

**N THE HIGH COURT OF FIJI AT SUVA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO.: 118093 Of 2002**

**BETWEEN: THE PROCEEDINGS COMMISSIONER, FIJI**  
**HUMAN RIGHTS COMMISSION**

***PLAINTIFF***

**A N D: THE COMMISSIONER OF POLICE**

***FIRST DEFENDANT***

**A N D: THE ATTORNEY-GENERAL**

***SECOND DEFENDANT***

**Dr S. Shameem with Mr. U. Ratuveli for Plaintiff**

**Ms D. Buresova for Defendants**

**Date of Hearing: 13<sup>th</sup> and 14<sup>th</sup> September 2005**

**Date of Submission by: 3<sup>rd</sup> October 2005**

**Date of Judgment: 8<sup>th</sup> November 2005**

**JUDGMENT**

The Proceedings Commissioner brought these proceedings on behalf of one Joti. Her allegation is that two named members of the police force on 14<sup>th</sup> July 1999 forced her to undergo invasive medical procedure without her consent. As such, the Proceedings Commissioner alleges that the police breached Section 25(2) of the Constitution which provides for right to freedom from scientific or medical treatment or procedures without the informed consent and Section 27(1)(f)

which gives an arrested or detained person the right to be treated with humanity and respect for his or her inherent dignity.

I shall call Joti complainant in this judgment. The complainant alleges that on 11 ~ July 1999 while working at Village 6, she found a new born baby in a toilet cubicle. The police were called. A few days later she was taken to Central Police Station and escorted to CWM Hospital where she was made to undergo a medical examination to find if she had given birth recently.

The defence is that the police wanted the complainant to undergo medical test to remove any doubt as to whether she was the mother of the baby as her breast milk was flowing. The defendants deny forcing the complainant to undergo medical test.

The plaintiff made extensive written submissions together with relevant authorities. The defendants though asked to file submissions failed to do so. This was the first, case of its type before the courts in Fiji and the importance of submissions by the defendants should have been obvious to them.

The plaintiff's submissions considered the origins of the rights at issue by referring to the Universal Declaration of Human Rights, the International Covenant on Economic Social and Cultural Rights and how the defendants' breached those rights. The Second World War exposed spectacularly the destructive capability of a state against its own citizens. Hence the emphasis post war shifted away from how sovereign nations behaved towards each other to how a state treated its own citizens.

#### **POLICE POWERS ON RIGHT TO PRIVACY:**

Fiji is fortunate in having its own Bill of Rights entrenched in the Constitution. This case concerns the balancing the powers of police in investigating and detecting crime with a person's right to his or her personal privacy and to be treated with dignity,

The prime functions of the police is to preserve peace, to concentrate on preventing the commission of crime, to protect life and property, to investigate crime, to apprehend offenders

and to preserve evidence and to prosecute the offenders — Brooks v. Metropolitan Police Commissioner — (2005) 2 ALL ER 489 (House of Lords). The powers of the police in carrying out their duties are not limitless; there are parameters within which the powers of police are to be exercised in carrying out their duties. In the present case the opposite side of the balance is the right to privacy. An adult individual of sound mind has a right to decide what may or may not be done to his or her body. Anything done to the body without his/her consent is unlawful — Chester v. Afshar — (2004) 4 ALL ER 587 at 593.

The Chester was a case of medical negligence but the principles are equally well applicable to issues before me. Lord Steyn at page 593 paragraph **14** stated:

*“The starting point is that every individual of adult years and sound mind has a right to decide what may or not be done with his or her body ... surgery performed without the informed consent of the patient is unlawful ...”*

#### **CONSENT TO MEDICAL EXAMINATION:**

Section 25(2) of our Constitution also uses the words “*informed consent*”. Informed consent means consent obtained after the person has been told what risks even though minimal or side effects are involved in a treatment. Consent must be a willing consent; it must be voluntary. In the present case although the complainant knew why she was being examined, her consent shown by her signature on the medical report must be viewed in the context of police detention with a shadow of police presence in the background. The issue here is not so much with being informed as to what was to be done but rather the nature of consent obtained.

The fact that the complainant went through a medical examination is not in issue. The central issue is did she consent to the medical examination. The vital time is the time of the examination not so much her state of mind prior to the examination.

Both the plaintiff and also *DWI* Ravi Narayan said that while at the Central Police Station she did not want to go to the hospital. Therefore it is obvious that she *was* taken to the hospital against her will.

The medical report of the complainant was tendered. It too confirms that the complainant was distressed and angry with police for bringing her there. However that medical report is signed by the complainant giving consent to medical examination. There is evidence from DW2 Sarafina Seinikoraciri that the form was signed in the presence of the doctor. The medical examination was conducted with only the complainant, a nurse and doctor being present. There were no police present there. The complainant said after the examination she felt good.

Amongst all the facts one fact stands out and that is that the complainant while in police custody underwent a medical procedure. I find given the circumstances and a clear statement by the doctor of the complainant's distressed condition, the consent to the medical examination was not freely given but with a shadow of police presence close by. The complainant I believe realized that she could only get release if she went through a medical procedure.

#### **HUMAN RIGHTS COMMISSION ACT:**

These proceedings were brought by the Proceedings Commissioner under the provisions of Section 36 of the Human Rights Commission Act 1999. The remedies which the Proceedings Commissioner may seek are set out in Section 38 of the Human Rights Commission Act 1999 are inter alia damages or declaration that the defendant has contravened the Bill of Rights.

Section 39 sets out the damages which the High Court may award under the Act. It reads

***“39. — (1) In proceedings under section 36 for unfair discrimination or a contravention of the Bill of Rights, the***

***High Court may award damages against the defendant in respect of any one or more of the following:***

***(a) pecuniary loss suffered or expense incurred by the complainant or the aggrieved person as***

*a result of the conduct complained of;*

*(b) expenses reasonably incurred by the complainant or the aggrieved person in seeking redress for the conduct complained of;*

*(c) loss of any benefit, whether or not of a monetary kind, which the complainant or the aggrieved person might reasonably have been expected to obtain but for the conduct complained of;*

*(d) humiliation, loss of dignity and injury to feelings of the complainant or the aggrieved person.*

*(2) Subject to subsection (3), the Commission must pay any damages recovered by the Proceedings Commissioner under this section to the complainant or the aggrieved person on whose behalf the proceedings were brought”*

## **CAN DAMAGES BE AWARDED FOR BREACH OF A RIGHT?**

The plaintiff has in her submissions urged the court to grant \$100,000.00 damages. The plaintiff has asked for exemplary damages. That the court has the power to award damages for contravention of Bill of Rights cannot be doubted. In fact in some cases damages may be the only appropriate remedy. Section 41(1) of the Constitution permits persons whose rights have been infringed to seek redress from the High Court. Redress is not confined to making mere declarations; it also encompasses damages.

In Simpson v. Attorney-General (1994) 3 NZLR 667 (Baigent’s Case) the New Zealand Court of Appeal by a majority of 4 to 1 held that an action for breach of Bill of Rights was possible and that such action was not conceived as a new tort but a **“public law action directly against the state for which the state was primarily liable?”**

The Judicial Committee of the Privy Council in Mohammed v. State — (1999)2 AC 111 at 1123 stated:

*“The stamp of constitutionality on a citizens right is not meaningless; it is clear testimony that an added value is attached to the protection of the right”*. Further Lord Hutton in Cullen v. Chief Constabk~ — 2004 2 ALL ER 237 at 255 stated

*“where a right is contained in a written constitution it is accorded a special value by the courts and a breach of that right without damage or harm can lead to an award of damages.”*

Of course, anything which falls from the pen of Lord Hutton is entitled to great respect but it may be stating the principle too widely. The rights contained in the Bill of Rights provisions of our Constitution are varied and if every breach were to result in a damage award it would have serious consequences for state coffers. Our Constitution itself eaves open the remedy to the discretion of the court. In many instances, a declaration might suffice.

Taking an extreme case as an example. If a person, with previous convictions and who was no stranger to courts, was arrested and charged for an offence and is subsequently convicted on his own plea of guilty but the police have not informed him of the right to counsel, ought such a person be awarded damages for breach of such right. One wonders how the public would view the administration of justice if this were to happen.

Really, one would need to realistically look at the particular right, which is an issue, and how the breach of that right has affected the applicant and the remedy in the final analysis is up to the court. It need not be damages in every case but only in appropriate cases. I am of the view that there is no automatic or prima facie right to damages in every case of breach of a right contained in the Bill of Rights chapter of our Constitution.

### **LEVEL OF DAMAGES:**

First, the level of damages awarded must be harnessed against the backdrop of social and economic conditions of Fiji and not by some universal standards even though such rights may be

universally applicable. We cannot use level of awards given in economically advanced countries as a guide to make awards in Fiji.

Secondly, the level of award must not be excessive but restrained or moderate. I refer in particular to comments of Cooke P in Baigent's case at page 678 as follows

*“As to the level of compensation, on which again there is much international case law. I think that it would be premature at this stage to say more than that, in addition to any physical damage, intangible harm such as distress and injured feelings may be compensated for; the gravity of the breach and the need to emphasise the importance of the affirmed rights and to deter breaches are also proper considerations; but extravagant awards are to be avoided. If damages are awarded on cause of action not based on the Bill of Rights, they must be allowed for in any award of compensation under the Bill of Rights so that there will be no double recovery. A legitimate alternative approach, having the advantage of simplicity, would be to make a global award under the Bill of Rights and nominal or concurrent awards on any other successful causes of action.”*

*[underlining is mine for emphasis]*

More recently a differently constituted New Zealand Court of Appeal in Minister of Immigration v. Udompun — 2005 NZCA 128 endorsed the above remarks. In Udompun the court looked at a number of New Zealand cases on Bill of Rights and it concluded that the objective of the Bill of Rights remedy was *“to vindicate human rights, not to punish or discipline those responsible for the breach”*— paragraph 177. Hammond J at paragraph 210 stated that *“moderation is required in claims of this character”*.

The right being considered in Udompun was one of human dignity. It dealt with rights of a Thai woman who was denied entry into New Zealand and then held in a police cell for a period of two days pending her departure. She did not speak English. She was not allowed change of clothes at

a time when she was menstruating. The Court of Appeal reduced the damages awarded from \$50000.00 to \$4,000.00.

Thirdly, the plaintiff need not show outrageous or oppressive conduct on part of the defendant. An outrageous conduct would attract greater damages than mere inadvertent conduct. Hammond J. in Udompun at page 213 stated:

*“it should not be necessary to show oppressive conduct, let alone maliciousness. The relevant question is how ought this behaviour reasonably to be seen as infringing on human dignity, in the particular circumstances of this case.”*

#### **APPLICATION OF LAW TO FACTS:**

In the present case the police, had reasonable cause to arrest the plaintiff based on the information they had. A new born baby was found at a place where the plaintiff worked. The plaintiff's partner was away from her since 995. Her breasts were flowing with milk.

The test the police wanted to be conducted were extremely relevant. The test would show one way or another if the plaintiff had given birth recently. As it turned out the test completely excluded the plaintiff as a potential perpetrator of the crime. She was in police custody for roughly four hours.

The plaintiff had the right to be treated with dignity. It is a very fundamental and an important right. The police ought to have respected her right not to be medically examined. Vaginal examination even by a trained qualified doctor is an embarrassing experience. The fact that two very junior police officers were asked to accompany the plaintiff may not have assisted either. Had the investigating officer gone with the complainant, the doctor could have spoken to him of patient's unwillingness to go through the medical examination and the whole episode avoided.

I also consider that the attitude of the plaintiff did not assist much. When ASP Ravi Narayan explained to her that it was only proper for her to go through a medical examination, there was



no need for her to get abusive. Further when she came back from hospital, she stated she went to ASP Ravi Narayan and told him *“You wait, I will see you”*. She expressed a desire to get back at Ravi Narayan, a desire to take revenge, which is really not an objective of Bill of Rights. Its purpose is to encourage persons to behave decently.

Paul Rishworth, Associate Professor at Auckland University on human rights explains that *“human rights, is, to a large extent, tutelary. It is aimed at the reform of attitudes and social practices that had previously been invisible to law ... It creates the conditions for a democratic and decent society in which people of different beliefs live together happily in one country”* — *“Law stories — Essays on the New Zealand Legal Profession”* at page 180.

I can understand the enthusiasm and zeal of police in trying to find out the author of a crime but even in doing so, they must maintain certain amount of decency below which their actions too become suspect.

In this case, the plaintiff has not been charged so there is no question of excluding unfairly or unlawfully obtained evidence. A mere declaration will be no solace to the plaintiff. A monetary award is the only logical remedy I believe. Some damages will need to be awarded. I fix the figure for damages — a global figure at \$5,000.00.

The plaintiff had also claimed pecuniary losses being loss of wages under Section 39 of Human Rights Commission Act. According to the statement of claim the plaintiff left her job at Village 6 on 3~ February 2000. In her evidence she said she lost her job three or four months after the event. I find no nexus given such a substantial intervening period that the loss of the job at Village 6 was in any way related to the incident. Further full particulars of amounts claimed were not provided at least four weeks prior to hearing as undertaken in the statement of claim.

Accordingly, award the plaintiff damages in the sum Of \$5,000.00. I also award costs which I summarily fix in the sum of \$2,000.00. For sake of clarity the \$5,000.00 is to be paid to the complainant and the costs of \$2,000.00 to be retained by the Human Rights Commission.

[Jiten Singh

JUDGE

At Suva

8th November 2005