a **Fiji Islands**

Commander, Republic of Fiji Military Forces v Navualaba

b [2010] FJCA 5

Court of Appeal

c Byrne AP and Calanchini JA

6 November 2009, 10 February 2010

Tort – Military forces – Liability – Damages – Exemplary damages – Claimant detained in temporary military camp – Claimant incurring injuries and post-traumatic stress as a result of assault by soldiers – Claimant bringing action for d *damages – Whether tortious liability engaged – Court awarding exemplary damages – Whether appropriate case for such an award – Relevant considerations – Appropriate test – Royal Fiji Military Forces Act (Cap 81), s 27.*

The respondent brought proceedings in the High Court claiming damages as e a result of being assaulted by members of the police force and soldiers from the Fiji Military Forces at a temporary military camp. The High Court awarded the respondent $45,000 general damages for pain and suffering and $18,000 exemplary damages. The appellant, the Commander of the Republic of Fiji Military Forces, appealed to the Court of Appeal, submitting (i) that the High Court had erred in law in failing to consider that in the 2000 coup f certain civil liberties were suspended until law and order was restored and (ii) that the High Court had erred in law in awarding $45,000 in damages for pain and suffering when the medical evidence did not support such an award.

HELD: Appeal dismissed.

Section 27 of the Royal Fiji Military Forces Act (Cap 81) provided that nothing g in the Act exempted any person from being prosecuted, tried and convicted before the ordinary tribunals of Fiji for any felony, misdemeanour or offence against any law for the time being in force in Fiji. Members of the armed forces were not above the law. On the facts, the award of $45,000 to the respondent as general damages for injuries to his spine, fractures and h post-traumatic stress was reasonable, if perhaps a little on the low side. The respondent had surrendered himself to the army camp. If he had been a suspect he should have been handed over to police to investigate the allegations against him according to law. The conduct of the soldiers was disgraceful, having no respect for the respondent's rights, and was not acceptable for members of a disciplined force. The instant matter was i therefore a proper case for aggravated or exemplary damages, the main purpose of which was to punish a defendant, as there had been oppressive and high-handed conduct on the part of the soldiers. An award of $18,000 was

appropriate for exemplary damages, which were to be punitive and not crippling. Awards had to be considered in a local context, not in the context of awards made in other developed countries (see paras [7]–[23], below). Dicta of Mansfield CJ in *Burdett v Abbot* (1812) 4 Taunt 410 at 449–450 applied. *Rookes v Barnard* [1964] 1 All ER 367, *Australian Consolidated Press v Uren* [1969] 1 AC 590, *Taylor v Beere* [1982] 1 NZLR 81 and *Dr Anirudh Singh v Sotia Ponijiase* (unreported), Fiji HC, considered

[*Editors' note*: Section 27 of the Royal Fiji Military Forces Act (Cap 81), so far as material, provides: 'Nothing in this Act contained shall exempt any person from being prosecuted, tried and convicted before the ordinary tribunals of Fiji for any felony, misdemeanour or offence against any law for the time being in force in Fiji ...'

Cases referred to in judgment

Anirudh Singh (Dr) v Sotia Ponijiase (unreported), Fiji HC
Australian Consolidated Press v Uren [1969] 1 AC 590, Aus PC
Burdett v Abbot (1812) 4 Taunt 401, (1812) 128 ER 384
Rookes v Barnard [1964] 1 All ER 367, [1964] AC 1129, UK HL
Taylor v Beere [1982] 1 NZLR 81, NZ CA

Legislation referred to in judgment

Emergency Decree 2000, s 21(c)
Royal Fiji Military Forces Act (Cap 81), s 27

Appeal

The appellant, the Commander of the Republic of Fiji Military Forces, appealed against the judgment of Singh J in the High Court on 8 August 2008 awarding the respondent, Taito Navualaba, $45,000 general damages for pain and suffering and $18,000 exemplary damages as a result of injuries sustained by the respondent. The facts are set out in the judgment of the court.

J Boseiwaqa for the appellant.
S Valenitabua for the respondent.

10 February 2010. The following judgment of the court was delivered.

BYRNE AP and CALANCHINI JA.

[1] The appellant appeals from the judgment of Singh J in the High Court dated 8 August 2008 in which the judge awarded $45,000 general damages for pain and suffering and $18,000 exemplary damages as a result of injuries sustained by the respondent between 24–25 August 2000.

[2] In the High Court the respondent claimed damages as a result of assaults on him by members of the police force and soldiers from the Fiji Military Forces. The assaults were committed at a temporary military camp set up at Wainavau, Naitasiri. The respondent told the court that he was arrested for having committed murder and robbery. Following his arrest he claimed that he was tortured for a period of one day as a result of which he

was hospitalised at the CWM Hospital from 25 August 2000 to 11 October 2000. After his release he also attended St Giles Hospital.

[3] The appellant in his defence denied assaulting or causing any injuries to the respondent. He denied knowledge of any injuries suffered by the respondent.

GROUNDS OF APPEAL

[4] The appellant originally filed five grounds of appeal but at the hearing in this court only two were argued. These were:

(i) that the High Court erred in law in failing to consider that in the 2000 coup certain civil liberties were suspended until law and order was restored.

(ii) that the High Court erred in law in awarding the sum of $45,000 in damages for pain and suffering when the medical evidence did not support such an award.

ASSAULT

[5] The only direct evidence of assault was given by the respondent himself. He told the court that he voluntarily surrendered himself to the soldiers at the Naqelewai Community Hall, Naitasiri after he learnt from his wife that the soldiers were looking for him. He stated that he was taken by soldiers from Naqelewai to Wainavau Camp in Naitasiri for questioning. At Wainavau he stated that he was tortured by being beaten on his body with an iron rod; he was made to dive into a shallow stream as a result of which blood came streaming down his face. He said that he lost consciousness so hot water was poured on him and he regained consciousness. He said he was kicked on his back and also hit with rifle butts. He also told the court that he was made to collect horse manure and cow dung and the soldiers forced him to eat this. As a result he felt so bloated that he could not eat food. He was made to sit and pistols were pointed at his head. At night he stated that he was made to sleep in a dog cage at the back of a twin cab van with two dogs. He slept close to the dogs for warmth. The next morning the beating started again. Later he was taken to the military hospital because he could not walk. From there he was taken to CWM Hospital, Suva.

THE INJURIES SUFFERED

[6] The respondent alleged that he suffered the following injuries:

(a) bruises, cuts and wounds to his head;

(b) head and eyes swollen so that he could not see for a week;

(c) complex fracture on the left middle phalanx of left index finger;

(d) complex fracture on left ankle;

(e) hair cut with a pair of scissors after the assaults to mock him;

(f) dislocated lower spine;

(g) restriction of use of lower jaw causing inability to eat solid food;

(h) blood coming from ears and nose when he was admitted at CWM hospital.

[7] Singh J did not accept all the allegations of injuries made by the respondent but he found that the respondent probably suffered some injury to his spine. He also found that the respondent was beaten and so suffered body

pains with tenderness on his back and both chest walls. He accepted that the respondent received a fracture to the middle phalanx of his left finger and that he suffered a fracture of his left forearm which had to be put on a back slab. The judge also found that the beatings resulted in the respondent not being able to move and have difficulty in sitting even in bed. He accepted also that his face was swollen and he had black eyes and his arms and legs were swollen.

EVIDENCE OF POST-TRAUMATIC DISORDER

[8] The principal evidence of this was contained in a medical report issued by the St Giles Hospital dated 8 February 2008. It stated that a post-traumatic stress disorder is an anxiety disorder which can develop after exposure to a terrifying or life-threatening event or ordeal in which serious physical harm occurred or was threatened. The respondent had first visited St Giles Hospital on 3 August 2002. On 15 March 2004 he was re-living his trauma and developed fears that unspecified persons were trying to harm him. He also had increased irritability and insomnia. He was now short tempered, so that his prognosis was not good because even after seven years following the event he suffered from insomnia and irritability.

[9] The judge accepted this evidence.

LOSS OF INCOME

[10] The judge rejected the respondent's claim for loss of income but held that he was entitled to general damages for pain and suffering. He said that the respondent must have gone through intense fear for his life during the time he was in custody. He said, and we agree, that the damages in such a case have to be higher than in personal injury cases suffered in motor vehicle accidents, where events occur within seconds and the fear is over. Here the trauma continued for hours while in custody.

[11] For all these injuries past and future the judge awarded the sum of $45,000, which in our judgment was reasonable and we shall not interfere with it.

EXEMPLARY DAMAGES

[12] The main purpose of exemplary damages is to punish a defendant. The judge noted a decision of Coventry J in the High Court in *Dr Anirudh Singh v Sotia Ponijiase* (unreported), Fiji HC, in which the judge ordered $100,000 exemplary damages for an extreme case where soldiers had kept surveillance on the plaintiff. The plaintiff was handcuffed and hooded so he had difficulty breathing and was brutalised for twelve hours. The judge said, and we also agree, that the present case was nowhere near the brutality in that case.

[13] There has been a difference of approach taken to exemplary damages in the English, Australian, New Zealand and Canadian courts.

[14] In *Rookes v Barnard* [1964] 1 All ER 367 the House of Lords through Lord Devlin dramatically renounced exemplary damages as incompatible with the essentially compensatory nature of civil liability, except when expressly authorised by statute or against oppressive, arbitrary and unconstitutional acts of government servants. In Australia, New Zealand and

Canada exemplary damages have survived as a mark of public censure against extremely bad misconduct—see, for example, *Australian Consolidated Press v Uren* [1969] 1 AC 590 and *Taylor v Beere* [1982] 1 NZLR 81.

[15] In his judgment Singh J said (at [34]) correctly that the question whether the appellant's conduct had reached this threshold was a factual one but in the present case he said it really did not matter whether he applied the English or the Australian approach because both fitted the facts of the case.

[16] The judge went on (at [35]), which we quote in full because we agree with it):

> 'The plaintiff had surrendered himself to the army camp. If he was a suspect he should have been handed over to police to investigate the allegations against him according to law. The plaintiff was alone among soldiers. Far from protecting him, they assaulted him. They subjected him to totally unwarranted indignities of forcing him to eat horse manure. Regardless of how heinous a person's conduct may be, neither the police nor the armed forces have the right to punish a person for such conduct. The punishment of an offender is for a competent court of this country after all due process is provided to him. The conduct of the soldiers in this case was extraordinarily undignified having no respect for the defendants' right. This is a proper case for aggravated or exemplary damages as there was oppressive and high-handed act on part of the soldiers. I award the plaintiff a sum of $18,000, as exemplary damages are not supposed to be crippling but rather punitive. Besides, awards must be considered in local context not in the context of other developed countries.'

[17] The judge used the adjective 'undignified' in relation to the soldiers' conduct. With respect it seems to us this is being more than kind to them. In our view their conduct was disgraceful and could not be accepted of members of a disciplined force. That said, however, we do not consider the judge's award of $18,000 was so unreasonable as to warrant this court interfering with it. We would simply put it at the lower end of the scale for such awards in such circumstances.

[18] In respect of Ground 1 which appears to suggest that the assault on the respondent was justified by virtue of the Emergency Decree 2000 ('the Decree') we only say this: s 21(c) of the Decree on which the appellant relies allows members of the armed forces to use such force as is necessary when:

(i) searching any building, vehicle, vessel, cargo, or baggage which they have reasonable grounds for suspecting may contain any matter connected with the commission of an offence against the Decree;

(ii) effecting arrest of any person whom they have reasonable grounds for suspecting to have committed an offence against the Decree.

[19] It is clear to us, as it was to the trial judge, that the soldiers who assaulted the respondent were neither searching any buildings, vehicle, vessel, cargo and baggage, nor were they effecting an arrest. The evidence shows that the respondent surrendered voluntarily to the police and soldiers. He was then taken to the Wainavau Military Camp and detained. Whilst in detention, the respondent was assaulted. In these circumstances the assaults on him

could not be justified and we therefore reject this ground.

GENERAL DAMAGES

[20] We cannot find any fault in the learned judge's assessment of these damages. In our view his judgment was measured and realistic and his award of general damages fair, if perhaps a little on the low side. In these circumstances we find no reason to interfere with his award of $45,000.

THE LAW

[21] It is desirable to make brief reference to the law governing this case which is found both in s 27 of the Royal Fiji Military Forces Act (Cap 81) ('the RFMF Act') and in the common law.

[22] Section 27 of the RFMF Act states that nothing in the Act shall exempt any person from being prosecuted, tried and convicted before the ordinary tribunals of Fiji for any felony, misdemeanour or offence against any law for the time being in force in Fiji. Put simply, this means that members of the armed forces are not above the law. This principle was stated as long ago as 1812 by the Court of Exchequer Chamber in *Burdett v Abbot* (1812) 4 Taunt 401 at 449–450, where Mansfield CJ said:

> '... but since much has been said about soldiers, I will correct a strange mistaken notion which has got abroad, that because men are soldiers they cease to be citizens; a soldier is gifted with all the rights of other citizens, and is bound to all the duties of other citizens, and he is as much bound to prevent a breach of peace or a felony as any other citizen ... It is therefore highly important that the mistake should be corrected which supposes that an Englishman, by taking upon him the additional character of a soldier, puts off any of the rights and duty of an Englishman.'

For 'Englishman' in the present context we read 'Fijian'.

[23] Accordingly, for the reasons we have given we dismiss this appeal and order the appellant to pay the respondent $3,000 costs. There will be orders in these terms.