IN THE COURT OF APPEAL FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0003 OF 2006S
(High Court Civil Action No. HBC 93 of 2002S)

BETWEEN: THE PROCEEDING COMMISSIONER FIJI HUMAN RIGHTS

Appellant

AND: THE COMMISSIONER OF POLICE

First Respondent

ATTORNEY GENERAL OF FIJI

Second Respondent

Coram: Ward, President
Wood, JA
McPherson, JA

Hearing: Tuesday, 14th November 2006, Suva

Counsel:			
	Dr S Shameem	]	
	S B S Colavanua	]	for the Appellant
	V Chang	]	
		]	
	S D Turaga	]	for the Respondents
	S Tuiwaqa	]	

Date of Judgment: Friday, 24th November 2006, Suva

JUDGMENT OF THE COURT

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[1] At issue in this appeal is the proper measure of damages in a case involving the breach by the Police of the rights of a complainant, referred to in the proceedings as "Joti', arising under Chapter 4 Bill of Rights of the 1997 Constitution.

THE PROCEEDINGS

[2] The proceedings, in which that question arose, were brought by the appellant Commissioner, in the High Court, against the Commissioner of Police, and the Attorney General of Fiji, on behalf of Joti. They were commenced by an application by the Commissioner to the High Court for redress under the Human Rights Commission Act 1999. Objection was taken to the Commissioner's standing to bring the proceedings on behalf of the complainant. The High Court initially ruled that the Commissioner lacked the necessary standing, but this was reversed in the Court of Appeal.

[3] The institution of the proceedings followed attempts by the Commissioner to secure a conciliation, which were unsuccessful by reason of the refusal of the Police to apologise, or to provide reparations for the claimed breach of Joti's rights.

[4] The nature of the claim appears from the writ of summons and statement of claim which was filed on 22 April 2004, and alleged breaches of ss.25(2) and 27 of the Constitution, involving a forced medical examination of Joti, that was conducted, without her consent, at the insistence of the Police.

[5] The first of those sections provides:

> ***"S.25(2) every person has the right to freedom from scientific or medical treatment or procedures without his or her informed consent....."***

[6] S.27 makes specific provision for the several rights of a person who is detained or arrested. Although the original statement of claim did not particularise which of its provisions was breached, the amended statement of claim, filed on 31 January

2005, confined the breach to one concerning the right arising under s.27(1)(f). That provision is as follows:

> ***"27(1) Every person who is arrested or detained has the right:***
>
> ***(f) to be treated with humanity and with respect for his or her inherent dignity."***

[7] Damages were sought in respect of the humiliation, loss of dignity and injury to the feelings of Joti, and also for the pecuniary losses attributable to her inability to continue her employment, or to secure other employment by reason of the adverse publicity and stigma relating to the investigations of the Police, in the course of which it was alleged that the breaches of sections 25(2) and 27(1)(f) occurred.

The Claim

[8] It was appellant's case, based upon the evidence of Joti that, on 11 July 1999, while working at the Village 6 Cinema Complex, she found a newborn baby in a toilet cubicle. The baby was still alive and Police were called, after Joti reported her discovery to management.

[9] A few days later DC Satya Nand called in at the Village 6 Complex, and asked Joti to accompany him to the Central Police Station. She was not informed that she was under arrest, and went voluntarily with him to the Crime Office. Joti had previously worked as a Special Constable and was familiar with the relevant Police and with the office.

[10] Acting Superintendent Ravi Narayan asked her whether her breasts were discharging, acting on some information conveyed to him by a co-employee at Cinema 6. Joti agreed that this was the case, but explained that she had not given birth to the baby and that her condition was due to an entirely unrelated medical

cause. She indicated that her medical folder was at the hospital, and invited its inspection.

[11] After some argument, ASP Ravi Narayan instructed DC Satya Nand to take her to the CWM Hospital for a medical check. Joti made it plain that she did not agree to this, but despite her protests, she was taken by two female officers in the back of a caged Police van to the Cinema 6 Complex. She was observed by staff of the complex while in the van. She collected her bag, including her medical card and was then taken in the same vehicle to the hospital. She provided the card to Police, who had made it clear to her that, when taken from the Police Station to the Village 6, and then to the hospital, she was a prisoner and unable to sit in the front of the vehicle.

[12] At the hospital, she tried to use her phone card to make a telephone call, but was stopped by the Police, who took her card. She was seen by a Doctor, and informed him that she was not the mother of the child and that she did not consent to being medically examined.

[13] The Doctor informed Police that he was not prepared to carry out the examination without her consent. At that point, the complainant said, Police threatened her that she would be locked in a cell if she did not consent.

[14] The complainant indicated that after trying unsuccessfully to obtain the assistance of a lawyer who happened to be at the hospital, and further argument, she signed the consent form to avoid being locked up.

[15] The complainant was then subjected to invasive vaginal examination using an instrument, and blood was taken. The Doctor reported at the conclusion of the test that she had not given birth recently.

[16] The complainant was then allowed to leave the hospital. Although offered a lift back in a police vehicle, she refused that offer and caught a taxi back to the Central Police Station where she remonstrated with ASP Ravi Narayan.

[17] With one exception, namely whether the complainant caught a taxi after leaving the hospital, as she said, or was taken back to Cinema 6 in a police van, as the police said, these facts were essentially not in dispute.

[18] It was common ground that the complainant was effectively detained by police for about 4 hours. There was no dispute that during at least some of this time she was angry and abusive toward police in relation to their allegations and the requirement that she submit to an examination at the hospital. The existence of her anger and distress was noted by the Doctor on the consent form.

[19] Nor was there any dispute in relation to the evidence of Dr Schramm that the complainant's medical file showing that she suffered from the condition of galacteria, that the file was at the hospital and could have been located with a little bit of detective work, using the reference number from the medical card.

[20] The Police witnesses acknowledge that Joti was not cautioned before being interviewed, or informed of the right to see a lawyer. Detective Superintendent Ravi Narayan gave evidence that he did not apologise to her when she returned to the police station after the examination, and added that he refused to apologise when asked by the Human Rights Commission to do so.

[21] As a consequence of these events, the complainant gave evidence that she lost her partner; that her reputation suffered; that by implication she was identified to those who knew her in a Fiji Times newspaper article as being responsible for the "dumping" of the baby at Cinema 6, since that article referred to the fact that a woman, in her early thirties who had been a former Police Constable, had been interrogated by Detectives who were awaiting a detailed medical report before

deciding on the next course of action; that her brother had ceased to speak to her; that after 3 to 4 months she felt unable to continue her employment at Cinema 6; and that when she sought and obtained other employment, the police would inform her employer that she had taken them (the Police) to Court.

[22] None of these assertions was the subject of contradictory evidence, although one police witness said that she had not told the press about the case. In cross examination a question was put to Joti that it was not this incident that caused her to lose her job. To that question there was no answer.

[23] Superintendent Narayan sought to justify the conduct of police in having the complainant medically examined on the basis that she was under investigation in relation to the abandoned baby, that the information received in relation to her breast discharge provided reasonable cause and that, as a result, a medical examination was appropriate.

[24] No explanation was offered as to why independent, and obvious, inquiries had not been made of fellow employees, or others, as to whether the complainant had been seen to be pregnant in recent weeks, as must have been the case had she given birth to the child. Nor was any attempt made to explain why inquiries were not pursued to access her medical file so as to investigate her explanation for the condition which seems to have sparked off the police inquiry.

[25] At the close of the evidence, the trial Judge made directions for the parties to provide written submissions, The appellant provided lengthy and detailed submissions together with copies of authorities and other relevant materials concerning the assessment of damages in cases involving breaches of human rights. The respondents did not trouble to supply any submissions or to reply to the appellant's submissions.

[26] The appellant's submissions made it clear that breaches were alleged of s.25(2) and s.27(I)(f) of the Constitution, and that compensatory damage including damages for pecuniary loss were sought, along with exemplary damages in accordance with the principles established in ***Rookes v Barnard*** [1964] AC 1129. The claims for pecuniary loss were made under s.39(1)(a) and (c) of the Human Rights Commission Act 1999, while the claims for damages for humiliation, loss of dignity and injury to the complaint's feelings rested on s.39(1) (d) of that Act.

[27] The submissions pointed to additional breaches arising under section 27, in relation to the rights of the complainant which were not respected. They included the absence of any caution (s.27(3)(a); the refusal of permission to use the phone to contact a third party (s.27(1)(d)); the absence of any advice that she had a right to consult a legal practitioner (s.27(1)(c); the failure of police to take reasonable steps to inform her partner or next of kin of her detention (s. 27(2)) ; and the carrying out of the examination, without her consent, in circumstances that amounted to a breach of the right against self incrimination (s.27(3)(a). In addition it appears that she was never informed of the nature of the charge that might be brought against her (s.27(1)(a), although she was certainly aware of the reason why the police wished to speak to her.

THE JUDGMENT IN THE HIGH COURT

[28] The breach which was found by Justice Singh was confined to the s.25(2) breach. In this regard it was found that the complainant "was taken to the hospital against her will ", and that her "consent to the medical examination was not freely given but with a shadow of Police presence close by."

[29] His Lordship did make reference, early in the judgment, to the effect that the appellant also placed reliance on a breach of s.27(1)(f) but this was not further addressed. Possibly that was due to the fact that, in the statement of claim, the

particulars given of this breach were essentially the same as those given for the s.25(2) breach.

[30] Consideration was not given to any of the other breaches identified in the appellant's submissions, even though evidence was led in relation to them without objection, and even though the respondents did not provide any submissions in reply.

[31] The damages for the s.25(2) breach were assessed in the sum of $5,000. The claim for pecuniary loss in relation to the complainant's alleged inability to continue in her employment at Village 6 Cinema was dismissed, on the basis of the absence of sufficient proof of a nexus between the events of 11 July 1999 and that event. The deciding factor it would seem was the length of the intervening period of three to four months. No mention was made by his Lordship of the complainant's evidence, and claim concerning her inability to secure permanent employment by reason of the alleged communications between police and potential employers.

[32] His Lordship did not deal with the complainant's claim for exemplary damages other than noting that they had been sought.

THE APPEAL

[33] In determining whether the award of damages in this case was inadequate, it is convenient to note the approach which Singh J took in relation to four matters.

Public Law Remedy

[34] His Lordship noted the background to Chapter 4 of the Constitution, in the form of the Universal Declaration of Human Rights (1948), and the International Covenant on Economic and Social Rights (1976), the provisions of which are not only adopted in Chapter 4, but are extended.

[35] The intention to provide full respect for the Chapter 4 rights, in accordance with public international law norms, is indicated by the compact contained in Chapter 2, particularly s.6(a) which requires the rights of individuals to be fully respected; by s.43(2) which requires the court to have regard to public international law applicable to those right; and by the preamble to the Constitution which notes the reaffirmation of the recognition, by the people of Fiji, of "the human rights and fundamental freedoms of all individuals and groups, safeguarded by adherence to the Rule of Law, and (their) respect for human dignity."

Singh J held, against that background, that the remedy for a breach of a right under Chapter 4, gave rise to a "public law remedy" actionable under the Human Rights Commission Act.

[36] Although there has been much debate as to whether the remedy in this context is a public law remedy or a remedy for a constitutional tort (see the analysis in Clayton and Tomlinson *The Law of Human Rights*. Oxford University Press 2000) the preponderance of opinion favours the public law remedy approach: ***Simpson v Attorney General*** (Baigent's case) [1994] 3 NZLR 667; ***Maharaj v. Attorney General of Trinidad and Tobago*** (No.2) [1979] AC 385; ***Kearney v Minister for Justice*** [1986] IR 116; ***Saman v Leeladasa*** [1989]: 1 Sri LR1; and ***Nilarati Bahera v The State of Orissa*** (1993) Crim LJ 2899.

[37] In addition, in ***R v Secretary of State for the Home Department, Ex-Parte Greenfield*** (2005) 1 WLR 673, Lord Bingham noted that the Human Rights Act 1998 (UK) was not a tort statute but had objects which were different and broader. Support for it being regarded as a public law remedy rather than a tort based remedy is also supported by the circumstance that the remedy is discretionary, whereas damages in tort are recoverable as of right.

[38] Similarly in ***Manga v Attorney General*** [2000] 2 NZLR 65 Hammond J observed, (at 81) that:

> ***"cases based upon violation of the Bill of Rights are about vindications of statutory policies which are not 'just' private; they have overarching public dimensions."***

[39] This distinction can have a significance if, as a result, it means that the general principles for the assessment of damages in tort do not necessarily all apply. Indeed in ***Anufrijeva v Southwark*** LBC (2004) 2 QB 1124 the Court of Appeal warned against drawing too close an analogy between a claim for damages under the Human Rights Act and a claim against a public authority in tort. There is, however, support for the view that, when assessing damages for breaches of human rights, the Courts are free to derive guidance from the law of damages in relation to torts; See ***Dunlea v Attorney-General*** [2000] 3 NZLR 136; ***Marcic v Thames Water Utilities Ltd.*** (No.2) [2001] 4 All ER 326 and ***R (Bernard) v London Borough of Enfield*** (2003) HLR 4 (Bernard's case).

Balancing of Rights and Police Powers

[40] Justice Singh described the case as one that concerned a balancing of the powers of Police, in investigating and detecting crime, with an individual's right to "personal privacy" and to be "treated with dignity."

[41] Although His Lordship correctly observed that police powers are "not limitless", a resort to a balancing exercise between those powers and the complainant's rights was potentially misleading.

[42] The Constitution makes it clear that the rights and freedoms in Chapter 4 are "subject only to the limitations under laws of general application permitted by the Chapter:", and to "such derogations as are authorised under Chapter 14" laws, made in a state of emergency (S21(2)).

[43] The s.25(2) right is an absolute right, and although the provisions of the Constitution are to be "interpreted contextually', and having regard to the content and consequences of any laws permitted by the Chapter (S21(4)), there is nothing in the Police Act Cap 85, under which police derive their powers, to permit a forced medical examination of a suspect, or for that matter, any form of invasive forensic procedure.

[44] It may be accepted that there are interests of society at large in having wrong doing detected and crime suppressed and in supporting the Fiji police, whose functions and duties are spelled out in sections 5 and 18 to 26 of the Police Act; see also ***Chic Fashions (West Wales) Ltd. v Jones*** [1968] 2 QB 299 at 313 per Lord Denning. However their powers of detention, arrest, questioning and charging those in respect of whom reasonable cause for suspicion exists, must be exercised within the framework of the Bill of Rights and any legislation permitted under the Constitution.

[45] As was pointed out in ***Basu v State of West Bengal*** (1997) 2 LRC1 the rights guaranteed under a Constitution cannot be denied "except according to the procedure established by the law by placing such reasonable restrictions (on those rights) as permitted by law" [22] and [34].

[46] In the present case the desire of police to investigate the abandonment of the baby, which admittedly was of serious concern was not sufficient to permit them to exercise a power which did not exist, and which was expressly forbidden by Chapter 4 of the Constitution. It follows that the case ultimately did not call for any balancing of powers and rights, and the interests of law enforcement could not be invoked to moderate any award of damages.

The Availability of Damages for a breach of the Bill of Rights

[47] The Human Rights Commission Act includes an award of damages as a discretionary remedy. Questions however arise, in the context of this case, as to the

measure of damages and whether or not exemplary or punitive damages can be awarded.

[48] Justice Singh cited ***Minister of Immigration v Udompun*** (2005) NZCA 128 as authority for the proposition that the objective of a Bill of Rights remedy is "to vindicate human rights, not to punish or discipline those responsible for their breach.", noting, however, that "outrageous conduct would attract greater damages than mere inadvertent conduct." He also cited the observation of Associate Professor Rishworth that the law of "human rights is, to a large extent, tutelary. It is aimed at the reforms of the attitudes and social practices that had previously been invisible to the law."

[49] It is the case that, on occasions, declarations or orders to undo an existing breach will achieve the tutelary purpose and provide a vindication of a complainant's right. In other cases, such a remedy will be insufficient to provide appropriate redress, such that an award of damages is justified.

[50] This, however, give rise to important questions as to the appropriate measure of damages that will satisfy the objective of the legislation, and whether they should include punitive or exemplary damages. Justice Singh addressed the first question but not the second question.

[51] In relation to the first, he correctly observed that the level of damages must be "harnessed against the backdrop of the social and economic conditions of Fiji, and not by some universal standards, or by comparison with awards given in economically advanced countries." There is support for the proposition that damages generally should be awarded according to the costs and values prevailing in Fiji rather than by attempting to mimic awards in other jurisdictions: see ***R (KB) v Mental Health Review Tribunal*** (2003) 2 All ER 209, and ***Marika Lawanisavi v Pesamino Kapieni*** Civil Appeal No. ABU0049/98S, 13 August 1999.

[52] Any attempt to derive a tariff of damages by reference to decisions in other jurisdictions is of little value, having regard not only to the substantial differences that can exist in relation to local economic conditions and values or expectations, but also because the legislation is not always uniform. For example the power of the courts to provide a remedy under the Human Rights Act 1998 (UK) is a discretionary power to extend such remedy as it considers "just and appropriate." (S.8(1)), an expression which has been taken to mean 'effective, just and appropriate": ***Attorney-General's Reference No. 2*** (2004) 2 AC 72 at [24]. The awarding of damages under that Act is conditional upon the court being satisfied that the award is necessary to afford "just satisfaction" to the person in whose favour it is made (S.8(3)). The Court is then required to take account of the principles applied by the European Court of Human Rights in relation to the award of damages under the European Convention (S.8(4)).

[53] For these reasons, while we have had regard to the decisions of Human Rights Tribunals and Courts dealing with Human Rights breaches, in other places , which were cited to us, we regard them as of little assistance in establishing a tariff.

[54] They do, however, have a relevance in relation to the general principles to be applied, subject to the qualification which we have mentioned in relation to any material difference in the legislation. This has a relevance to the next observation of Justice Singh, which was clearly important to his decision, that "the level of the award must not be excessive but restrained and moderate."

[55] In this regard he cited the observations of Cooke P in ***Simpson v Attorney-General*** (Baigent's case) at 678. This proposition is consistent with the reference repeatedly made in the European Court of Human Rights to "prudent damages", with the observations of Justice Shameem in ***Seniloli v Voliti*** Civil Appeal No. HBA 0033/99 22 February 2000, with the decision in ***Bernard's case*** where it was said that " a restrained or modest approach to quantum will provide the necessary degree of

encouragement" for public authorities to respect the rights of individuals arising under the Convention."

[56] On the other hand, it has also been recognised that awards of damages, in these cases, should not be too low, because that would diminish the respect for the essential policies which underpin the legislation: Clayton and Tomlinson, The Law of Human Rights at 1433. Were it otherwise police, for example, may be prepared to run the risk of paying small amounts of compensation, so that they can continue to employ practices of law enforcement that infringe constitutional rights.

[57] His Lordship did not mention this balancing consideration, and proper respect for it was not given in the respondents' submissions to this Court that there should be a moderation of damages out of a fear of opening the "floodgates" to other complainants or out of a fear that the risk of having damages awarded might deter police from an active performance of their duties.

[58] These propositions cannot be accepted. The "floodgates" argument needs to be approached with caution for the reasons noted by Lord Roskill in ***Junior Books Ltd. v. Veitchi*** [1983] 1 AC 520 at 539, that, if the law provides a remedy, it should not be denied simply because it may became available to many rather than to few.

[59] Otherwise, it is undeniable that the police can exercise their powers lawfully, and with proper respect to the provisions of Chapter 4, so that the fear of being sued should never act as a deterrent to their investigation.

[60] The associated proposition which was advanced, that regard should be had to the effect of an award of damages on the resources of the Police and their consequent effectiveness, can be accepted and indeed derives some support from s.21(4) of the Constitution. However, it is not to be overlooked that the probable quantum of an award in most cases is unlikely to make much of a dent in those resources.

[61] There are two other matters in relation to the measure of damages that were not mentioned by His Lordship which we consider to have a particular relevance.

[62] First, the context in which the breach occurred, and the existence of a failure by the relevant authority to afford a complainant the protection of other rights, can have a direct bearing on the extent of the hurt to personal feelings, humiliation and loss of dignity, as well as on the complainant's feelings of having been subjected to an injustice. In this regard the fact that the injustice may have been the act of an authority sworn to uphold and enforce the law cannot be understated as an aggravating circumstance: ***Basu v State of West Bengal*** at [9] and ***Kennedy v Ireland*** (1987) IR 587 at 594 per Hamilton P.

[63] Secondly of relevance is the subsequent conduct of the Public Authority responsible for the breach. The provision of a timely apology, or the making of immediate reparations, will justify a lower award than would otherwise be the case: ***R (Bernard) v London Borough of Enfield*** (2003) HLR 4.

[64] On the other hand the maintenance of an unjustifiable stance by a defendant as to the correctness of its actions, the refusal to participate meaningfully and bona fide in a conciliation, or the exaction of revenge in response to a lawful complaint, or in response to the bringing of proceedings, will be relevant in assessing damages. This follows from the fact that conduct of this kind will only reinforce and prolong the hurt to feelings, the loss of dignity and the humiliation arising from the breach itself, and the complainant's sense of injustice.

[65] We next consider the question of punitive or exemplary damages. At common law such damages are awarded, without reference to the actual loss of the complainant, and to that extent they are anomalous. Their purpose is to mark the Court's disapproval of the offending conduct, and to provide a deterrent effect: ***XL Petroleum (NSW) Pty Ltd. v Caltex Oil Australia Pty Ltd***. (1985) 155 CLR 448 at 471. Normally they require proof of conscious wrongdoing in contumelious

disregard for the rights of another: ***Whitfield v De Lauret and Co. Ltd.*** (1920) 29 CLR 71 at 77.

[66] They have been regarded as available in most common law jurisdictions (save where some form of statutory immunity exists) in the circumstance identified in ***Rookes v Barnard*** and see ***Broome v Cassell and Co. Ltd.*** (1972) AC 1027. In the present case, the relevant basis for the availability of exemplary damages would require proof that the action of the police, as a government agency was "oppressive, arbitrary and unconstitutional."

[67] The appellants submitted that exemplary damages should be available in cases such as the present where the State is a party, because it, or the relevant authority, is in a position to control the activities of its servants or to punish them for their wrong doing. As such, it was argued, particularly if the State has to pay the damages rather than the wrongdoer, there is a deterrent factor to be served, as well as an interest in securing greater care in the selection and training of its servants.

[68] Additionally it was argued, the difference between private law remedies and human rights compliance mechanisms, that aim to secure fulfillment of the Constitutional rights and community interest in their protection, justify an award of exemplary damages where the breach is particularly serious.

[69] The Human Rights Commission Act does not make any express provision for the award of exemplary damages. The decisions in international jurisdictions do not speak with one voice, although to some extent that is explicable by reference to the terms of the legislation in question, or by reference to the extent to which the limitations in ***Rookes v Barnard*** have been accepted.

[70] It would seem that the European Court of Human Rights, which awards damages on a compensatory basis: ***Vachu v France*** (1997) 24 EHRR 482, has not embraced exemplary damages; although it has been suggested that an element thereof has

found its way into awards where there has been an extremely serious violation of a human right: see the discussion in Clayton and Tomlinson The Law of Human Rights at 1434 to 1437 and for an example see ***Aksoy v Turkey*** (1977) 23 EHRR 553.

[71] In ***R v Secretary of State for the Home Department ex Parte Greenfield*** (2005) 1 WLR 673, the House of Lords offered the view that the explanation for this approach of the European Court may have turned upon its acceptance of the fact that the primary focus of the Convention is the protection of human rights rather than compensation; see also ***Basu v State of West Bengal*** where the Court similarly noted that, in the context of human rights remedies, the emphasis should be on the compensatory rather than the punitive elements. To similar effect were the observations of Richardson J in ***Martin v Tauranga District Court*** [1995] 2 NZLR 419 at 428.

[72] The view has also been expressed that exemplary damage are not available under the Human Rights Act 1998 (UK): See Clayton and Tomlinson *The Law of Human Rights* at 1437, *Amos Human Rights Law Hart Publishing* 2006 at 156; ***Anufrijeva v Southwark*** and ***R (on the application of KB) v Mental Health Review Tribunal*** [2004] QB 936.

[73] The appellant drew attention to several cases where exemplary damages had been awarded in conventional tort cases, involving for example actions for unlawful imprisonment or trespass to the person (assault). They do not provide any authority in the present context, nor do cases such as ***Tynes v Barr*** Supreme Court of the Bahamas 28 March 1994, or ***Shan Mohammed v Commissioner of Police*** Civil Action 60/2006, 31 March 2006, where the High Court of Fiji awarded exemplary damages, since each was a case where relief was given for the defendant's liability in tort and also for breaches of human rights.

[74] In ***Dunlea v Attorney General*** consideration was given to the question whether exemplary damages were available in this context, but the point was not definitively decided by the majority. Thomas J who dissented in relation to the primary decision, said that he did not "wish to draw an analogy with exemplary damages or inject a punitive element into the determination of compensation for a breach of the Bill of Rights" He added that "the vindication of rights can be achieved without recourse to the concept of punitive damages – although such damages may at times be called for over and above the damages necessary to vindicate the right." (at [78]).

[75] The availability of exemplary damages in this context was assumed in ***Odugo v. Attorney General of the Federation and Others*** (Nigeria) 1996 IC HRL 47, and in ***Ezeaka v The Commissioner of Police and Others*** (1999) 1C HRL 165. In ***Attorney General of Trinidad and Tobago v Ramanoop*** (2005) UK PC 15 the Privy Council did not accept the submission of the Petitioner that the right of redress permitted under the Constitution, in that case, was confined to an "award of conventional damage in the traditional sense" Their Lordships observed (at [19]).

> ***"An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach and deter further breaches. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award where called for is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award.***

[76] Two other cases were cited that suggest that exemplary damages were available. The first was the decision of the National Court of Justice of Papua New Guinea in

Koimo v The Independent State of Papua New Guinea (1995) PNGLR 535. However in that case the Constitution made express provision for the award of exemplary damages, so that it is distinguishable. The second was a first instance decision of the Fiji High Court in ***Mohammed Kasim v Commissioner of Police and Others*** HBC 0471 of 1999, 3 December 2001, concerning the unlawful detention of the Plaintiff in breach of his constitutional rights, in which both compensatory and exemplary damages were awarded. It does not appear that the legal basis for the availability of such damages was fully argued. In any event the decision is not binding on us. It is the case that exemplary damages were also awarded by the High Court of Fiji in ***Seniloli and Another v. Voliti*** citing the decision in ***X v Attorney General*** [1997] 2 NZLR 623. The cited case was one concerning an actionable breach of confidence, and it is accordingly distinguishable.

[77] We have reached the conclusion that although the Constitution envisages the Court having jurisdiction to make such orders as "it considers appropriate" to "redress" contraventions of Chapter 4 (S 41), exemplary damages should not be available for a breach of Constitutional rights in Fiji. The primary purpose of the remedy which has been accepted in the European Court, in New Zealand and elsewhere, as noted above, and the fact that exemplary damage have not been awarded for breach of the European Convention and of the Human Rights Act 1998 (UK), point towards the conclusion we have reached.

[78] Where the breach is particularly serious, then we see no reason why that should not be reflected in the level of the award for compensatory damages. Nor do we see any advantage in tagging labels to the damages available which might distinguish between conventional, aggravated and exemplary damages. In the present context, the concept of aggravated damages, which at common law have been awarded for hurt feelings, distress and so on, is directed to the same kinds of loss or harm as are dealt with in s.39(1)(d), and, as a result, they do not require separate consideration.

[79] The making of a compensatory award of sufficient magnitude, without the need for an additional punitive element, can achieve the vindication purpose and also provide a lesson to the relevant authority. In any event, where the wrongful act is committed by its servant, who will not be personally expected to pay the damages, a question arises as to the purpose of a punitive order against his employer.

The behaviour of the Complainant

[80] It is evident from the judgment that His Lordship was not impressed with the complainant's attitude to police, when she was initially requested to submit to the examination, or when she returned to the police station, after the examination had cleared her of responsibility for the birth and abandonment of the baby. However, her response, it seems to us, was a wholly irrelevant consideration.

[81] The complainant had every right to be angry, and to complain forcefully, when required to submit to an invasive medical examination to which she did not consent. The present case is distinguishable from cases such as ***Udompun*** where the conduct of the complainant contributed to, or provoked, the breach of a relevant right. The complainant did nothing, in this case, to encourage the police to commit the breach. She had not given birth or abandoned the child and such abusive conduct, for which she was responsible, was provoked solely by the unlawful conduct of the police.

[82] Equally unjustified, it seems to us was the somewhat illogical submission made by the respondents to us that the damages should be moderated by reason of the fact that the complainant was an "habitual smoker" and a person who was "defiant of authority." The only evidence advanced in support of these propositions was the evidence of the complainant's behaviour at the police station; which was entirely explicable by reason of the unlawful demand placed upon her. That she was an otherwise law abiding citizen who had reported the discovery of the baby and had spoken earlier to police, seems to have been entirely overlooked. We need to say

nothing about the proposition that there should have been a set off of $400 equated to one year's purchase of cigarettes, since the absurdity of that contention speaks for itself.

[83] Otherwise the submission fails in limine since rights arising under a Bill of Rights are of universal application. They are not reserved for upright citizens alone.

THE ADEQUACY OF THE DAMAGES IN THIS CASE

[84] In the light of these principles we come finally to decide the critical point in this appeal.

Compensatory Damages

[85] The breach of s.25(2), which also involved a breach of s.27(1)(f) was very serious, and was not capable of being excused upon the basis, advanced by the respondents, that it occurred, in substance, because the police were earnestly trying to perform their difficult duties. The forced medical examination was entirely unnecessary, and it could have been avoided by the obvious alternative investigative measures that were available, including obtaining access to the complainant's medical file, when she waived her right to confidentiality and invited that access.

[86] The conduct of the police was high handed in taking her medical and phone cards, in treating her as a prisoner, and in transporting her around the city in the back of a caged police van in circumstance where she was obviously being treated as a prisoner.

[87] The context in which she was detained and forced to submit to a medical examination was relevantly to be taken into account, in so far as the additional breaches of her rights, relating to the failure to inform her of the charge in contemplation, to caution her, to inform her of her right to a lawyer and to have

access to a lawyer, to allow her to contact her partner or next of kin, or to inform such persons of her detention, were likely to reinforce and increase the hurt to her feelings and dignity, as well as her humiliation and sense of injustice.

[88] Additionally there was the aggravating circumstance that her rights were abused by the authority expected to maintain the law.

[89] The degree of lack of consideration involved in her treatment as a detained person, and in being required to submit to an embarassing and highly personal vaginal examination, was compounded by the circumstance that had she, in fact, recently given birth and abandoned her baby, the police should have realised she was likely to have been in a fragile psychological state that called for particular consideration and care by them.

[90] As a direct consequence of the breach, her relations with her family were harmed, a circumstance that could only have increased the hurt to her feelings and her humiliation.

[91] Additionally, as we have observed, in the assessment of these damages, it is proper to take into account the subsequent response of the police to the breach, since the nature of that response, or lack of it, is directly relevant to the reinforcement of the hurt occasioned and the prolongation of that hurt.

[92] In this case, there was no immediate apology even though the police knew the complainant had been cleared. They refused to apologise at the attempted conciliation. They made no attempt to secure a correction to the article in the Fiji Times, which they, as well as the complainant, and anyone who worked with, or who was related to her, realised concerned her.

[93] On the contrary, unjustifiability, they maintained their stance that they were entitled to require an examination that was forbidden by the Constitution. Then, when

proceedings were taken to redress that wrong, they sought to punish the complainant by informing others that she had instituted those proceeding, an assertion in her evidence that was not rebutted by any evidence to the contrary.

[94] We note the respondent's submissions in this Court that sought to justify an award of $5,000 less the smoker adjustment, for a 3½ hour period of detention referable to the measure of damages suggested in the judgment of Justice Scott in ***Sivorosi Raikali v Attorney-General*** HBC 95 of 1999, 10 December 1999. As this submission dealt with the detention aspect, and assumed that an award in the order of $5,000 was appropriate, it would tend to support a larger award as it neglects entirely the primary s.25(2) breach.

[95] For these reasons we are satisfied that the award of $5,000 compensatory damages was wholly inadequate and should be replaced by an award of $15,000.

Exemplary Damages

[96] We are not persuaded that Justice Singh erred in not awarding exemplary damages. Our reasoning is set out earlier.

Pecuniary Loss

[97] We are also not persuaded that error occurred in relation to this head of damage. The onus rested on the appellant to prove the necessary nexus, and to prove, by way of suitable particulars, the extent of the actual loss of earnings or interference with her economic capacity.

[98] The evidence was sparse in relation to both matters, being unsupported by any independent evidence from a co-worker or subsequent employer, or by any details of loss from which an informed assessment of damages could have been made. There was no cogent explanation of why it was that, having been cleared of wrong

doing, she was able to continue working at Cinema 6 for 3 to 4 months, but then felt unable to continue.

[99] Any subsequent attempts by police to interfere with her employment could have involved a separate actionable wrong, which was not pleaded, and its relevance is therefore confined to the aspect previously mentioned. It went to the response of the police to the breach, and on that basis it was available to be taken into account as a matter intensifying and/or prolonging the complainant's hurt feelings, but not otherwise.

Conclusion

[100] For these reasons we consider that the appeal should be allowed.

The orders of the Court are that:

(1) The appeal is allowed.

(2) In lieu of the sum awarded for damages, the Commissioner of Police is to pay damages in the sum of $15,000.

(3) The damages to be paid to the Appellant for payment out to the complainant Joti.

(4) The Respondents to pay the Appellant's costs of this appeal assessed in the sum of $500 .

(5) Such costs to be paid to the Appellant.

(6) The costs order in the High Court to stand.

Ward, President

Wood, JA

McPherson, JA

Solicitors:

Office of the Fiji Human Rights Commission, Suva for the Appellant
Office of the Attorney General Chambers, Suva for the First and Second Respondents

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