

Taulanga Kaufusi v Sisi Lasa & Others

Court of Appeal
Martin CJ, Roper and Morling JJ
Appeal No 2/1990

3, 12 September 1990

10 *Appeal – assessment of damages – principles to be applied by Appellate Court Practice – appeal – assessment of damages – principles upon which decision appealed from will be reversed*

The appellant appealed from a decision of the Supreme Court awarding him \$15,000 for general damages, \$1,000 for exemplary damages, and \$120 for special damages in respect of an assault upon him by the first respondent, a Police Officer, and his subsequent false arrest and unlawful detention. On appeal, the appellant argued that the award of damages was inadequate.

20 **HELD:**

1. The appeal related to the assessment of appropriate damages;
2. When reviewing an assessment of damages an appellate court should not interfere with the decision appealed from unless convinced that the judge had acted upon some wrong principle of law, or that the amount awarded was so extremely high or very small as to make it an entirely erroneous estimate of damages;
- 30 3. Applying this test, too little recognition had been given by the judge to the loss of amenities of life and future economic loss as regards general damages, and the seriousness of the actions of the first respondent as regards exemplary damages;
4. The award of general damages should be increased to \$20,000 and the award of exemplary damages should be increased to \$5,000, reduced by \$1,180 representing the value of traditional gifts received.

40 Case considered : Flint v Lovell [1935] 1 K.B. 354

Counsel for the appellant : Mr L. M. Niu
Counsel for the respondents : Mr K. Whitcombe

Judgment

This is an appeal against the judgment of Webster J. in a case concerning a claim by the Appellant for damages following an assault upon him by the first Respondent, a police officer, and his subsequent false arrest and unlawful detention.

The Trial Judge's findings that the Appellant was seriously assaulted and that the arrest and detention which followed were unlawful were not challenged.

The only issue on this appeal is whether the damages awarded the Appellant were either manifestly inadequate or assessed on wrong principles.

50 In his statement of claim the Appellant sought judgment for \$100,000 general damages and \$100,000 exemplary damages. In a "further or alternative cause of action", which appears to relate to the unlawful arrest and detention, a further \$10,000 was claimed for both general and exemplary damages.

The award was \$15,000 for general damages, \$1,000 for exemplary damages and \$120 special damages, being loss of wages.

The amounts claimed and the submissions made in their support bear no relationship to reality and simply serve to confuse.

The Facts

60 The facts, so far as they are relevant to this inquiry, were that the Appellant, who Webster J concluded was probably drunk at the time, was forcibly removed from a dance hall by the first Respondent and led off in the direction of the police station. On the way the Appellant asked why he was being arrested and got no reply. He then tried to escape but was caught by the first Respondent and assaulted, which included being kicked in the right eye while he lay on the ground. He was then taken to the police station and placed in the cells. No medical treatment was provided although Webster J. held that the need must have been obvious. On his release the next morning the Appellant saw a doctor, was admitted to hospital, and the eye was removed by surgery the following day. It appears that the eye could
70 not have been saved even if medical care had been available on the night the injury was inflicted although the delay increased the risk of infection. However, the Appellant made a good recovery and was able to return to work in two weeks.

At the relevant time, 4th March 1989, the Appellant was a painter employed by Oceanic Industries Ltd. He was 30 and unmarried. He returned to the same employment and has had some increases in pay since the incident.

The Award of Damages

80 A classic statement of the grounds upon which a Court of Appeal will interfere by reassessment of damages appears in the judgment of Greer L. J. in *Flint v Lovell* [1935] 1 K. B. 354 (C. A.) at P. 360, where he said:

"This Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance 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, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff
90 is entitled."

That statement has been approved and adopted by both The House of Lords and The Privy Council and although not binding on this Court we would be foolish not to follow it.

Leaving aside for the moment the question of exemplary damages the factors to be considered where personal injury results in circumstances such as the present are pain and suffering, the loss of amenities of life and economic loss.

As for pain and suffering Webster J. recognised it as a head of damage, but without comment or attempt to assess its significance in the circumstances of the case. It is reasonable to assume that the crushed eyeball must have caused intense pain, but also reasonable to conclude that that state was shortlived and there is no suggestion that he will experience trouble in the future. Loss of amenities of life is a more serious issue. As to that Webster J. recognised that there may be some loss of job satisfaction in that the Appellant could not do the first class job he wished; that his rugby playing days were over and that his fixed unwavering eye may affect his prospects in the marriage market. We believe there is more to it than that. He may, as Webster J. remarked, be getting a little old for rugby but the fact is that many sports and activities are now closed to him. He cannot risk damage to his remaining eye and this must influence his future activities for life. We think Webster J. underestimated the importance of this head of claim.

As for the third head, economic loss, Webster J. does not seem to have considered this at all except in his assessment of special damages, where he said "I am glad to be able to record that the Plaintiff has suffered no continuing loss of wages as a result of his injury and has in fact had more than one raise since then". The loss of earning capacity generally forms the principal head of damages in a personal injury action and both loss of earnings by the time of trial and prospective loss must be taken into account. In this case the loss by the time of trial was minimal, but no allowance appears to have been made for prospective loss. The amount which the Appellant is presently earning may not be the amount which he will continue to earn in the future, for while a partial disability may not have immediate affect it may well put him at a disadvantage in the labour market should he have to look for fresh employment. A fully sighted employee has obvious advantages for an employer over a one eyed man. It is not easy to assess the loss of earning capacity represented by the Appellant's physical handicap but it is certainly much more than a negligible risk and in our opinion justified serious consideration in arriving at the appropriate award of damages.

As for exemplary damages it is well established that only in certain limited circumstances will such damages be awarded. Webster J. recognised that and applied the law as enunciated by Lord Devlin in *Rookes v. Barnard* [1964] A.C. 1129. In that case their Lordships determined that there remained three categories of cases in which awards of exemplary damages continue to be legitimate, only one of which is relevant here, and that is where there has been "oppressive, arbitrary or unconstitutional action by servants of the government". In *Holden v Chief Constable of Lancashire* [1987] Q.B. 380 (C.A.) it was held that wrongful arrest by a police officer came within this category. In the present case of course we are considering not only wrongful arrest but also a serious assault and wrongful detention by police officers. A significantly more serious situation.

Webster J. concluded that although this was a case for an award of exemplary damages, they should be assessed having regard for the sum he proposed to award for compensatory damages, namely \$15,000. That is certainly a legitimate approach. While the assessment of compensation can never be affected by the amount awarded by way of exemplary damages. The converse is certainly not true and *Rookes v. Barnard* is authority for that proposition and particularly the observations of Lord Devlin at p. 1228.

150 However, in this case we are of the opinion that Webster J. underestimated the value of the compensatory damages, so leaving no room for an exemplary element.

We believe that Webster J. gave too little recognition to the loss of amenities of life and future economic loss in his assessment of damages, and did not fully recognise by way of exemplary damages, the treatment the Appellant received at the hands of those whose duty it was to serve and protect the public.

We therefore allow the appeal and give judgment for the Appellant in the sum of \$20,000 by way of general damages and \$5,000 by way of exemplary damages to be reduced by the sum of \$1,180 for traditional gifts received. The award of \$120 special damages is to stand.

160 The Appellant is awarded costs and disbursement to be fixed by the Registrar.