NARENDRA KUMAR

v.

SAIRUSI DRAWE, THE MINISTER FOR HOME AFFAIRS & AUXILLARY ARMY SERVICES & THE ATTORNEY-GENERAL

[HIGH COURT, 1990 (Palmer J) 24 July]

Civil Jurisdiction

Damages- personal injuries- measure of- whether circumstances justified an award of exemplary damages.

The Plaintiff suffered injuries of a moderate character to his leg after shots were fired at his motor car. Liability was conceded and the High Court was only required to assess damages. The Court considered all the circumstances and awarded $7000 general damages for pain, suffering and loss of amenities. The Court also considered but rejected a claim for exemplary damages. It explained the circumstances in which such awards may be made and pointed out the different approaches which have been adopted in England and Wales on the one hand and Australia and New Zealand on the other.

Cases cited:

Australian Consolidated Press v. Uren (117) CLR 185, [1967] 3 All ER 523
Broome v. casell and Co. Ltd [1972] AC 1027
Fogg v. McKnight [1968] NZLR 330
Gopal Naidu v Babu Lal (Action 235 of 1970)
Moti Lal v. Ilikini Sauroutu (Civ. Action No. 183/73)
Phulkuar v. NLTB & Ors (Suva S.C. 1972)
Rookes v. Barnard [1964] AC 1129
Shambu Prasad v. Gurnam Singh & Anr 13 FLR 47
Uren v. John Fairfax and Sons Proprietary Ltd (117) CLR 118

H.M. Patel for the Plaintiff
Ratu Joni Madraiwiwi & Ms. G. Phillips for the Defendants

Palmer J:

This is an assessment of damages for personal injury following the entry by consent of Judgment for the Plaintiff for damages to be assessed.

The Plaintiff who is now 32 years of age and lives at Nasinu was driving his car on his way to work on the 21st January 1988 when a shot or shots fired by the 1st Defendant pierced his car and his left leg. He was taken to the CWM Hospital where he was admitted. An operation was performed to remove two fragments of metal from the left thigh which had been disclosed by X-rays. He had apparently been attended by various Doctors while in hospital. The Plaintiff

called Dr. D. Sharma, a Consultant Surgeon. He said that he saw the Plaintiff on the 25th March 1988 when the Plaintiff complained that his symptoms were persisting, there were spasms in the left knee even if sitting. He had pain in the left lower thigh in walking a distance of three chains. The pain took some time to settle down, he was not able to work. He went to see Dr. Sharma to see if something had been left in the thigh because the pain and spasm were not settling down. He was limping on the left leg when walking. The left thigh on examination showed two scars two inches long vertical in front and three inches long on the posterior medial side. There was marked tenderness on the medial side of the knee and the lower thigh where the injury was. There was some weakness of muscles, sensation was increased on the medial or inner side. He was given antibiotics and antirheumatic tablets. Dr Sharma then saw the X-rays taken at the hospital and found that both foreign bodies had been removed. He told the Plaintiff that the symptoms would settle down and he would see him later on. He told Dr Sharma that he was a Court Bailiff currently on sick leave.

Dr Sharma said that on the 24th January 1989 the Plaintiff saw him again at his Surgery. He complained that the symptoms had persisted, there was still pain on the inner side when walking half a mile or lifting even a bottle of water. He was unable to play any sport, he also said there was a swelling occurring in the region of the knee. Even driving to Navua or Tailevu, at the end of the day he had to get medication for the pain. On examination two scars were still present, there was tenderness as before, slight weakness in extension and flexion, also the left calf muscles produced pain when moved against resistance. Sensation was slightly increased from the scar to the joint line on the medial side. Flexion was limited in that on the left side the distance between heel and thigh was six inches and on the right it was three inches. The right knee had normal movement. There was no grating in the knee, circulation was normal, reflexes were normal, the 1988 X-rays were normal. Dr Sharma gave the conclusion that the Plaintiff had been injured by objects which penetrated the skin on the lower side, operation had been carried out, he was getting limited pain when walking, probably because of fibrosis. There was limitation of bending the left knee, he would have problems in work. Because of the time lapse from when he had last seen him since the injury he had considered that the impairment was permanent, almost no improvement would occur, it might even get worse. He had already got increased sensation on the medial side below the scar. This would indicate irritation of the subcutaneous nerve and might cause pain in future if it were to get strangulated in scar tissue and may need surgery to free it. The scars were either side of the major blood vessels. The scarring of tissues could be fibrosis, contraction of fibrous tissues causing obstruction of circulation. The swelling was also due to fibrosis, obstruction of lymphatic vessels converging from the lower leg to the site of the injury before reaching the groin. He might get swelling in the lower leg especially if the leg was dangling for any time. He saw the Plaintiff briefly on the day of the hearing and there seemed to be no improvement. He estimated

the Plaintiff's incapacity at 12%. Dr. Sharma said he had been Chief Surgeon at the CWM Hospital for 4 1/2 years and was now in private practice for half his time. He has been in practice since 1966, four years in New Zealand as intern and Surgical Registrar and two years in the United Kingdom and then to the C.W.M. He held the degrees of MBBS (Bombay) FRCS (England) FRCS (Edingburgh) and FRACS. In cross-examination he said he had not treated bullet wounds. He said there was no muscle wasting in the injured leg but the Plaintiff could not exert full pressure because of the pain. Circulation was normal, there was no bony abnormality. The Plaintiff had said that walking and driving caused pain. He maintained his finding of January 1989 that there was no improvement and that the Plaintiff's impairment was to be regarded as permanent. He doubted whether exercise would help recuperation, he said no treatment would reduce the pathology, if he exerted himself he would get worse because of the fibrous tissue, it was a visicous circle, he could do exercise within limits but not to exert himself. He said what the Plaintiff told him fitted in with his pathology. He had never advised the use of walking aid. The Plaintiff was not dependent on others, he could maintain his normal life activities. On the second consultation he saw no swelling nor on the day of the trial. The Plaintiff had told him that he experienced swelling at the end of the day and that would be consistent with what he had found. He had told him that he was on pain killers and had taken them since the injury when he got pain or exerted himself. He (Dr Sharma) had not consulted the Plaintiff's own Doctor. In his view the sequelae of injury were still persisting, he had difficulty in squatting, sitting on the floor cross legged or on country toilets, there was no chance of improvement. In answer to me Dr Sharma said that had there been any treatment available overseas he would have advised it but there was nothing there in his view that could help the Plaintiff.

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The Defendants called Dr Welby Korwa to give medical evidence. He said he was the Senior Surgical Registrar at the C.W.M. Hospital and had been so for the past ten years. He had been a qualified Doctor for 24 years. He had attended Plaintiff when seen at the C.W.M. Hospital on the 2lst January 1988 and he had carried out the removal of the two metallic objects. He had treated patients with shotgun wounds before. He regarded the matter as not serious. One foreign body was lodged in the lateral aspect in the fatty tissue under the skin, the second one was deeper down in the thigh, they were lying in the groove between the two muscles at a depth of 5 - 8 cms. They were not difficult to remove, the operation was successful and the recovery uneventful, there were no unusual events. The healing process had been a little longer than usual with penetrating objects, 10 to 14 days. No other parts of the leg had been affected. He had last examined him on the 25th January 1990 - a week before the trial when he noticed the wounds had healed completely and as far as function was concerned the Plaintiff could move the leg in any direction. There was no permanent incapacity. He said it was not usual to have pain and discomfort after two years. There was no need for exercise but he was able to undertake it. He could put all his weight on the

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leg, he could play sports, there was no prospect of further deterioration. In cross-examination he said that on the 25th of January he checked the Plaintiff's reflexes but he did not ask him to walk. He had been looked after by a number of Doctors at the hospital including himself and had been given antibiotics and dressings. He did not examine the knee nor ask him to bend the knee or do squatting. He agreed that fibrosis resulted if blood clots set in and this causes fatty degeneration, this was part of the healing process and could cause rheumatic pains. In answer to me he said that the Plaintiff had been given pain killers and other medication 6 hourly while an inpatient including Indocid. The two foreign bodies he removed were silver metallic bodies, semi-circular in shape and were parts of one object that had disintergrated. When he saw the Plaintiff on the 25th of January he did not ask him if he suffered any pain or discomfort, nor whether it interfered with his work or his lifestyle, his comments were based on his notes of the injury as observed by him.

The Plaintiff who is employed in the Judicial Department of the Public Service gave evidence and called two witnesses who were officers in the same department: one, Mr. Hassan was the previous Deputy Registrar of the High Court. The Defence called two other officers from the same department. The evidence establishes the following facts: The Plaintiff was 30 years of age at the time of the shooting and is married with one school child now aged 9. They were and are living with his parents. He is and was at all material times a Bailiff in the Sheriff's Department of the High Court. He was and is the only Bailiff in that Department and as such is responsible for the service of all summonses, notices of hearing etc and the execution of all process enamating from the High Court. The work involves a great deal of driving and he receives a mileage allowance for that purpose. He did and does work a certain amount of overtime some of which he is paid for and some of which is compensated for by the allowance of time off in lieu. He was in hospital for some eight days and had one operation, already referred to. He was released home and was on crutches for the following two weeks. While at the hospital he was given medication in the shape of painkillers. He stayed home for three months where he was assisted by his brother, his wife and neighbours etc. After that period he was given light duties for a period of time. He was kept in the office on light duties and his Supervisor assisted him by allowing him to perform light duties for a period of some two months. After that he returned to normal work. He was in receipt of his full public service pay at all times, his pay before the shooting was about $4,000 p.a. which was the same afterwards and the same during his period of sick leave. The position he occupies is the only one of its kind and is of the same grade as that of Court Interpreter. He has received no promotion since the shooting. Mr. Hassan gave evidence to the effect that there is no scope for any promotion unless he transferred to another branch.

The Plaintiff says that he has pain if he has to walk any distance in excess of about half a mile and in those cases he has to take a rest and resume again. He says he cannot sit for long, his muscles seem to stretch, he gets pain after driving

for any distance even to such places as Navua, Nausori, Naboro, he gets pain in the leg one two or three times a week, he cannot lift heavy loads now. There is evidence that for some unspecified period of time after his return to work he was limping, at first quite heavily. He says the pain is affecting his work, he is not working as efficiently as previously. One of his colleagues called by the Defendant said this was manifested by the amount of Summonses etc which seemed to be piling up on his desk. Apparently his department has accommodated his problems by sending another officer with him when he has to perform executions of process; he, the Plaintiff, being the only Bailiff has to be present, but on those occasions he sits in the car while the other officer performs the execution work; he can also help with the driving. Also he took time off from work for days or a week at time following his return to duty.

He also says that his personal life has been affected by the problems about sitting and walking already mentioned. Moreover he says that his sexual life with his wife has been affected by the disability and recurrence of pain, he says relations with his wife are not as normal as they were before and his wife is complaining about this fact. Also he used to do gardening, growing vegetables etc which he cannot do fully now but he can do some. He also used to run and play soccer for the Judicial Sports Club. He played or practiced once a week for a number of years but has not been able to do so since the accident.

On this material the factors I take into account in assessing damages for pain and suffering and loss of amenities of life are these: the Plaintiff had eight days in hospital and underwent a surgical operation. Apparently this was not attended by any great difficulty and was of a more or less routine kind but nevertheless must have involved some pain and. discomfort. There is corroborated evidence of fairly extensive use of painkillers for a period of time. The Plaintiff was on crutches for two weeks and off work altogether for three months. So much for the past. As far as the future is concerned it seems clear discomfort especially on exertion. He is experiencing difficulty with his sex life which has not been further eleborated in evidence. He has had to give up a sport which he actively pursued at least once a week when on the Judicial Department soccer team. He has some pain or discomfort in taking up certain positions such as squatting or sitting on the ground. To that extent he has suffered permanent disability. Overall as to his medical situation I prefer the evidence of Dr Sharma to that of Dr Welby Korwa. The Plaintiff is only 32 years of age and there is a possibility that his present problems may get worse and that the fibrosis might cause rheumatic type of pain on exerting the thigh and limit his activity. At the same time he is able to pursue his work and except as stated maintain his ordinary life style and look after himself without any need for outside assistance. His disability is all in all of a moderate character. Taking all factors into account I consider that an award of $7000 is appropriate to compensate under this head.

Turning to the question of loss of prospective earnings which are also claimed, first of all it should be said that it is quite plain from the evidence that the

Plaintiff has lost no income as the result of the shooting to date. As for the future, he is a Public Servant and I presume in the absence, of any evidence to the contrary that he is an established Public Servant. There is no evidence that he has either sought or been urged to seek employment outside the Public Service. He gave evidence that he attended school up to School Certificate level, he has no other skills or trade, he has always done clerical work and worked as an accounts clerk and worked for the Nausori Council before joining the Public Service. In my view no case has been made out for any award on account of prospective loss of earnings. Despite the evidence that he is not as competent as before he appears to be managing to hold down his job apparently with some indulgence from his employing department.

One does not know how long his will be extended to him but no evidence whatsoever has been led to indicate in what circumstances and on what terms he might be discharged from the service as a result of this injury and if so what benefits he might thereupon receive and to what extent they might fall short of his normal salary. Without that kind of evidence it is not only impossible to fix an appropriate amount for damage under this head but it is impossible to come to the conclusion that any damages under this head are in fact likely to arise. Similarly nothing has been put to suggest that because of his injury he might find it necessary to retire before the normal retiring age and what the financial consequences of that might be and what the likelihood of this happening might be. In short, no case has been made out in respect of loss of earnings either past or future.

I now turn to the claim for special damages. There is a claim for damage to clothing in the sum of $40 and a claim for the franchise paid in respect of repairs to his car in the sum of $200 both of which are conceded and I accordingly propose to allow those sums. There is further a claim for medical expenses. The Plaintiff gave evidence that he paid Dr. Sharma $225 for his report and $25 for his first check up and $5 to the hospital for its report. Notwithstanding that not a single receipt has been produced in evidence I am satisfied from the Plaintiff's evidence that he paid those amounts and I propose to allow the sum of $255 accordingly. The Plaintiff claims to have made a large number of visits to the hospital for medication but he says that at the hospital and the Civil Service Clinic he did not have to pay, at times the medication was not available and he had to buy it outside. However he has no receipts and gave no figure whatsoever on which any award could be based. Any allowance for medication purchased would be sheer guess work. He has also claimed for travel to the hospital and clinic for those purposes, but again no evidence has been led as to any expense this has involved and in view of the fact that he was receiving mileage for the use of his car and the total absence of any other evidence as to this I do not propose to allow anything under that head either.

Lest it should be thought that I have overlooked it, the statement of claim also contains the following claim:

> "11. Owing to the injuries the Plaintiff suffered pain incurred financial loss and loss of amenities shall continue till he receives corrective medical treatment in New Zealand Australia in future".

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As to that the only evidence led was that from the Plaintiff's own doctor, Dr Sharma, already noted, to the effect that no overseas treatment would be of any benefit to the Plaintiff.

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The Plaintiff has also claimed exemplary damages. I have given careful consideration to that claim because at first sight there appeared to me to be some justification for marking the Court's disapproval of or punishing the first Defendant for his arbitrary action in injuring the Plaintiff. The leading authority on the subject as far as the English law is concerned is the decision of the House of Lords in Rookes v. Barnard [1964] AC 1129. Lord Devlin on page 1226 said:

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> There are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the Civil Law a principle which ought logically to belong to the Criminal"

D

He then proceeded to set out three such categories, of which only the first is of any possible relevance in the present case. It is as follows: cases where there has been "oppressive, arbitrary or unconstitutional action by the servants of the government. I have also been referred to the House of Lords case of Broome v. Casell and Co. Limited, [1972] AC 1027 in which the House discusses Rookes v Barnard at considerable length . However, as Lord Hailsham points out in that case it was not concerned with Lord Devlin's first category.

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After most carefully considering all that was said in Rookes v. Barnard I am not persuaded that the present case bears the characteristics of Lord Devlin's first category or that it qualifies for an award of exemplary damages under the law as if stood in England before Rookes v. Barnard. The matter has not been argued very fully before me, but although in one sense the first Defendant was clearly a servant of the government, which fact is acknowledged by the other Defendants, I think the cases pre-suppose some nexus, some transaction or dealing between the Plaintiff and the government in relation to the action in question. No evidence whatsoever has been led as to the circumstances of the shooting beyond the barest fact that the Plaintiffs was hit by a missile in the leg. It is conceded that the shot was fired by the first Defendant. There is no evidence as to whether this was done deliberately, recklessly or negligently although each of those matters are pleaded in the Statement of Claim and not having been controverted by any defence must be taken to be admitted. Much has been said in the authorities as to the punishment for such acts which constitute also a crime being the function of

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the Criminal rather than the Civil Law see for example Broome v. Cassell, ibid, p. 1100 A – B per Lord Morris, and Rookes v. Barnard, ibid p. 1230 per Lord Devlin:

> "Aggravated damages in this type of case can do most, if not all, of the work that could be done by exemplary damages. In so far as they do not, assaults and malicious injuries to property can generally be punished as crimes, whereas the objectionable conduct in the categories in which I have accepted the need for exemplary damages are not generally speaking, within the criminal law and could not, even if the criminal law was to be amplified, conveniently be defined as crimes. I do not care for the idea that in matters criminal an aggrieved party should be given an option to inflict for his own benefit punishment by a method which denies to the offender the protection of the criminal law."

No evidence was placed before me as to whether or not the first Defendant whose identity by name and badge number is known, was charged and if so convicted and if not why not. Be that as it may, I have come to the view that compensatory damages taking into account all the circumstances are the appropriate measure of damages in the present case. Having come to that view there is no need to discuss Rookes v. Barnard further. However I have considered whether exemplary damages can be awarded in Fiji and in case this matter goes further it may be useful to state my conclusions.

I am in no doubt that exemplary damages may be awarded in Fiji. This follows from the decisions to be mentioned shortly and also by inference from the Law Reform Act , (Cap.27) Section (2) (a) which expressly excludes exemplary damages from actions by estates of deceased persons. What is less clear is whether such awards are limited to the categories postulated by Lord Devlin.

It is clear from Rookes v. Barnard that their Lordships found themselves unable to say that there should be no awards of exemplary damages at all because of the previous history of judicial decisions on the subject. The High Court of Australia came to the view that as far as Australia was concerned the categories of exemplary damages were not closed or confined to those set out in Rookes v. Barnard. See Australian Consolidated Press v. Uren 117 CLR 185 and Uren v. JohnFairfax and Sons Proprietary Limited 117 CLR 118. The Australian view was upheld by the Privy Council in Australian Consolidated Press Limited v. Uren 117 CLR 221, [1967] 3 All ER 523. In New Zealand a single Judge in Fogg v. Mcknight [1968] NZLR 330 (Mcgregor J) expressed the same view for New Zealand. I am unable to say with any degree of confidence whether or not Rookes v Barnard, has been adopted in Fiji. In Moti Lal v. Ilikimi Sauroutu, Civil Action No. 183 of 1973 Stuart J referred to the topic of exemplary damages. His Lordship said after referring to the cases just referred to

"The position in Fiji may well be the same".

He went on to say that exemplary damages for trespass had been awarded by Tuivaga J (as he then was) in Phulkuar v. Native Land Trust Board and Others 1972 page 356 and by Williams J in Gopal Naidu v. Babu Lal Action 235 of 1970. His Lordship did not go on to consider those cases because of his finding that he should not award exemplary damages in that particular case. As far as I am concerned the trail of research ends there because those two Judgments are not available any longer. I am not able to say therefore whether those awards were made under the pre - Rookes v. Barnard law, or by adopting Lord Devlin's categories for Fiji.

I note that in Shambu Prasad v. Gurnam Singh and Another 13 FLR 47 Milss-Owens CJ refers to Rookes v. Barnard in stating that in that particular case the Plaintiff was entitled to aggravated but not to exemplary or punitive damages, which suggests that his Lordship at least took the view that Rookes v. Barnard had application in Fiji. The point, as stated, has not been fully argued and therefore the determination of whether the Rookes v. Barnard categories are applicable in Fiji at the present day or not must await another occasion when the matter is relevant and is fully argued.

On the facts of the present case as placed before the Court I am of the view, as stated, that compensatory damages only are appropriate and I propose to proceed accordingly.

The total award of damages is as follows:

1)	Special damages	$
	Clothing	40.00
	Car Repairs (franchise)	200.00
	Dr. Sharma	225.00
	" " - Report	25.00
	C.W.M. Hospital Report	5.00
		495.00
2)	Pain, suffering, loss of amenities	7000.00
		$7495.00

There will be Judgment for the Plaintiff for $7495 and costs to be taxed if not agreed.

(Judgment for the Plaintiff)