of Parliament and any proclamation, regulation, order, by-law or other act of authority made thereunder, the English common law and equity for the time being in so far as they are not excluded by any other law in force in Western Samoa, and any custom or usage which has acquired the force of law in Western Samoa or any part thereof under the provisions of any Act or under a judgment of a Court of competent jurisdiction:"

By Art. 114, subject to the provisions of this Constitution -

> "(a) the existing law shall, until repealed by Act, continue in force on and after Independence Day; and
>
> (b) all rights, obligations and liabilities arising under the existing law shall continue to exist on and after Independence Day and shall be recognized, exercised and enforced accordingly; ..."

For the purposes of this action the law relating to libel and slander was amended by the Defamation Act 1992/1993 and the English common law for the time being was interpreted by the Court of Appeal of Samoa in *L v L* (C.A. 21/93; judgment 28 March 1994) as follows at p 6:

> "We agree with the opinion of St. John C.J. in *Opeloge Olo v Police* (Misc. 550; Crim. No. M5092/80) that, as he put it, in the foregoing definition 'the adjective English is descriptive of a system and body of law which originated in England and is not descriptive of the courts which declare such law'. Thus, in determining the common law applicable in Western Samoa, the courts of this country are free to draw on decisions in common law jurisdictions other than England itself, although English precedents will always be among the primary sources. Where,

> for instance, there are differences of approach in the other jurisdictions, the Western Samoa Courts will select or evolve the solution which they adjudge to be the most suitable for the society of Western Samoa. Indeed, in no case can any overseas decision be an absolutely binding precedent for the Western Samoa courts, but decisions of overseas national appellate courts are likely to have especial persuasive force and obviously unanimity of opinion among the jurisdictions would be very telling."

In that judgment the Court of Appeal also held that the common law to be applied in Samoa should not be treated as static as at Independence Day 1 January 1962 as there is room for continued development of the common law. Furthermore, the judgment of Sapolu C.J. which was under appeal was "fully in harmony" with what was said by the Court of Appeal.

It follows from that decision that the freedom of speech and expression provided in Art. 13(1) is subject under Art. 13(2) to the operation of the existing common law of defamation in so far as that existing common law may be developed without imposing unreasonable restrictions on that freedom of speech and expression in the interests of public order or morals for preventing defamation.

In raising as a defence to what I have held to be statements defamatory of the plaintiff, a constitutional right to free speech and expression, Mr Harrison submitted that the Court could not find the defendants liable in damages because what they published was in exercise of their constitutional right of free speech and expression. But for present purposes he limited that freedom of speech and expression to a political discussion. Accordingly I approach this issue to that extent.

The starting point is the fundamental right of freedom of speech and expression. This is a precious right which the press enjoys as a watchdog in the public interest to expose corruption in holders of political office and in the conduct of public affairs. It is in the interests of those exercising their universal voting rights in Samoa to be informed of corruption, if it exists, in the halls of power. But this fundamental freedom is not absolute, it must be curbed to prevent defamation to the extent that the law in Samoa imposes reasonable restrictions on the exercise of that right. The restrictions involve the recognition of the right in everyone to their good name and the right not to have their reputation disparaged by defamatory statements made about them by third persons without lawful justification or excuse. Samoa has retained the offence of criminal libel, which New Zealand has not, showing the importance in Samoan society attached to reputation. It is the common law and the Defamation Act 1992/1993 which impose restrictions on the exercise of that fundamental right of freedom of speech and expression.

Mr Harrison submitted that this case raises issues "of crucial importance to the future freedom, in practice, of the independent media in this country, and to their future ability to publish, in good faith and without the chilling effect of a defamation claim hanging over them at every turn, material dealing fully and frankly with political life and political affairs in the democratic State of Samoa". The key words in that submission are that the publication must be made in good faith. In fact the media need not be independent so long as what it publishes is published in good faith and without malice. It then need not fear "the chilling effect" of defamation proceedings.

The Constitution's fundamental rights in Part II provide, *inter alia*, for the right to life, the right to personal liberty, right to a fair trial, rights regarding freedom of assembly, association, movement and residence and for various freedoms such as freedom from inhuman treatment and freedom of religion. The right to one's good name sits well in this context and as I read Art. 13(2) it is also a fundamental right under the Constitution. The right to freedom of speech and expression under Art. 13(1)(a) is qualified by Art. 13(2) in that nothing in Art. 13(1)(a) shall affect the law as defined and qualified for preventing defamation. And just as the right to freedom of speech and expression is qualified by Art. 13(2) so also is the right to be protected from defamation qualified in so far as the law preventing defamation imposes reasonable restrictions in the interests of public order or morals. To the extent that one right is offset by the other, there must be a balancing exercise to achieve what are reasonable restrictions on the constitutional right of freedom of speech and expression in relation to political affairs. Which in turn raises the question whether the defence of a constitutional right to freedom of speech and expression in relation to political affairs is a separate defence or within the ambit of qualified privilege. Counsel made extensive submissions on the cases of *Lange v Australian Broadcasting Corporation* (1997) 145 A.L.R. 96 and *Lange v Atkinson and Australian Consolidated Press NZ Ltd* [1997] 2 N.Z.L.R. 22. The former, the unanimous decision of the High Court of Australia, recognised that:

> "The purpose of the law of defamation is to strike a balance between the right to reputation and freedom of speech". (p 113)

That is the balancing exercise already referred to in this judgment. In carrying out this balancing exercise, the Court said, at p 113:

> "It is not to be supposed that the protection of reputation is a purpose that is incompatible with the requirement of freedom of communication imposed by the Constitution. The protection of the reputations of those who take part in the government and political life of this country from false and defamatory statements is conducive to the public good. The constitutionally prescribed system of government does not require - to the contrary, it would be adversely affected by - an unqualified freedom to publish defamatory matter damaging the reputation of individuals involved in government or politics."

I respectfully share those views and draw the attention of the defendants to them as, on the occasion of their publication, with which this case is concerned, they allowed their watchdog role, which they saw as operating both in principle and in practice to the benefit of the Samoan people and Samoan public life (see second defendant's sworn brief of evidence, para. 9), to overstep the mark by not keeping in balance the right of an individual not to be defamed.

The High Court of Australia held that defamatory matter published pursuant to a freedom guaranteed by the Commonwealth Constitution as a stand-alone defence was bad in law holding in favour of the defence of qualified privilege appropriately widened in favour of political discussion. The Court held at p 115:

> "Accordingly, this court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion - the giving and receiving of information - about government and political matters. The interest that each member of the Australian community has in such a discussion extends the categories of qualified privilege."

The judgment of Elias J in the High Court of New Zealand in *Lange* (*supra*) expressed the indicative view on an application to strike out a separate defence under the heading "political expression" (as pleaded in the case before this Court) that it should be repleaded as part of the defence of qualified privilege which she said, at p 51:

> "... attaches to political discussion communicated to the general public. 'Political discussion' is discussion which, by developing and encouraging views upon government, bears upon the function of electors in a representative democracy. It is clearly available in the case of discussion about performance in high political office. The defence is available equally to individuals and the news media."

Since judgment was reserved in this case, the Court of Appeal of New Zealand delivered its decision on the appeal from the judgment of Elias J in *Lange*. Counsel then sought leave, which was granted, to file further submissions dealing with the decision. In the Court of Appeal (C.A. 52/97; judgment 25 May 1998) the President, Sir Ivor Richardson and Henry, Keith and Blanchard JJ delivered one judgment and Tipping J another judgment. All Judges agreed that the appeal should be dismissed, holding that the statement of defence was capable of amendment to state a tenable defence of qualified privilege. Tipping J, while not supporting a separate defence of freedom of political discussion, was attracted to the introduction of a requirement in qualified privilege for the taking of reasonable care in verifying the facts, a requirement which he thought would be a desirable ingredient in striking a fair balance between the competing interests. He was ultimately persuaded against introducing reasonableness basically because "however one dressed it up, we would thereby be creating essentially a new defence which is the prerogative of Parliament and not a

bona fide development of the common law defence of qualified privilege". In their separate judgment the other four Judges held that, while indifference to the truth defeats the privilege, carelessness does not. At p 64 they said:

> "Our review of the law as it has developed over the last two centuries or more confirms us in that conclusion. In particular neither the cases nor the legislation incorporate any requirement of reasonable care into the defence of qualified privilege."

The issue of reasonableness arose in *Lange* in the High Court of Australia because it was dealing with the Defamation Act 1974 of New South Wales, s 22 of which provided that:

> "Where, in respect of matter published to any person:
>
> ...
>
> (c) the conduct of the publisher in publishing that matter is reasonable in the circumstances,
>
> ...
>
> there is a defence of qualified privilege for that publication."

There was no similar provision in the New Zealand Defamation Act 1992, nor is there such a provision in the Defamation Act 1992/1993 of Samoa. Mr Harrison invited this Court to treat the decision of the President and three other Judges in the Court of Appeal in *Lange* as both stating the common law and applicable in the Samoan context. In their judgment at p 3 they said:

> "We hold that the defence of qualified privilege applies to generally published statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to be Members, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities. The determination of the matters that

> bear on that capacity will depend on a consideration of what is properly a matter of public concern rather than of private concern."

Mr Jacobs claimed that there was not sufficient identity between culture and values of the New Zealand community on the one hand and the Samoan community on the other to import the Court of Appeal decision in *Lange* into Samoan jurisprudence.

There are differences in the political systems of Australia, New Zealand and Samoa but they all have sufficient similarities in their respective systems of representative government for qualified privilege, as spelt out in the passages quoted above from the High Court of Australia and the Court of Appeal of New Zealand, to be adopted and applied as part of the common law of Samoa. If the facts published in paragraphs two and three of the editorial had been true, they would be very relevant to the Prime Minister of Samoa meeting his public responsibility in a matter which is one of public concern. I would adopt and apply the *Lange* decisions for qualified privilege to Samoa as a proper development of the common law in the interests of freedom of speech and expression in political discussion, without removing the balance needed to prevent defamation.

As to the issue of reasonableness Mr Harrison invited this Court to follow the New Zealand approach in preference to the High Court of Australia in *Lange*, that is, not to introduce a test of reasonableness into the applicability of the defence of qualified privilege. He advanced as a reason that in the media fight against corruption by holders of public office, the media was under-resourced and public sources of

information not readily accessible so that it would always be, with hindsight, possible to construct a case of unreasonableness. I would have thought that those same reasons could be advanced in support of the publisher's conduct as provided in the New South Wales statute, in publishing the matter as reasonable in the circumstances. In Samoa by the Defamation Act 1992/1993 qualified privilege in respect of reporting proceedings of the Legislative Assembly and many other proceedings listed in the Schedule to the Act is available in any civil or criminal proceeding provided it is "fair and accurate" and not made with malice. I see no occasion to add "reasonable" to "fair and accurate" reporting. Parliament did not choose to do so, and I suggest that an unreasonable publication is unlikely to be considered fair. I have already distinguished the High Court of Australia decision in *Lange* as to its application of reasonableness I see no occasion for the above reason and those of the Court of Appeal in New Zealand to introduce in Samoa the test of reasonableness to the applicability of the defence of qualified privilege.

Mr Harrison also submitted that the Court of Appeal in New Zealand in *Lange* did not provide any assistance, one way or another, as to the availability of the defendants' separate constitutional defence based on Art. 13 of the Samoan Constitution. That is so. The Court of Appeal recorded that the "defence of political expression" was not before it as there had been no cross-appeal in respect of the ruling of Elias J that the protection of political discussion does not require a stand-alone defence and that the defence of qualified privilege sufficed. Mr Harrison submitted that the right to freedom of speech and expression "triumphs" over other laws by virtue

of Art. 2 of the Constitution except to the extent that they Art. 13(2) applies. Art. 2 provides:

> "**2. The supreme law**
>
> (1) This Constitution shall be the supreme law of Western Samoa.
>
> (2) Any existing law and any law passed after the date of coming into force of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

The fundamental right to freedom of speech and expression under Art. 13(1) of the Constitution can hardly be said to "triumph" or be in any superior position when it is qualified by Art. 13(2) by laws which impose reasonable restrictions to prevent defamation. Tipping J said at p 2 that Elias J in *Lange* was "absolutely correct" when she said that s 14 of the New Zealand Bill of Rights, which affirmed that everyone has the right to freedom of expression, does not elevate "for all purposes freedom of speech above the right to reputation which is inherent in the dignity of the individual". I am of the same opinion with regard to Art. 13(1) and (2). I see no occasion for the introduction in Samoa of a stand-alone constitutional freedom of speech defence on political affairs when the Constitution itself limits such freedom by existing laws which in Samoa are the Defamation Act 1992/1993 and the English common law, as evolved in Samoa. In accordance with the decision of the Court of Appeal of Samoa in *L v L* (*supra*), I would develop the common law as in New Zealand and Australia to widen the scope of qualified privilege in accordance with the passages I have quoted from both *Lange* cases. With the introduction of universal adult suffrage in Samoa by the Electoral Amendment Act 1990, replacing

matai suffrage, the former being preferred by a majority of the people of Western Samoa voting in the 1990 plebiscite, each member of the Samoan community "has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Samoa" (*Lange v Australian Broadcasting Corporation*, p 115). This widening of the scope of qualified privilege brings political matters within the general rule that there must be a common and corresponding duty or interest between the person who makes the communication and the person who receives it.

Applying that extended meaning to the alternative defence of qualified privilege, the publication of the defendant's editorial of 8 December 1996 would come within the protection of qualified privilege providing information concerning the demotion of a Cabinet Minister and, if truthful, an admission by the Prime Minister that a considerable sum had been given by the government towards the construction of his hotel. As the defamatory paragraphs of the editorial were alleged to be a report of proceedings of the Legislative Assembly, s.18(1) of the Defamation Act 1992/1993 and Part I of the Schedule to the Act apply so that the plaintiff must prove that the qualified privilege was defeated by malice. The defendants pleaded that their report was published without malice and was a fair and accurate report of the proceedings of the Legislative Assembly of Samoa. This defence fails. There were no such proceedings of the Legislative Assembly, so it could not be a fair and accurate report. I come now to the plaintiff's allegation of malice.

Issue 3 - Malice

I accept the burden of proof of malice is on the plaintiff and it is not one which is lightly satisfied. It is express malice with which we are concerned as that rebuts the defence of qualified privilege. For a definition of express malice we must look in Samoa to the common law as there is not a definition in the Defamation Act 1992/1993 and no similar provision to s 19 of the Defamation Act 1992 in New Zealand.

I have already held that there was no parliamentary broadcast as reported in the defamatory publication and that the second defendant did not have an honest belief that there was any such broadcast, and I have given my reasons for reaching those conclusions. Furthermore, I reject the second defendant's explanation for including the offending passages in his editorial, namely that they formed "an integral part of a review of the performance of Mr Vitale and the Public Works Department under his leadership". That is not a credible explanation as the "integral part" did not exist. The offending paragraphs read together were plainly defamatory and, without a credible explanation, I find them to be expressions of ill will towards the Prime Minister, made to embarrass him by raising again Opposition allegations against the Prime Minister of the wrongful use of government funds.

In the leading case of *Horrocks v Lowe* [1975] A.C. 135, it was held that a finding of malice could not stand with a finding of honest belief. Here, without honest belief malice can be found. Viscount Dilhorne said at p 145:

> "If a man abuses a privileged occasion by making defamatory statements which he knows to be false, express malice may easily be inferred."

And Lord Diplock said at pp 149-50:

> "The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another ..."

Again from Lord Diplock at p 152:

> "So the judge was left with no other material on which to found an inference of malice except the contents of the speech itself, the circumstances in which it was made and, of course, the defendant's own evidence in the witness box. Where such is the case the test of malice is very simple. It was laid down by Lord Esher himself, as Brett L.J., in *Clark v Molyneux* 3 Q.B.D. 237. It is: has it been proved that the defendant did not honestly believe that what he said was true, that is, was he either aware that it was not true or indifferent to its truth or falsity?"

With the benefit of seeing and hearing Mr Malifa give evidence and not accepting his credibility on his claim to an honest belief in having heard the broadcast, I draw the inference that he knew the defamatory statements were false, that he was motivated by ill will to the Prime Minister and intended to injure his reputation. I find express malice and accordingly the defence of qualified privilege including the widened defence of constitutional free speech on political matters fails.

Issue 4 - Damages

The defendants in their First Amended Statement of Defence dated 14 April 1998 raised a plea in mitigation of damages:

> "16. The First and Second Defendants will at the trial of the action lead evidence that the Plaintiff had on or before 8 December 1996 or alternatively has now a bad or a diminished reputation as a man who had committed an offence or offences of dishonesty, in that he was on or about 14 June 1966 convicted of two counts of theft in the Tuasivi Magistrates' Court under the name Vaaelua Eti.
>
> 17. Further or alternatively, the First and Second Defendants will at the trial of the action lead evidence that the Plaintiff currently has a bad or diminished reputation by reason of his having publicly denied contrary to the truth the existence of the convictions referred to in the immediately preceding paragraph, as follows:
>
> 17.1 In the Legislative Assembly of Samoa on 1 and 2 July 1997;
> 17.2 In the Legislative Assembly of Samoa on 28 August 1997;
> 17.3 In the Legislative Assembly of Samoa on 29 January 1998;
> 17.4 In the Legislative Assembly of Samoa on 11 and/or 12 February 1998;
> 17.5 Publicly, on one or more other occasions which the First and Second Defendants propose, but are presently unable to particularise."

Dealing first with paragraph 16. On 14 June 1966 the plaintiff was one of 18 matai of the village of Lalomalava who were convicted and fined £2.10.0 on each of two charges that on or about April or May 1965 they abetted in the commission by others of the offence of theft and thereby were parties to the offence. According to the facts of the case, most of the coconut trees planted by the village were badly damaged by stray cattle. After a warning broadcast on Radio 2AP that wandering cattle found between Fusi and Lauto'i would be treated as wild beasts and killed, two cattle beasts

found on the new coconut plantation of the village were killed by young men of the village, six of whom were charged with the theft of two breeding cattle beasts of a total value of £47.0.0. They were convicted and discharged. It appears that they were carrying out the directions of the village Tuua and matai who were charged with abetting the offence. When one takes into account the facts of the case and that the villagers acted to protect their own property after a warning broadcast by radio and that these convictions of the plaintiff were 30 years ago, I am satisfied and I hold that these two convictions of the plaintiff would not lower him in the estimation of right thinking members of the community. These facts were known to the defendants and raising this plea a week before trial does them no credit. Any fair minded person could not possibly consider that such an incident of this sort 30 years ago would support a plea that the Prime Minister had a bad or diminished reputation. Again, it speaks for itself as evidencing the second defendant's feelings of ill will towards the Prime Minister. This submission on mitigation of damages accordingly fails.

Turning now to para. 17, this raises a different aspect to the convictions themselves. When the Leader of the Opposition raised them against the Prime Minister in the Legislative Assembly there was set in train a number of debates in which the Prime Minister made various statements and there was some confusion over the nature of the offences, usually referred to as theft and not as being one of 18 matai who abetted the offence and there was confusion because of the disappearance at one stage of the Police file. There was also a suggestion of a "cover-up". This whole matter was referred to during this trial as the "previous convictions saga". To get to the bottom of this matter would involve a trial within a

trial which should not and need not be undertaken. The plea in mitigation alleges the plaintiff "having publicly denied contrary to truth the existence of the convictions". I should point out that the plaintiff made no statements on this matter other than in the Legislative Assembly debates which are broadcast on radio and recorded in Hansard on the dates listed in paragraphs 17.1 to 17.4. No further occasions were raised under paragraph 17.5.

The second defendant in his supplementary brief of evidence sworn on 21 April 1998 testified that "the whole previous convictions saga, played out in Parliament and broadcast live to the nation on national radio has progressively in my assessment more and more seriously damaged the plaintiff's reputation". I have already held that the convictions as such would not diminish the plaintiff's reputation but the defendants claim that the Prime Minister made certain denials, contrary to truth, that he had been convicted which would tarnish his reputation. The defendants rely on paras 17.1 to 17.4 to prove the occasions in the Legislative Assembly when they say the plaintiff made certain denials contrary to the truth. Mr Jacobs has argued that I should follow the decision of the Privy Council in *Prebble v Television NZ Ltd* [1994] 3 N.Z.L.R. 1, and not refer to the Hansard record of what the Prime Minister said in the Legislative Assembly to impugn the plaintiff's credit as a basis for submitting he made statements contrary to the truth. In *Prebble*, also a defamation case, the judgment of their Lordships was delivered by Lord Browne-Wilkinson who said at p 10:

> "For these reasons (which are in substance those of the Courts below) Their Lordships are of the view that parties to litigation, by whomsoever commenced, cannot bring into question

> anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading. Such matters lie entirely within the jurisdiction of the House, subject to any statutory exception such as exists in New Zealand in relation to perjury under s 108 of the Crimes Act 1961."

This judgment did not rely alone Article 9 of the Bill of Rights 1688 which is in force in New Zealand but not in Samoa. The judgment referred to there being, in addition to Art. 9 itself, a long line of authority which supports a wider principle, of which Art. 9 is merely one manifestation, viz. that the Courts and Parliament are both astute to recognise their respective constitutional roles.

The judgment of the Privy Council in *Prebble* has been applied in Samoa by the Court of Appeal of Samoa in *Ah Chong v The Legislative Assembly of Western Samoa and others* (C.A. 2/96; judgment 17 September 1996), as stating a well-settled principle accepted in all comparable jurisdictions. While that principle may have some limits because of the written constitution of Samoa, this case falls clearly within the above quote from *Prebble* relating as it does to words alleged to be untrue. Applying that principle in this case, I do not allow the defendants to lead evidence by reference to Hansard to prove that the Prime Minister in the Legislative Assembly publicly made denials of convictions contrary to the truth. The testimony of the second defendant in his supplementary brief was that the previous convictions saga "progressively in my assessment more and more seriously damaged the plaintiff's reputation". The second defendant has made it clear that he does not accuse the Prime Minister of having lied in Parliament about his previous convictions (Vol. 14(1), p 4). That being the case I do not accept the second defendant's evidence

that the Prime Minister's reputation has been diminished. The second defendant sought to support his own assessment of the position by reference to inadmissible hearsay evidence. The failure of the defendants to call any independent evidence to support what they allege was serious damage to the Prime Minister's reputation leaves me unconvinced on the balance of probabilities that the defendants have proved their plea that the plaintiff has "a bad or diminished reputation" from public denials which they admit were not lies.

This case is concerned with the plaintiff's reputation at the time the defamatory paragraphs were published, but the defendants have sought to rely on the plaintiff's reputation having been damaged by events subsequent to the editorial of 8 December 1996, namely by the previous convictions saga. They claim that the reputation of the plaintiff has been diminished since their publication and that this is relevant in mitigation of any damages. Reliance was placed on the following passage from the judgment of McGechan J in *Television New Zealand Ltd v Quinn* [1996] 3 N.Z.L.R. 24 at p 52:

> For my own part, I am not attracted to any rigid rule under which the quantum clock stops at the moment of defamatory publication. Reputation is an ongoing state. In assessing compensatory elements in damages, there seems room logically for allowance for damage which hindsight tells us would have occurred in any event. The same may not be so true of punitive damages, which have different aims. However, even with allowances made in TVNZ's favour for damages to Mr Quinn's reputation which may have been caused by other matters and media attention, there was and remained a substantial character which was significantly damaged.

In *Quinn* it was put to the jury by the trial judge to decide whether the damage to the plaintiff's reputation from the television broadcasts had been extinguished by other subsequent matters or did it carry on. I have held against the pleas in mitigation so I do not need to rule on the issued raised by McGechan J in *Quinn.*

Having found for the plaintiff that the paragraphs of the defendants' editorial were defamatory of him and having found against the defendants in respect of their defences and plea in mitigation of damages, I come now to consider the quantum of damages. There was a time when insults were settled by resort to swords or pistols. Not so any more. Lengthy litigation has taken over. The action was commenced on 7 March 1997 and, after considerable resort by counsel for both sides, to interlocutory motions involving three pre-trial conferences in New Zealand, the case came to trial in the Supreme Court at Apia on 20 April 1998 and continued for 13 days, including two full days on a Saturday and a Sunday. Each side has blamed the other for such a lengthy costly duel. Mr Harrison described the case as a "trivial matter blown up out of all proportion" (Vol. 14(4), p 358). Mr Jacobs said all the costly procedure "could have been avoided by an apology" (Vol. 13, p 92). What a pity that no apology was forthcoming until the second defendant in para. 24 of his sworn brief of evidence, gave a limited apology, without any expression of remorse for his error, in the first sentence of the third paragraph of his editorial that the plaintiff had admitted in Parliament that "the government gave $250,000.00 towards the construction of his hotel". This error also gave rise to the defendants not relying on defences of justification, fair comment and a fair and accurate report (Mr Harrison, Vol. 14(3), p 304 and Vol. 14(4), p 348).

The first two days of the hearing were mainly devoted to submissions and legal argument on a motion for directions as to the conduct of the trial, in particular, whether the plaintiff or the defendants should go first in the presentation of their respective cases. Mr Jacobs made the plaintiff's position clear. He said:

> "... the plaintiff will not call evidence in chief in support of the plaintiff's case. He relies on admissions in the statement of defence and presumptions and matters for the Court. All his evidence will be in rebuttal to the defendants' case when heard."

I reproduce the following passage from my Ruling:

> "In the particular circumstances of this case in that the plaintiff does not elect to call evidence in chief, I am satisfied that justice and convenience requires the defendants should proceed first. There is a straightforward case to answer with admissions as to the parties and publication of the alleged defamatory words. If defamatory the law presumes it to be published falsely and maliciously. It is for the Judge to rule if the words in question are capable of bearing a defamatory meaning of the plaintiff and to decide if in fact they do bear such a meaning. At this stage on the plaintiff's pleading I would indicate that I would so rule subject to hearing the defendants' evidence and argument to the contrary. The law presumes some damage will flow from a defamatory statement and the question of damages is one for the judge."

In making this Ruling, I passed the following comment:

> "I note that Singleton L.J. passed the comment in *Beevis* (*supra*) at p 205:
>
> > 'one might have thought that a plaintiff seeking damages for libel would have been only too anxious to answer those charges.'
>
> But that is the matter I must put to one side at this stage."

I return now to the fact that, in the event, the plaintiff did not give evidence either in chief or in rebuttal. It must be unusual in a defamation case for the plaintiff not to give evidence. Salmon LJ in response to counsel for the plaintiff's suggestion that the plaintiff might not be put in the witness box made the comment, "I have never known a case where a plaintiff got damages for libel without going into the witness box." (see *Goody v Odhams Press Ltd* [1967] 1 Q.B. 333, 337). The plaintiff escaped a long and searching cross-examination such as that to which Mr Malifa was subjected. One would have expected the plaintiff to appear and give evidence in support of para. 7 of his statement of claim that:

> "By reason of the publication the plaintiff's political and personal reputation has been seriously impaired and he has been exposed to ridicule and contempt ..."

and in support of his claim for general damages of $400,000.00.

No witnesses testified to the plaintiff's reputation suffering as a result of the editorial published by the defendants. The Court is left in the position that while the presumption of damage flowing from a defamatory statement suffices to establish a cause of action it can carry little weight when it comes to assessing quantum. Clearly a claim for damages of $400,000.00 is grossly excessive. Mr Harrison accepted that the meaning ascribed to the words complained of was relevant to quantum of damages. He submitted that, leaving aside factors of mitigation and aggravation, a moderate award would be appropriate if the two allegations of corruption were made out and the third meaning pleaded, if established, would warrant no more than nominal damages in all the circumstances.

Mr Jacobs sought to rely on passages in Hansard to prove that the allegations made against the Prime Minister concerning the hotel caused him anguish. I am not prepared to resort to that source of information in the context of Parliamentary debate to prove what the plaintiff should have been prepared to say from the witness box and be cross-examined by the defendants. Mr Jacobs, having called no witness to testify to any harm to the plaintiff's reputation, turned to injury to the plaintiff's feelings. He relied on an inference that the defamatory publication "must be very hurtful". The nature of the defamatory statement is relevant to quantum and in this case a statement published throughout the nation in the local newspaper that the ordinary reasonable reader would take to mean that the Prime Minister was guilty of massive corruption calls, in my view, for more than an award of nominal damages for the affront to him and the indignation it would cause him.

I turn now to the grounds for claiming aggravated damages. Mr Jacobs in his closing submissions (Vol. 13, pp 88-91) set out a long list of circumstances which he submitted warranted an award of aggravated damages. These were disputed by Mr Harrison. I am not going to deal with them individually because once I accept, as I do, that this is a case for an award of aggravated damages, I must approach my assessment of damages by fixing what I think is fair and reasonable in all the circumstances. Mr Jacobs submitted that "this is a very serious case calling for this honourable court to show its displeasure of the defendants' conduct by an appropriate award of damages" (Vol. 13, p 5). That goes very near to seeking exemplary damages which were claimed originally but not claimed in amended statements of claim. I do, however, accept that to publish in a newspaper with a wide circulation in Samoa

a statement meaning the Prime Minister was guilty of corruption in a large amount was in itself a serious attack on his reputation and goes to quantum of damages. I do not hold it against the second defendant that he has stood for Parliament as a candidate for the Opposition nor that his paper may have political leanings against the Prime Minister and his party. Many papers throughout the world are well known for their political stance. Nor do I overlook that on a particular occasion the second defendant called on the Prime Minister to apologise for a publication made in the second defendant's absence. But on this occasion Mr Malifa fell far short of the truth and resorted to a malicious defamation of the Prime Minister. The defendants will find some comfort in the widened scope of qualified privilege in Samoa which will provide them with ample opportunity to publish editorial comment on political affairs, provided it is free of malice.

I have said that I am not going to deal with all aspects of the case which may go to aggravate compensatory damages. This is because each additional ground to award aggravated damages would not necessarily add to the total award. I would regard as the major factor, the finding of malice because of the lack of honest belief, which the second defendant maintained to the end, and because of his expression of ill will towards the plaintiff. Added to that is the defendants' subsequent conduct in persisting with pleas of justification, fair comment and a fair and accurate report until abandoned at the eleventh hour when the second defendant must have known all along that those pleas were without merit. Further aggravation was the raising, shortly before trial, of the previous convictions of the plaintiff when the defendants were well aware of the full facts warranting no adverse reflection on the plaintiff's character or

reputation and when the defendants disavowed any accusation that the plaintiff had lied in Parliament about them.

I come back to what is a fair and reasonable award in all the circumstances. Having regard to counsel's indication that an apology at the outset could have avoided all the costly process of litigation, it is the vindication of the plaintiff by this judgment which will assuage his hurt feelings. The defendants made it clear that they made no allegation of corruption on the part of the Prime Minister nor that he had lied to Parliament and they made an apology somewhat limited and belatedly. On the other hand, the defendants' publication was grossly defamatory of the Prime Minister, it was malicious, and aggravated damages must be awarded for the major reasons given, pleas in mitigation having failed.

I award the plaintiff general damages of $50,000.00. Costs are reserved for counsel to make written submissions within 14 days of the date of this judgment, if agreement cannot be reached.

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