

It is therefore the Judgment of this Court that the District Court Judgment be affirmed so far as it has determined that ownership of the Palauan money known as *Eterenged* is owned by defendant Merei without limitation and that this Court makes no determination of the redemption rights of Kukumai and Merei.

Court costs shall be allowed defendants.

SANTA et al., Plaintiffs

v.

JOHNSTON et al., Defendants

Civil Action No. 63-73

Trial Division of the High Court

Truk District

November 14, 1974

Action by person allegedly handcuffed in an unnecessarily harmful manner. The Trial Division of the High Court, Hefner, Associate Justice, held the government protected by sovereign immunity statute barring assault and battery actions against the government, held police supervisors would not be liable where their knowledge of the practice was not alleged and held that the officers involved, and the police chief, if he knew of the practice, could be held liable.

1. Trust Territory—Suits Against—Sovereign Immunity

Complaint against the government, for negligent supervision of its agents, resulting in injury to plaintiff through a certain manner of handcuffing him, was based on assault and battery and thus barred by sovereign immunity statute barring suits arising out of assault and battery. (6 TTC § 252(5))

2. Assault and Battery—Liability of Third Person

Allegation that superiors of police officers who allegedly handcuffed plaintiff in a cruel manner causing injury knew of the handcuffing because one of them, the police chief, was told of it at a meeting with plaintiff's counsel, was insufficient to sustain the complaint against the superiors other than the chief.

3. Public Officers—Immunity From Suit

Public officers are immune from civil suit for money damages for negligent, nonministerial acts committed by them while they are acting within the scope of their authority and in the discharge of their official duties.

4. Constitutional Law—Cruel and Unusual Punishment

The cruel and unusual punishments provisions of the United States Constitution and the Trust Territory Code apply to authorized penalties under some type of sentence or judicial dictate. (1 TTC § 6)

5. Constitutional Law—Cruel and Unusual Punishment

Statutory prohibition against cruel and unusual punishment does not apply to needlessly hurtful manner of handcuffing a person prior to any conviction and sentence.

6. Constitutional Law—Due Process—Mistreatment of Prisoners

Mistreatment of a prisoner before sentence, and mistreatment after sentence which arises from acts not carried out pursuant to a judicially invoked sentence, is a violation of due process provision of the Trust Territory Code. (1 TTC § 4)

7. Public Officers—Respondeat Superior

Respondeat superior doctrine does not cover the superiors of police officers who mistreat persons unless personal responsibility on the part of the superiors is shown.

8. Public Officers—Immunity From Suit

Plaintiff alleging that police officers handcuffed him in an unnecessarily harmful manner could proceed against the officers, and against the police chief, who allegedly knew of the practice, despite their official position.

<i>Assessor:</i>	SOUKICHI FRITZ, <i>Presiding Judge</i>
<i>Interpreter:</i>	ROKURO BERDON
<i>Reporter:</i>	SAM SASLAW
<i>Counsel for Plaintiffs:</i>	PAULA CASEY
<i>Counsel for Defendants:</i>	JACK LAYNE

HEFNER, *Associate Justice*

The defendants have moved to dismiss plaintiffs' action on two grounds. First, the action is barred on the theory of sovereign immunity by 6 TTC, Section 252(5); and second, the suit against the various defendants in their individual capacities is improper and the suit, if it is maintainable at all, must be against the Government of the Trust Territory of the Pacific Islands.

This matter concerns the vulnerability of the Government and its officials to suits for monetary damages. It also involves the rights of the citizens of the Trust Territory to

compensation for wrongs perpetrated against them by official or unofficial conduct of government officials and employees.

For the purposes of this motion, the Court will take the allegations of the amended complaint filed on October 17, 1974 as true. *Antonio v. Trust Territory*, 6 T.T.R. 123; *Walker Process Equip & Food Mach. & Chem Corp.*, 382 U.S. 172, 86 S.Ct. 347 (1965).

In plaintiffs' understandable zeal to present their case, the amended complaint includes more than ultimate facts and a short and plain statement of the claim. The Court must separate and consider the allegations and not determine this motion on conclusions or evidentiary fact pleadings. See Federal Rules of Civil Procedure, Rule 8 and annotations thereto, *United States Code Service*.

This Court considers it poor practice to attach affidavits to a complaint and in effect argue the case instead of plead the case. The trial is the proper vehicle to prove plaintiffs' case, not the complaint. The time of counsel and the Court can best be served by pleading ultimate facts in a concise way. The Trust Territory Courts have been liberal in construing pleadings and motions to strike and demurrers are seldom seen. The defendants have not moved to strike any portion of plaintiffs' complaint and the Court shall do no more than consider the allegations without excising the evidentiary facts and conclusions encompassed in the complaint.

Accumulating and assessing the allegations in plaintiffs' complaint, it states that the defendants negligently supervised their agents and subordinates and certain unnamed police officers used "crazy-eight" handcuffing procedures. As a proximate cause of the negligent supervision, the plaintiffs were injured and they seek damages against the Government and the various individuals named as defendants.

The plaintiffs also ask for declarative and injunctive relief which has not been directly attacked by defendants.

The individual defendants are by law charged with various degrees of responsibility for supervision of the police officers in the Truk District; 69 TTC, Sections 51, 1, 2, 3 & 52. The police officers who actually performed the "crazy eight" handcuffing are not named but the complaint caption uses the wording ". . . and their agents, subordinates, and all those acting in concert with them; . . ." If the plaintiffs wish to name the police officers, an amendment must be made to include the specific officers involved. Common and accepted practice is to name fictitious or unknown defendants as Doe I, Doe II, etc. See Appendix for Forms to Federal Rules of Civil Procedure, Forms 28 and 29.

The only conclusion that the Court can arrive at from the complaint is that the individually named defendants were acting within the course and scope of their official duties. Not only does the complaint cite the code section charging the respective individuals with a responsibility relating to the Truk police, but the very core of plaintiffs' complaint and argument resisting this motion is that the defendants failed to provide proper supervision, as required by law. There are no allegations that any of the individually named defendants acted beyond or outside of their scope of official duties.

6 TTC, Section 252 lists the types of cases over which the High Court shall not have jurisdiction and which are therefore barred. Subsection (5) of that section states that any claim arising out of assault and battery is prohibited. Since this section is the same as 28 U.S.C., Section 2680 (h), United States court decisions are helpful.

Most of the cases cited by counsel involve incidents where a third party was the one causing the injuries and not a government employee. See *United States v. Muniz*, 374 U.S.

150 (1963); *Gibson v. United States*, 457 F.2d 1391 (1971) and *Antonio v. Trust Territory, supra*. Rather than try to show the applicability of third-party cases, if cases involving government employees are found, these must necessarily be given more weight. *Panella v. United States*, 216 F.2d 622 (1954), cited by defendants upheld the right of the plaintiff to sue the Government for damages which were inflicted upon him by a fellow inmate in a Government hospital. However, the Court stated very clearly that it is important to distinguish cases in which it is sought to hold the Government liable on a negligence theory for assaults committed by government employee. The latter type of case makes it “. . . not difficult to imply that Section 2680(h) (Assault and Battery) exception was intended to exonerate the Government from all liability of this nature, no matter what the form of the action.” (At page 624.)

Subsequent to the *Panella* case, the case of *Pendarvis v. United States*, 241 F.Supp. 8 (1965) applied the assault and battery exception where the plaintiff was injured by a United States Army officer in arresting the plaintiff. See also *Stepp v. United States*, 207 F.2d 909 (1953).

In 1966, *Collins v. United States*, 259 F.Supp. 363, was decided and again the Assault and Battery exception was applied where the injuries were caused by the Government employees. Plaintiff's theory in that case was that the Government was negligent in hiring the assailant.

The case of *Smith v. United States* (1971, D.C. Mich.) 330 F.Supp. 867, involved an incident where the plaintiff was shot by a National Guardsman. Plaintiff's theory for his cause of action was that the Government was negligent in supervision, failure to formulate rules, issuance of vague orders and the failure to properly assess the quality of guardsmen to carry out riot control. The Court held that the suit was actually based on assault and battery and therefore barred.

The question as to whether a prisoner can sue the Government for injuries has met an additional hurdle. In *Samurine v. United States* (D.C. Conn.) 287 F.Supp. 913, affirmed 399 F.2d 160, the Court concluded that a suit against Federal prison officials could not be sustained on the theory of negligence because the acts of the officials were discretionary. *Smith v. United States, supra*, also held that the acts complained of, as far as the supervising officials were concerned, were discretionary and therefore excepted under 28 U.S.C. Section 2680(a). The Trust Territory Code has a similar section, 6 TTC, Section 252(2). During the oral argument of this matter, the Court indicated its opinion that the acts of the police officers were operational and agreed with plaintiffs' argument (Page 6, lines 28 through 31, plaintiffs' memorandum of points and authorities). However, if plaintiffs seek to hold liable the officials named in the complaint and not the police officers, a different conclusion is demanded by the *Samurine* and *Smith* cases.

The core or roots of plaintiffs' claim is an intentional, deliberate tort committed by the police officers. Assault and battery is intentional tort. Intention is the very essence of the tortious act. *Gibson v. United States, supra* at page 1396. As stated in *Nichols v. United States*, 236 F.Supp. 260 (1964): "The test is not the theory upon which the plaintiffs elect to proceed or how artfully the pleadings may have been drawn. Rather, the decisive factor is whether, in substance and essence, the claim arises out of assault and battery."

If the plaintiffs are allowed to circumvent the exception of assault and battery by alleging that the Government was negligent in supervision of the employee or in hiring the employee or in not formulating rules and procedures, the entire exception would have no meaning or significance. This Court cannot conclude that the Congress of Micro-

nesia (or for that matter the U.S. Congress) performed an idle act when it includes assault and battery as an excepted tort. The theory advanced by the plaintiffs in their complaint must inevitably rest upon the intentional torts of the police officers. Plaintiffs cannot pull themselves up by their own bootstraps.

[1] It is therefore the conclusion of this Court that plaintiffs' complaint is based on assault and battery and barred by 6 TTC, Section 252(5) and should be dismissed as to plaintiffs' claims for monetary damages for injuries against the Government.

[2] The Court also concludes that this action must be dismissed against all individually named defendants except the Chief of Police, Frank Nifon.

[3] The general rule in the United States, and accepted by this Court, is that public officers are immune from civil suit for money damages for negligent, nonministerial acts committed by them while acting within the scope of their authority and in discharge of their official duties. *David v. Cohen*, 407 F.2d 1268 (1969); *Bowman v. White*, 388 F.2d 756 (1968); 63 Am.Jur.2d 798.

Plaintiffs have alleged that defendant Frank Nifon knew of the practice of "crazy eight" handcuffing because of a meeting with plaintiffs' counsel on June 27, 1972. There are no ultimate facts pled which show any knowledge of the practice by any of the other individual defendants. The complaint concludes that the other defendants knew of the practice apparently because of the June 27, 1972 meeting with Frank Nifon. This is insufficient to sustain the complaint against the other defendants.

The very essence of plaintiffs' theory, to avoid the assault and battery exception, is negligence by the individuals in the performance of their duties as prescribed by the Code. However, in the attempt to avoid the assault and battery

exception, they are met by the problem of trying to establish personal liability of the individual defendants for the acts of their subordinates, the police officers.

The complaint bases the individual liability of the High Commissioner, Attorney General, Superintendent of Public Safety and District Administrator of Truk on the chain of command theory. If this were to be the law and subject public officials to individual liability for acts of subordinates two, three or more times removed, there is no doubt that the threat of litigation would impede the official to whom ultimate or secondary responsibility is assigned. This is the key test enunciated in *David v. Cohen, supra*.

All of the legal consequences of the statutes and cases cited above and the sophisticated approach to the case at bar does not and cannot conceal the fact that the plaintiffs have allegedly been subjected to a practice of handcuffing which is deplorable. The question remains what if any remedies exist to correct what has happened in the past and to prevent a re-occurrence in the future.

The defendants have not moved to dismiss the portion of plaintiffs' complaint seeking injunctive relief and therefore the Court need not decide this issue except to note that since the individual defendants other than Nifon are removed as defendants, the preliminary injunction lies specifically against the Chief of Police and his subordinates, which in the final analysis are the critical parties to be enjoined to have effective compliance with the preliminary injunction. No purpose is served in keeping all other individually named defendants in the suit merely to enjoin them from acts which have been perpetrated by members of the Truk District Police detachment.

The injunctive relief provided does not compensate the plaintiffs for their injuries sustained in the past. Plaintiffs argue that even with sovereign immunity, plaintiffs have recourse and a remedy because their "Constitutional"

rights have been violated, to wit, the due process provision and have been subjected to cruel and unusual punishment. Cited are 1 TTC, Section 4 and 1 TTC, Section 6, being in substance the Fifth, and Eighth Amendments to the United States Constitution.

The question not raised by counsel but which must be answered is whether the specific acts complained of are violations of 1 TTC, Section 6. That is, whether abuse by the police is cruel and unusual punishment considering that there was no conviction on sentence levied. The term "punishment" may be defined as a penalty inflicted on a person by authority of law and the judgment or sentence of a court for some crime or offense committed by him. 21 Am. Jur. 2d 542. If this is the case, the provisions of 1 TTC, Section 6 are not applicable because the complaint is clear that the punishment here was not pursuant to a judgment or sentence.

[4] A review of the Eighth Amendment to the Constitution and 1 TTC, Section 6 leads to the conclusion that the term "punishments" is used in the context of authorized penalties under some type of sentence or judicial dictate. When read with the terms of "excessive bail" and "excessive fines" it is clear that some court source is mandatory as bail and fines can only originate from some judicial order. A further review of the cases annotated in United States Codes Service FCA Edition for the Eighth Amendment, pages 218 to 220, reveals that generally the punishment referred to, originated from a sentence in court.

In *Dearman v. Woodson*, 429 F.2d 1288 (1970) the Court said that although cruel and unusual punishment as a Constitutional concept, is a principle which has not traditionally lent itself to precise definition, it is beyond dispute that a punishment may be cruel and unusual when,

although applied in pursuit of legitimate penal aims, it goes beyond what is necessary to achieve those aims.

Anderson v. Nossner, 438 F.2d 183, mod. 456 F.2d 835 (1971) applied the Eighth Amendment to police treatment given to arrested civil rights demonstrators and before conviction and sentence. See also *Howell v. Cataldi*, 464 F.2d 272 (1972).

The dilemma of whether the cruel and unusual punishment clause of the Eighth Amendment is properly applicable only after conviction and sentence and not applicable to pretrial detainees, was solved in another way in the case of *Johnson v. Click*, 481 F.2d 1028. That court held that it is a violation of the Due Process clause when law enforcement officers apply undue force to a suspect and deprive him of his liberty. The court further stated it had considerable doubt that the cruel and unusual punishment clause is properly applicable at all until after conviction and sentence.

[5] This Court concludes and therefore holds that where 1 TTC, Section 6 refers to cruel and unusual punishment, this does not apply to the act of "crazy eight" handcuffing before any conviction and sentence.

[6] This Court further concludes that treatment (or really mistreatment) of prisoners before or after sentence and which is not pursuant to a judicially invoked sentence is in violation of 1 TTC, Section 4, the due process provision.

Johnson v. Glick, supra

Anderson v. Nossner, supra

[7] An action is sustainable against the police officers who actually inflicted the injuries but the general doctrine of respondeat superior does not suffice to include the police officers' superior unless there is a showing of some personal responsibility. *Johnson v. Glick, supra*, at page 1034. Mar-

tinez v. Mancusi, 443 F.2d 921 (1970); *Wright v. McMann*, 460 F.2d 126. Here the complaint sufficiently pleads facts to show, for the purposes of this motion, that the Chief of Police, Frank Nifon, had some personal responsibility through knowledge of the practice of "crazy eight" handcuffing on June 27, 1972 and it is noted that some of the incidents complained of, occurred after that date.

[8] The conclusion arrived at here is consistent with the case of *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.*, 403 U.S. 398, 91 S.Ct. 1999 (1971) in so far as the U.S. Supreme Court sustained the cause of action for monetary damages against the defendants in that case. But in one respect, this order goes beyond the *Bivens* case. The Federal District Court ruled that the defendants, Federal Narcotic Agents, were immune from liability by virtue of their official position. 276 F.Supp. at 15. The Supreme Court did not consider or decide this issue. This Court holds that under the facts as pled in this case, the plaintiffs may proceed against the Chief of Police and the police officers notwithstanding their official position and they are not immune from suit.

Plaintiffs have also argued that the legislative history and the timing of the enactment of 6 TTC, Section 252 and Section 253 effectively eliminated the exceptions. For the same reasons as stated in *Antonio v. Trust Territory*, *supra*, this argument is rejected.

Whether or not the United Nations Trusteeship Agreement provides relief for the plaintiffs in a case such as this need not be decided as there is sufficient authority in the Trust Territory Code to sustain the suit as ordered herein. A review of *People of Saipan, et al., v. United States Dep't. of Interior, et al.*, No. 73-1769 (9th Cir., July 16, 1974) reveals that the Ninth Circuit Court dismissed the Federal suit without prejudice to the right of the plaintiffs to re-

file in the District Court should the High Court of the Trust Territory deny it has jurisdiction to review the legality of the actions of the High Commissioner (page 2). As a basis for the ruling, the court stated that the Trusteeship Agreement creates substantive rights that are judicially enforceable.

The extent to which the Trusteeship Agreement is to be used depends in good measure on the existence of procedures and laws available within the Trust Territory. In this case the existence and application of the Trust Territory Code, 1 TTC, Section 4, gives the plaintiffs authority for their suit and there is no need to call upon the Trusteeship Agreement.

It is therefore the order of this Court that this action is dismissed against Edward E. Johnston, Richard Miyamoto, Manuel Sablan, and Juan A. Sablan. The preliminary injunction entered on November 14, 1973, shall remain in force as to the Government of the Trust Territory of the Pacific Islands, Frank Nifon, and defendants' agents and subordinates. Plaintiffs are also entitled to seek declaratory relief against the remaining defendants. Plaintiffs shall maintain their action in a manner not inconsistent with this order and may amend their complaint to add as defendants the police officers who the plaintiffs allege inflicted the injuries complained of.