

IN THE HIGH COURT OF FIJI
AT LABASA

CIVIL JURISDICTION

CIVIL ACTION NO. 70 OF 2005

BETWEEN : SUBHASH MANI Plaintiff

AND : RAMENDRA KUMAR 1st Defendant

AND : DIVISIONAL CRIME OFFICER (LABASA) 2nd Defendant

AND : COMMISSIONER OF POLICE 3rd Defendant

AND : ATTORNEY-GENERAL OF FIJI 4th Defendant

BEFORE THE HONOURABLE MR JUSTICE J. BYRNE

Counsel for the Plaintiff : A. Sen
Counsel for the Defendants : H. Rabuku

Dates of Hearing : 20th & 21st June 2007
Date of Judgment : 17th July 2007

J U D G M E N T

The Plaintiff who is now aged 45 and was 42 at the time the incident giving rise to this action took place is now a semi-retired farm labourer and taxi driver. He is married with two children, both boys aged 13 and 12 years respectively. His wife is not employed.

The first Defendant was at all material times a Police officer employed by the Fiji Police Force who, according to the pleadings was at the Labasa Police Station at all relevant times but now

appears to be residing in Auckland, New Zealand. The second Defendant was at all relevant times the Divisional Crime Officer at Labasa under whose directions or instructions the first Defendant performed his duties in Labasa. The third Defendant is the chief of the Fiji Police Force and directs the operation of the Police Force throughout Fiji. The fourth Defendant is the representative of the Government of Fiji and is sued as the person liable in this claim under the Crown Proceedings Act. I shall refer in more detail to the facts of this case shortly, but at the outset I must say that the evidence discloses a story of Police brutality on a scale which I, admittedly having little experience in the criminal courts of this country, have not so far observed. The events reflect no credit on the members of the Police Force concerned and I can only express the hope that by now they have been appropriately disciplined. Certainly they deserve to be. I pass now to the facts.

All about the 16th of November 2004 at about 3.00pm the Plaintiff was driving his taxi near the Fiji Sugar Corporation mill, Labasa, when he was stopped by police officers from the Labasa Police Station.

Thereafter he was taken into custody and to the Labasa Police Station under the control and the direction of the second Defendant. He was taken to a room in the Police Station and was questioned about whether he had taken part in a robbery with violence on the night of the 15th of November, 2004, which the Plaintiff denied. He was then ordered by the Police to remove all his clothes which the police took away. He was then physically assaulted by the first Defendant and other police officers as a result of which he received injuries:

- i) Abrasions on both forearms;
- ii) Pain on the anterior chest walls;
- iii) Fracture at the mid-shaft of the left radius;
- iv) Pain at the back and on both hips;
- v) Fracture of transverse L1, L2, L3 vertebra, fracture of the eleventh rib on the right resulting in his subsequent admission to hospital;
- vi) Incomplete Fracture of the distal right fibula.

Here I shall quote the Plaintiff's account of how these injuries were caused. After the Police removed all his clothes and he stood naked before them, they rubbed chillies on his genitals, eyes, ears, and all around his mouth. The Police told him to lie on the floor but he refused. They forced him to do so and one of them stood on his stomach. He changed his T-shirt on which there was a blood stain. The police then took him to a bathroom and helped him to bathe himself for about 15 minutes. They then took him to another room and interviewed him for about half an hour. He said he was in bad pain. He told them that he wanted to lie down. They then dragged him to a cell because he could not walk. This was between 5.30 and 6.00pm. He told the police that he wanted to go to the hospital but they said "*there is no vehicle*".

He was kept in the cell for three days and nights and knew he was getting worse. He asked again to be taken to the hospital but this time he was told that the doctors were on strike. I comment here that I believe neither of these excuses. If there were no police vehicle available then there are numerous taxis in Labasa and, if as they claim, the doctors were on strike, which I find most unlikely, there are other private medical practitioners in Labasa who could have been telephoned and requested to come to the Station.

He was given no medication or pain-killers and he had no bed on which to sleep. He slept on the cement floor of the cell. He could not go to the toilet. The police then offered him a meal but he had difficulty eating it so other prisoners helped him. Next day his wife visited him and saw his condition.

On the 18th of November 2004 he was taken to the Labasa Magistrates' Court and appeared before a magistrate. Three other persons helped him to the dock. A magistrate ordered him to be taken to the hospital that day. I comment that the report which was tendered by consent is a model of brevity. He was taken back to the police cell, his condition then becoming worse so the next day he was taken back to the hospital. He was in more pain and could not stand up and his head was swelling and he had more back pain.

On the 19th of November he was taken to the hospital again and seen by a different doctor who found that he had a fractured left hand, ribs, left leg and back. Two days later he complained of pain in his left leg and after two days it was X-rayed.

On the third day he complained of pain in his left leg so a doctor at the hospital applied a Plaster of paris to it and he was admitted to the hospital. He was not allowed to move for seven days and made to lie on his back. One week later he was discharged and photographs were taken of him by his wife. He could not walk by himself. He was given crutches. He had a Plaster of paris on his left arm and leg for about three months. His wife bathed and fed him and changed his clothes. He says that his condition hurts in cold weather but generally it has improved except for his back. He has been unable to return to his normal life. Before he suffered his injuries he used to yoke the bullocks and plough his father's land but cannot do so now because of pain in his left hand and leg.

He cannot go fishing now because of difficulty in walking on rocks and he cannot use both hands properly in casting a line. He can drive for only about half an hour because pain develops in his back. He has tried to resume his normal life but now can perform only half his previous activities. Before he was injured he used to plant vegetables and rice but has not worked on the farm since he suffered his injuries. He previously played sport before he was injured, particularly he said that he played soccer in the villages around Labasa but since his injuries does not do so.

He was sent from the Labasa Hospital to Suva for treatment of his ear. Due to his assaults he had difficulty in hearing in his right ear which was discharging. Some wax was removed and he was given medication for it. This helped but now he says his hearing is not as good as before his injuries.

In cross-examination he said that he was charged by the police with robbery with violence. Initially he denied the charge but after his assault by the police he admitted involvement in the incident. I was informed by counsel that a Nolle Prosequi was filed earlier this year. He said that before he was injured he ploughed the land with bullocks or a tractor, drove taxis and heavy

trucks for other farmers. He operated a chain saw for use on his farm. His father paid him between \$50 and \$100 a week depending on the work he did but now he does not pay him anything. He cannot carry sacks on his shoulders anymore.

The second and last witness called by the Plaintiff was doctor Dr Abhay Bhal Chandra Chaudhary who is the Principal Medical Officer in the surgical department at the Labasa Hospital. He referred to a report which he prepared on the 17th of February 2005 which detailed the injuries which the hospital found the Plaintiff has suffered. He said that the fractures suffered by the Plaintiff were very painful and that if they were not attended to for three days there could be complications. He said such injuries had to be immobilised for if they were not and the patient had to move around, this could exacerbate the injuries. If they were not treated for four days a patient would have pain depending on his ability to endure it. He said that after fractures heal a person can continue to have pain. Wet and cold weather could affect some patients and it would be consistent for such a patient to say that he could perform only half his previous activities. He said that hot chilli rubbed on a person's genitals can cause inflammation and swelling which can last for a few days. Rubbing a hot chilli on a person's eyes could affect his sight and he could lose it totally if it were not treated. It could cause blurring of his sight.

Referring to the Plaintiff's injury to his ear, he said a heavy blow can cause infection later and the Plaintiff has to attend the clinic at the hospital every month because of his complaints of pain.

In cross-examination he said that comminuted fractures can be more serious than a single fracture because they can be in more than one place.

I note here that in the Defendants' submission their counsel stated that Doctor Chaudhary had said that the nature of the fractures was minor and can heal naturally. This is a mis-statement of Doctor Chaudhary's evidence. Comminuted fractures are serious. In Black's Medical Dictionary, 40th Edition, the author states that a comminuted fracture usually means the injury was more violent and that there is more risk of vessels and nerves being damaged. These fractures are unstable and take longer to unite. Rehabilitation tends to be protracted.

I come now to the question of damages. The Plaintiff claims general damages, exemplary damages and punitive damages and interest. In his submission the Plaintiff suggests different amounts for the Plaintiff's injuries. Thus he says that the fractured vertebra entitles the Plaintiff to a sum of \$25,000.00, two broken ribs to a sum of \$5,000.00 each or \$10,000.00 in toto, the fracture of his leg \$30,000.00 and the fracture of his hand \$25,000.00.

This method of assessing damages has long been disregarded by the courts which must take a global view of a person's injuries in considering the amount of damages to be awarded.

The figures suggested by the Plaintiff come to \$85,000.00 which happens to be the amount which I awarded Kylie Jane Anderson in Anderson v. Iowane Salaitoga (HBC No. 353 of 1989) in my judgment of the 4th of May 1994. There the Plaintiff suffered very serious injuries which her treating doctor, a Mr Robin of the Austin Hospital in Melbourne, Victoria described as some of the most horrific he had seen. By no dint of the imagination can the Plaintiff's injuries be so described but there is no doubt that they have caused and will cause him pain to the extent conceded by the Defendant, who called no contrary evidence, that the Plaintiff now has a working capacity and a capacity to enjoy life of about ½ of that before he suffered the injuries.

Damages and Case Law

I have been referred to many cases on damages for personal injuries. The most recent being the judgment of Pathik J in HBC 67 of 2005 Iowane Cawaru v. Inoke Tuinakelo and 2 Ors delivered on 2nd March 2007. In this case the plaintiff was falsely imprisoned by police but before being imprisoned he was assaulted resulting in the fracture of his mandible. For this the judge awarded him \$10,000 and \$2,000 for false imprisonment.

Counsel for the defendants submits that I should make a similar award in this case. I do not agree. There is a wealth of difference between the injuries suffered by the plaintiff in Cawaru and those suffered by the plaintiff in the present action. Counsel for the plaintiff referred me to two decisions of my brother Singh given in Labasa on 26 July and 25 October 2005 respectively being HBC 43 of 2003, Dalip Chand v. Vijav Kumar and Anor and HBC 88 of 2002 Abdul

Gani v. Ramesh Chand and 2 Ors. In the first of these, Dalip Chand the plaintiff suffered a crushed left lower limb with a penetrating wound on the medial side of the lower thigh entering the popliteal fossa (i.e. a depression in the region behind the knee). He also suffered a large haematoma of the popliteal fossa and lower third thigh, evidently the result of complete disruption of the popliteal artery and vein. The plaintiff who was aged 39 years at the date of trial was in hospital from 30th August 2000 to 3rd November 2000 (approximately 9 weeks) and according to the judge the injury below his knee bled profusely. The artery and vein were completely severed and a graft had to be performed to allow blood to flow to the lower part of the leg. He underwent four further operations to remove dead muscles. The judge said that the long term effect of these injuries was that his leg below the knee could never be normal. He would walk with a limp for the rest of his life and he could have difficulty doing heavy work again.

For these injuries the judge awarded him \$35,000 being \$25,000 for past pain and suffering and \$10,000 for future pain and suffering. In the second case, Abdul Gani the plaintiff suffered personal injuries in a motor vehicle accident. He was 57 years at the time of trial and suffered abrasions to his right shoulder and chest walls, multiple soft tissue trauma, multiple soft tissue injury, a fractured right scapula bone, fractured ribs, a head injury and a fracture of his right shoulder bone. The judge awarded him \$40,000 for pain and suffering being \$30,000 for past pain and suffering and \$10,000 for future pain and suffering. I respectfully agree with this award but, had I been the trial judge would have awarded the plaintiff Dalip Chand considerably more in damages. But this of course is a matter of opinion and of the impression a judge receives from seeing a witness and assessing the severity or otherwise of his injuries.

In the present case the plaintiff undoubtedly suffered serious injuries leaving him with a working capacity and for enjoyment of life of 50% of his pre-assault injuries. I consider he should be awarded \$60,000 for pain and suffering and special damages of \$1500 agreed.

The plaintiff claims exemplary and punitive damages for the injuries he suffered whilst being held in custody by the police and damages for breach of his constitutional rights, particularly breaches of Section 27(3)(b) which says :

“That every person who is arrested for a suspected offence has the right ...

(a) ...

(b) to be brought before a court no later than 48 hours after the time of arrest or, if that is not reasonably possible, as soon as possible thereafter.”

He also alleges a breach by the defendants of Sections 25 and 27(1) and (3) (b). Section 25 states :

“That every person has the right to freedom from torture of any kind, whether physical, mental, or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment.”

Section 27(1) states :

“That every person who is arrested has the right, inter alia, to consult with a legal practitioner of his or her choice in private in the place where he or she is detained and to be informed of that right promptly.”

Sub paragraph (f) which is very relevant here states :

“An arrested person has the right to be treated with humanity and with respect for his or her inherent dignity.”

At the beginning of this judgment I stated that this was the worst case of police brutality which I have encountered in my time as a judge and I would add even before that in private practice in Australia. The plaintiff rightly describes his treatment at the hands of the police as torture. I therefore find that he is entitled to an award for breach of his constitutional rights and for exemplary damages. In Donselaar v. Donselaar [1982] 1 NZLR 97Cooke J (as he then was) said at p.106 :

“I think that there is a need to have effective sanctions against the irresponsible, malicious or oppressive use of power; and also to maintain a punitive remedy for the common place types of trespass or assault, if accompanied by insult or contumely, which touch the life of ordinary men and women.”

I respectfully agree. It is submitted by the plaintiff that he should receive a constitutional award of \$20,000 and an award of \$10,000 for punitive damages whereas counsel for the defendants

submits that I should follow Pathik J and award only \$2,000. I was referred by the defendants to the case of Thompson v. Commissioner of Police of the Metropolis [1998] Q.B. 498 in which the Court of Appeal of England set out guidelines for the award of damages in cases of wrongful arrest and imprisonment. Summarised it is suggested that these be :

1. The total award should not exceed what is fair compensation for the injury the plaintiff has suffered.
2. Exemplary damages would only be awarded in exceptional cases.
3. The starting point for normal wrongful arrest in imprisonment should be £500 for the first hour and £3000 for period of custody of 24 hours with a progressively reducing daily rate for subsequent days in custody.
4. Awards for damages for false imprisonment should bear some relationship to awards for personal injuries.

It is pertinent to convert these suggested awards into Fijian dollars whereupon they become \$1500 approximately for the initial arrest and \$9,000 for the first 24 hours on a progressively reducing scale for subsequent days. That being so I do not find anything outrageous in the awards sought, submitted by counsel for the plaintiff. I note also that at page 517 of Thompson the court said :

“Where exemplary damages are appropriate they are unlikely to be less than £5,000 (FJD \$15,000). In cases particularly deserving of condemnation an award of £25,000 (FJD \$75,000) could be justified and the figure of £50,000 (FJD \$150,000) should be regarded as the absolute maximum, involving directly officers of at least the rank of superintendent.”

The thing that obviously emerges from Thompson is that awards for breach of constitutional rights and exemplary damages in Fiji are obviously lagging behind the times. It is no answer in my opinion, lest it be claimed, that Fiji is an undeveloped country. Police brutality and the injury it causes are the same whatever the state of a country's development. Pain and suffering are the same to an individual regardless of one's ethnic origin.

Special Damages

In the Memorandum of Special Damages the parties have agreed that these be fixed at \$1500 being the costs of travelling and medication.

Loss of Earning Capacity

Pre-Trial

The plaintiff testified that he earned the sum of \$125 a week by driving a taxi owned by his father and his income was supplemented by his father giving him money for the contribution made by him on his farm.

The plaintiff was not able to work for at least a year and I therefore award him $52 \times \$125 = \$6,500$.

I am satisfied that the plaintiff has suffered 50% total permanent disability or 50% of \$125 for future loss amounting to \$62.50 per week.

Post-Trial Loss

The plaintiff was 42 years of age at the time of his torture by the police. He is now 45 years old. It is submitted that the court can safely use a multiplier of 10 in assessing his future loss, this apparently being based on the normal retiring age in Fiji now of 55. There is some force in the submission but it seems to me that it does not make any allowance for the vicissitudes of life and so I shall use a multiplier of 8 giving a figure of $\$62.50 \times 52 \times 8 = \$26,000$. I consider there is no difference between exemplary and punitive damages. I think now the terms are interchangeable. For this reason I consider that justice will be done by combining the amounts suggested for the constitutional award - \$20,000 and punitive damages - \$10,000 into an award of \$30,000 for exemplary damages.

Interest

In both the judgments of Singh J to which I have referred His Lordship awards 6% interest on both general and special damages. This does not take into account the distinction which has been made in the courts of Fiji on awards of interest for pain and suffering and special damages. It would appear that His Lordship was not referred to the English decision of

Jefford v. Gee [1970] 2 Q.B. 130. This was referred to by the local Court of Appeal case of Attorney-General of Fiji v. Charles Valentine ABU 0019 of 1998S in a judgment delivered on 24th August 1998. As to special damages the court said at page 3 :

“Special damages. Interest should be awarded from the date of the accident to the date of trial at half the appropriate rate. (Usually special damages such as hospital expenses, loss of wages etc, accrue on a day-by-day basis). Rather than the Court making a series of interest calculations from the time each was incurred, it can achieve a broadly appropriate assessment by taking a figure representing a mean or average for the period. Half the interest over that time may be accepted as a suitable compromise figure in most cases.”

I consider interest for pain and suffering on the amount I have awarded, \$60,000.00, of 6% for the period from the date of the issue of the writ, 28 November 2005 to the date of trial 20 June 2007 should be awarded namely $\$60,000.00 \times 6\% \times 1 \frac{1}{2}$ years = \$5,400.00. I allow 3% interest on special damages from the date of the injuries namely 16 November 2004 to the date of trial 20 June 2007, 2 years and 7 months at 3% amounting to \$120.00.

The defendant submits that no award should be made for loss of future earnings on the ground that this was not pleaded or claimed by the plaintiff. This ignores the amendment to the statement of claim which was made at the beginning of the trial.

Paragraph A (d) of the particulars of Special Damages was amended to read “loss of wages at the rate of \$125 per week or more from 16 November 2004 and continuing.” I therefore reject the submission that there was no evidence before the court of loss of future earnings. This is represented in my award by \$26,000 as post-trial loss of earning. There will therefore be a total award of :-

Pain and Suffering	\$ 60,000.00
Interest thereon at 6 percent	\$ 5,400.00
Special Damages	\$ 1,500.00
Interest at 3 percent	\$ 120.00
Exemplary Damages	\$ 30,000.00
Pre-Trial Loss of Earning	\$ 6,500.00
Post-Trial Loss of Earning	<u>\$ 26,000.00</u>
Total Award	<u>\$129,520.00</u>

On the question of costs I note that the plaintiff's solicitors had carriage of this matter for more than 2 ½ years. I therefore award \$5,000.00 costs.

There will be judgment for the plaintiff in these terms.

.....
[John E. Byrne]
JUDGE

At Labasa

17th July 2007