AMI CHAND

v.

LAL BAHADUR

[HIGH COURT, 1996 (Fatiaki J) 16 September]

Appellate Jurisdiction

Tort- assault- quantum of damages- relevance of provocation by plaintiff to plaintiffs entitlement.

The Plaintiff initiated an incident in which he was injured by the Defendant who was subsequently convicted of assaulting him. On appeal against an award of damages the High Court HELD: (i) the Plaintiff's loss of earnings were properly awarded as special damages; (ii) the amount of general damages awarded was not excessive but that (iii) the award should not have been reduced to reflect the Plaintiff's role in provoking the incident.

Cases cited:

Angila Wati v. Khatum Nisha (1979) 25 F.L.R. 12
British Transport Commission v. Gourley [1956] A.C. 185
Flint v. Lovell [1935] 1 K.B. 354
Laisiasi Naigulevu v. Ram Rattan (1976) 22 F.L.R. 54
Satya Prasad v. Hari Chand Labasa Civ. App. 5/95
Stupple v. Royal Insurance Co. Ltd. [1970] 3 All E.R. 230
Watson v. Christie (1800) 5 R.R. 579
Lane v. Holloway [1968] 1 Q.B. 379

Civil appeal from the Magistrates' Court to the High Court.

A. Sen for Appellant
J. Singh for Respondent

Fatiaki J:

This is an appeal arising out of a decision of the Labasa Magistrates' Court awarding damages against the defendant on a claim for personal injuries sustained by the respondent after he was struck by the appellant on the back of the left elbow during an altercation.

In respect of this same incident, on the 30th of April the appellant pleaded guilty to a charge of Assault Occasioning Actual Bodily Harm in the Magistrates' Court, Labasa and was convicted and sentenced to a suspended prison term and fined $225 out of which $200 was ordered to be paid to the plaintiff, presumably, by way of compensation.

Proof of such a criminal conviction was described by Kermode J. in Laisiasi Naigulevu v. Ram Rattan (1976) 22 F.L.R. 54 as having the effect that :

> "Once a defendant had been convicted before a court, the burden of proof was on him in ensuing civil proceedings to establish that the offence had not been commited."

A

His lordship however, in preferring the view of Buckley J. to that expressed by Denning M.R. in Stupple v. Royal Insurance Co. Ltd. [1970] 3 All E.R. 230, said at p.59 :

> "It must still be established by evidence, in my view, that the offence involving negligence was a cause of the accident in which the plaintiff was injured."

B

The trial magistrate in his judgment correctly followed that approach in holding the appellant responsible for causing the respondent's injuries. Thereafter he assessed special damages at $995 and allowed $2,000 by way of general damages. The total was then reduced by one third to reflect the respondent's role in the altercation and, by a further $200 being the compensation earlier paid to him in the criminal proceedings (see : Section 161(3) of the C.P.C.), thus making a total award of $1,800 together with taxed costs.

C

The appellant's Notice of Appeal sets out 3 grounds of appeal as follows :

D

1. The Learned Magistrate erred in law and in fact in holding and/or finding that the plaintiff proved special damages to the required standard in awarding the same to him ;

2. The Learned Magistrate erred in law and in fact in making findings for the plaintiff in the absence of any cogent medical evidence that the injuries sustained was sufficient for the award made;

E

3. The Learned Magistrate erred in law and in fact in assessing the damages and further in assessing the contribution by the Plaintiff in the said award of damages.

F

Quite plainly this is an appeal against an award of damages and the proper approach of an appellate Court was said by Greer L.J. in Flint v. Lovell [1935] 1 K.B. 354 to be, at p.360 :

> "This Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think if ... they had tried the case ... they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, ... an entirely erroneous estimate of the damage to which the plaintiff is entitled."

G

Bearing the above in mind I turn next to consider the appellant's specific grounds of appeal.

A

As for ground (1), counsel for the appellant submitted that special damages must be readily quantifiable and be capable of being strictly proved in court and the respondent, being a self-employed rice farmer at the time of the incident, could not be said to have lost any income or wages since any loss incurred would be in the nature of loss of profits calculated at year end and therefore properly assessed under the head of general damages.

B

Counsel for the respondent on the other hand submitted that the respondent's claim was for a loss of income (see : Para. 9(a)(i) of the Statement of Claim), and therefore, it was incorrect to call it loss of profits or future earnings. What is more the trial magistrate in awarding a single season's loss had clearly treated the respondent's loss of earnings as special damages.

C

I am satisfied that as pleaded and proved, the respondent's claim for "loss of income" was a claim for special damages and properly assessed by the trial magistrate as such.

I am fortified by the dictum of Lord Goddard when he said in British Transport Commission v. Gourley [1956] A.C. 185 at p.206 :

D

> "In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damages, which has to be specially pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation. Secondly, there is general damages which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like, and, of the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future."
>
> (my underlining)

E

F

Before leaving the question of special damages, counsel for the respondent pointed out a minor addition error in the trial magistrate's judgment in so far as the correct total amount awarded for special damages was $(210 + 750 + 30 + 5 + 10) = $1005 and not $995 as stated.

There is plainly no merit in this ground of appeal which is based on a misconception of the meaning and nature of special damages.

G

In arguing ground (2), counsel for the appellant complains that the trial magistrate's assessment of general damages was unsupported by the evidence and excessive in amount. In this regard, counsel laid stress on the evidence of the appellant and his witnesses at the trial to the effect that the respondent's ability to continue farming (ploughing, in particular) had not changed after the

incident.

A The respondent on the other hand produced (without objection) at the trial, a medical report (Exhibit 2) which besides detailing the respondent's elbow injuries, also assessed his permanent disability at 7% (whatever that may mean). The respondent also testified as to his 21 day confinement in Labasa Hospital and his numerous post-discharge attendances at the fracture clinic for reviews and the continuing pain and immobility experienced by him as a result of his injuried elbow. He has also had to resort to share- farming his land since his injuries.

B

The trial magistrate in his judgment was clearly aware of all these factors when he assessed the general damages at $2,000. Needless to say, although the award was a global or lump-sum figure, such an award would have necessarily included the conventional personal injury heads of damage such as physical injury; pain and suffering; loss of amenities and disfigurement, to name but a few.

C

The award is also comparable with an earlier award of the same Magistrates' Court in Satya Prasad v. Hari Chand Labasa Civil Appeal No. 5 of 1995 in which this Court upheld an award of $2,500 to a plaintiff who had sustained head injuries as the result of an attack by a defendant using a fork and also, with an award of $2,500 by Williams J. in Angila Wati v. Khatum Nisha (1979) 25 F.L.R. 12 where the plaintiff suffered permanent disabling injuries to her right hand as a result of a cane knife attack.

D

In my view given that it was common ground that the appellant caused the respondent's injuries, the quantum of general damages assessed was neither excessive nor unsupported by the evidence. Indeed, if anything it erred on the side of inadequacy in the trial magistrate's apparent failure to consider the respondent's loss of future earning capacity necessitated by his permanent disability. (see: the calculation in Angila Wati's case (ibid) at p.15.) There is no merit either in this ground of appeal.

E

The appellant's third and final ground of appeal complains about the trial magistrate's assessment of the respondent's contribution to the incident in so far as he accepted that the plaintiff was partly responsible for what had happened on that day and which the trial magistrate assessed at one third.

F

In the course of his judgment the trial magistrate stated : "The incident started with the plaintiff (the respondent) assaulting the (appellant's) labourer" and later, "... I believe the defendant (appellant) and his two witnesses and accept the fact that the plaintiff (respondent) had initiated the fight in assaulting Kismet Singh (D.W.1)." and finally at p.5 of his judgment the trial magistrate concluded : "Taking all the evidence adduced in the case ... it is clear that it was the plaintiff (respondent) who had initiated the fight."

G

Bearing the above passages in mind, counsel for the appellant submits that the trial magistrate should have held the respondent either entirely responsible for the incident or at the very least, he ought to have considered the appellant's plea

of self-defence.

In this latter regard no such defence was positively pleaded in the Statement of Defence nor were any supporting facts averred, although counsel vainly attempted at the hearing of the appeal, to draw such an inference from the appellant's bare denial in the Statement of Defence that his criminal conviction was not relevant to the present matter.

In the notes to Or.18 r.7 of the White Book at 18/7A/3 the following passage appears:

> "If a party denies that the criminal conviction relied on is relevant to any issue in the proceedings, he may, if the denial is more than a mere denial and amount to a positive allegation, be required to give particulars of the facts and matters relied on to show the conviction is not so relevant."

Furthermore as long ago as 1800 in Watson v. Christie (1800) 5 R.R. 579 where a seaman sued his captain for a severe beating he received on the captain's orders and the captain had merely pleaded not guilty, Lord Eldon said :

> "... that although the beating in question, however severe, might possibly be justified on the ground, of necessity of maintaining discipline on board the ship, yet that such a defence could not be resorted to unless put upon the record, in the shape of a special justification."

Quite plainly having regard to counsel's submission on appeal, the pleadings in the Statement of Defence were wholly inadequate to raise a plea of self-defence.

In Lane v. Holloway [1968] 1 Q.B. 379 Lord Denning M.R. in rejecting the defences of *volenti non fit injuria* and *ex turpi causa oritur non actio* in that case, where a young man of 23 years assaulted a slightly inebriated elderly man of 64 years in circumstances in which it might be said the latter was the aggressor. said at p. 386:

> "Even if the fight started by being unlawful I think that one of them can sue the other for damages for a subsequent injury if it was inflicted by a weapon or savage blow out of all proportion to the occasion ... The man who strikes a blow of such severity is liable in damages unless he can prove accident or self-defence."

In this present case the trial magistrate quite properly considered that the use of a three foot long stick by a person in the prime of his life (the appellant) to assault and seriously injure an unarmed person of advanced years (the respondent) was excessive in all the circumstances, and for such excessive force, the appellant was accordingly liable to compensate the respondent.

In my view in the absence of any special pleadings justifying such an assault, the trial magistrate was entirely justified in making such a finding despite being satisfied that the respondent had initiated the incident.

Having made this latter finding however, what was its effect on the damages awarded? As earlier mentioned the trial magistrate reduced the respondent's damages by one third.

In this latter regard, despite counsel for the respondent's apparent concession at the hearing of the appeal, that the trial magistrate was entirely correct in his assessment of the respondent's contribution, (whatever that may mean), the law is clearly laid down in Lane v. Holloway (ibid) where Salmon L.J. in rejecting a similar reduction in the damages awarded in that case on the basis of the plaintiff's behaviour, said at p.392 :

> "... on principle, when considering what damages a plaintiff is entitled to as compensation for physical injury, the fact that the plaintiff may have behaved badly is irrelevant. I think it is important to remember this."

The only relevance and possible effect that such conduct can have on the question of damages is (that) :

> "Provocation by the plaintiff can properly be used to take away any element of aggravation. But not to reduce the real damages."
>
> [per Lord Denning M.R. (ibid) at p.387]

or, as Salmon L.J. put it at p.391 :

> "This (the plaintiff's behaviour) is relevant to the question of whether or not exemplary damages should be awarded, and, if so, how much."

The trial magistrate has clearly erred in law and in favour of the appellant, in considering the respondent's behaviour in assessing the general damages he was entitled to, however, as the respondent has not sought to appeal against the trial magistrate's judgment, I do not propose to alter it in any way.

For the foregoing reasons the appeal is dismissed with costs to the respondent to be taxed if not agreed.

(Appeal dismissed.)