

IN THE FIJI COURT OF APPEALCIVIL JURISDICTIONCIVIL APPEAL NO. 59 OF 1992

(High Court Action No. 14 of 1990)

BETWEEN:LUCKY EDDIES LIMITEDAPPELLANT

-and-

SHAZRAN LATEEFRESPONDENT

Mr. Dilip Jamnadas for the Appellant
 Mr. Subhas Parshotam for the Respondent

Date of Hearing : 10th August, 1993
Date of Delivery of the Interim Order : 9th November, 1993

INTERIM ORDER

The respondent to this appeal is a well known legal practitioner in Suva. He is (or was) also a regular frequenter of the appellant's premises where it conducts a nightclub. On 17th November 1989 he and his wife and some friends went there at about 9.30 p.m. On arrival, or shortly afterwards, a fracas occurred, and during it or not long afterwards he was involved, and fisticuffs between him and an employee of the appellant resulted. The respondent was injured, not only in his person, but also in his dignity - he says he was humiliated.

The respondent commenced an action in the Magistrate's Court on 28th November 1989 for damages for assault. In the statement of claim he listed three heads of damages (record p. 24):-

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- "1. *Special damages for injuries and loss of income.*
2. *General damages.*
3. *Any other relief this Court may deem just."*

It appears that the learned Magistrate delivered judgment on 17th August 1990. He awarded damages to the respondent in the sum of \$5000.00. We shall return to this.

The appellant filed a notice of intention to appeal on 21st August 1990. An appeal in the High Court followed on 27th August 1990. It contained the following grounds of appeal (record p.18):-

"1. THAT the Learned Trial Magistrate erred in law and in fact in assessing the quantum of loss suffered by the Respondent/Plaintiff.

2. THAT the Appellant/Defendant reserves the right to adduce further grounds of Appeal once the copy record of the Trial is made available."

It appears that further grounds of appeal must have been filed, or at least argued on the hearing of the appeal because the Judge refers to them (record p.8). They raised defences on the merits as well as on the question of damages. It is only necessary to refer to His Lordships summary of two of them (ibid):-

"(2) *That the Learned Magistrate erred in law in granting exemplary punitive damages against the Defendant.*

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- (3) *That the Learned Magistrate erred in law in arbitrarily awarding damages for injuries, the manner of inflicting injuries, humiliation and pain and suffering alleged by the Plaintiff.*"

On 17th September 1992 he dismissed the appeal and affirmed the quantum of damages. We shall come back to his reasons for doing so.

The appellant appealed to this Court. It was an appeal on quantum only. The grounds were (record p.4):-

- "(1) *The Learned Judge in the Court below erred in law and in fact in awarding aggravated damages to the Respondent.*
- (2) *The Learned Judge in the Court below erred in law and in fact in holding that the award of \$3,000.00 to the Respondent for pain and suffering is not excessive.*
- (3) *The Learned Judge in the Court below erred in law and in fact of arbitrarily awarding damage without due consideration to existing law.*"

Supplementary grounds were later filed. All they did was to excise the words "and in fact" from each of the three grounds set out above (record p.5).

The relevant portion of the decision of the learned Magistrate was (record p.41):-

"However in this case the security officer exceeded all bounds of decent behaviour. He went out of his way. Even if provoked at the doorway - he had no licence to move inside and assault the plaintiff in the

4.

manner described by Mr. Punja (some 5 minutes later). For this reason I am persuaded to grant exemplary or punitive damages under item (c) of the ruling prayed for the statement of claim.

Now in relation to damages I find that while special damages and loss of income is pleaded no evidence has been called and no such relief appears to be available - I therefore avoid no special damages or damages for loss of income.

On the question of general damages I have carefully considered all the circumstances - including the actual injuries, the manner of inflicting the injuries, the humiliation in front of friends and wife and the pain and suffering and bearing in mind all the related circumstances I award the plaintiff the sum of \$3000, as being reasonable and appropriate.

As for exemplary or punitive damages I have carefully considered them and I award the sum of \$2000 as being appropriate under the circumstances.

I accordingly award the plaintiff the sum of \$5000.00 damages against the defendant company."

Stopping there, four matters arise for consideration.

The first is that the learned Magistrate awarded a sum of \$2000 for what he termed exemplary or punitive damages.

The second is that he did so relying on the claim for "any other relief" in the statement of claim.

The third is that he took into account in awarding the sum of \$3000 as general damages under the second claim in the statement of claim the following matters, viz "the actual

5.

injuries, the humiliation in front of friends and wife and the pain and suffering"(record p.41).

The fourth is that we do not know upon what basis the learned Magistrate awarded exemplary damages. The passage which we have earlier quoted from his judgment was all that he said about them. We shall return to this.

The law is clear in this area. First, in addition to what might be called the ordinary general damages (pain and suffering, loss of enjoyment of life, permanent disability etc) there are two further categories of damages, one known as aggravated damages, and the other as exemplary damages.

The law is also clear that aggravated damages, where they are appropriate to be awarded, fall to be assessed as part of general damages.

The law is also clear that where exemplary damages are claimed they must be separately pleaded.

Exemplary damages are in fact punitive. "In certain circumstances the court may award more than the normal measure of damages, by taking into account the defendant's motives or conduct, and the damages may be "aggravated damages", which are compensatory, or "exemplary damages", which are punitive" Halsbury 4th Ed., Vol. 12 para 1112. The three classes of exemplary damages that may be awarded under this head are set out

6.

in the well known case of Rookes v Barnard (1964) A.C. 1129. Again it is sufficient to quote from Halsbury (op cit) para 1186:-

"There are two senses in which it can be said that a plaintiff's damage has been aggravated by the defendant.

In the first and strict sense of the word the defendant's motives, conduct or manner of inflicting the injury may have aggravated the plaintiff's damage by injuring his proper feelings of dignity and pride. In tort, but not in contract, the plaintiff can be awarded additional damages, called "aggravated damages", to compensate him for his injured feelings. Aggravated damages, which are compensatory in nature, are to be distinguished from exemplary damages, which are punitive in nature."

There seems to have been considerable controversy in England whether such a separate head of damages exists at all, but that now seems to have been put at rest by the decision in Rookes v Barnard (supra). Whatever the position, such damages were not able to be awarded here on the facts of this case.

As we have stated earlier, exemplary damages must be specially pleaded. Our attention was not directed to any requirement to do so in any rules that relate to the bringing of actions for damages in the Magistrate's Court. But whether or not there is any such requirement in rules or under the general law, the matter is quite immaterial here. The matter of exemplary damages was raised in submissions to the Magistrate on behalf of the respondent (record p.36) and no objection is

recorded. The matter was raised in written submissions submitted by the respondent to the Magistrate dated 8th June 1990, after the oral submissions were made on 16th February 1990 and before judgment was delivered on 17th August 1990. No complaint was made. It is far too late to raise the matter here.

However, we believe that we are entitled to point out that the distinction between aggravated and exemplary damages was made as confusing as it could be for the learned Magistrate by the submissions made to him by counsel for the respondent, and to which we have earlier referred. Those submissions contained these passages (record p.45-6):-

"Assault where tortiously committed affords protection not only from physical injury but also from insult which may arise from interference with a person and thereby lead to a further head of damage such as injury to feelings, loss of face coupled with indignity, mental suffering, disgrace and humiliation howsoever caused ultimately to be derived from the assault itself.

...

We would submit that exemplary damages can be awarded in this case if the Court can come to the view that the behaviour is such as to warrant an award on account of the Defendant's previous behaviour: Rookes -v- Barnard [1964] AC 1129.

This insult is compensated by the occasioning of personal indignity with the award of aggravated damages to compensate for the outrage: Fong -v- McKnight [1968] NZLR."

8.

That is confusing enough. But leaving on one side that none of the categories of exemplary damages to which Rookes v Barnard refer were applicable in this case, the submission proceeds as follows:-

"Accordingly, these submissions are given on the basis that damages should be assessed along with the conventional headings of:-

- (i) pain and suffering;*
- (ii) medical and other special damages such as doctor's bills;*
- (iii) loss of income both past and minimally for the future;*
- (iv) loss of future employment of life which should be assessed on the basis of the medical reports tendered; and finally;*
- (v) exemplary damages for aggravated and indignity to feelings on the basis referred to aforesaid.*

In all, the figure in globe that should be awarded should be a figure of \$2,500 made up of the damages that one would award in accordance with the heads numbered (i) to (iv) inclusive and finally a figure of \$2,500 for indignity to feelings for the aggravation and insult accorded by the Defendant's acts."

(The wording in all passages are as they appear in the record).

It will be recalled that the learned Magistrate did award a sum of \$2000 for "exemplary or punitive damages" (record p.41).

Notwithstanding this, and for reasons that we have already given, we believe that the learned Magistrate correctly included the aspect of aggravated damages under the head of general damages and assessed a sum of \$3000 in respect of such damages.

9.

The appellant appealed to the High Court. The edifying grounds of appeal were (record p.18):-

"1. THAT the Learned Trial Magistrate erred in law and in fact in assessing the quantum of loss suffered by the Respondent/Plaintiff.

2. THAT the Appellant/Defendant reserves the right to adduce further grounds of Appeal once the copy record of the Trial is made available."

The appeal was heard by Byrne J. His Lordship gave judgment on 17th September 1992.

There are two matters in his judgment that require examination.

The appeal appears to have been brought under the provision of Order 55 of the High Court Rules. Such an appeal is by way of rehearing - Order 55 rule 3(1). That Order does not require any pleadings.

As to the award of exemplary damages his Lordship said (record p.12):-

"As a result of the decision of House of Lords in Broome v Cassell & Co. Ltd (1972) A.C. 1027 the English High Court Rules now provide in Order 18, Rule 8/6 that a claim for exemplary damages must be specifically pleaded together with the facts relied on.

The object of the rule is to give a Defendant fair warning of what is going to be claimed with the relevant facts and thus to prevent surprise at the trial and so

10.

avoid the need for any adjournments of trial on this ground.

In my judgment the Learned Magistrate fell into error here by awarding \$2,000.00 exemplary damages when a claim for such has not been pleaded."

No doubt by his reference to the English rules his Lordship was only attempting to indicate that such a claim ought also to be pleaded in the Magistrate's Court. He might equally have referred to Order 18 rule 7(3) of the High Court rules. This matter was not raised in the grounds of appeal; whether or not it was raised in argument before his Lordship we are unable to say. But for reasons we have already given there was no way in which any such deficiency could have been successful in the High Court, and there was no requirement for pleading there.

For a completely different reason the conclusion reached by his Lordship on this aspect was correct. None of the three categories specified in Rookes v Barnard (supra) as enabling exemplary damages to be awarded applied in this case. His Lordship was of the view that despite the controversy that surrounded, or surrounds, the whole topic of exemplary damages, and differing views in Australia and elsewhere, that decision should be followed in Fiji. We are not disposed to disagree with that view at this stage. The matter was not argued before us on this appeal, and this Court would not consider making any definite pronouncement upon it without the benefit of very careful submissions and after careful consideration. We are now merely prepared to say that the award here did not fall into one

11.

of the categories that permit exemplary damages in accordance with the above quoted case.

The award of \$2000 for exemplary damages cannot stand, as his Lordship found.

But the difficulties do not cease there.

In the course of his judgment (record p.14) his Lordship refers to the position of the respondent, the circumstances of the assault and that he had no doubt that the respondent "felt humiliated and embarrassed by the actions of the staff of the Appellant". After referring to some matters not relevant here, he goes on (record p.15):-

"With these considerations in mind, and accepting that the Learned Magistrate should not have awarded exemplary damages for reasons I have given, nevertheless in my judgment an amount of \$2,000.00 is not inadequate by way of aggravated damages for the Respondent here.

In short, looking at the whole of the evidence, I am not persuaded that the result reached by the Learned Magistrate was wrong."

Now, as we have pointed out, the result reached by the learned Magistrate was a sum of \$3000 for general damages which included the aspect of humiliation and embarrassment. So that by adding on a sum of \$2000 his Lordship must have been of the view that the Magistrate had not considered this aspect, and that he was entitled to tack on a further sum under this head. Leave

12.

aside the correctness of apparently treating it as a separate head of damages, he states that he is not persuaded that the learned Magistrate's decision was wrong, who, of course, had considered, and had been asked to consider, this topic, and included it in an award of \$3000.

Clearly this appeal must be allowed. But what do we do now?

While the most appropriate course now to be followed must be clear to the parties, we have been asked by the respondent's advisers to allow the matter of costs to be argued, and of course we would permit this. The matter of what to do can also be dealt with then. Unfortunately logistics will make it difficult for this Court to be re-convened with more than 2 members. So the parties will either have to put their submissions in writing, or agree to the matter being further considered by two members of the Court in the November sittings. We would request the legal advisers to confer swiftly about this and inform the Court which course is to be followed.

Judgement reserved. In the event the parties agree to make further submissions before 2 Judges, the matter will be listed for hearing on Tuesday 9th November 1993 at 11.30 a.m. In the event that the parties do not agree to do so, any written submission are to be filed on or before 30th September 1993. It can be noted that in the event of consent orders, these can obviously be made by two Judges.

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Michael Helsham
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Mr Justice Michael M Helsham
President Fiji Court of Appeal

Moti Tikaram
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Sir Moti Tikaram
Resident Justice of Appeal

Mari Kapi
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Sir Mari Kapi
Justice of Appeal