IN THE HIGH COURT OF NEW ZEALAND
GREYMOUTH REGISTRY

CIV-2008-418-000163

BETWEEN	STEVEN FRANCIS FREDERICKS Appellant
AND	THE ATTORNEY-GENERAL SUED ON BEHALF OF THE NEW ZEALAND POLICE Respondent

Hearing: 11 February 2009

Counsel: J P McCarthy for Appellant
F Sinclair for Respondent

Judgment: 11 February 2009

ORAL JUDGMENT OF PANCKHURST J

Introduction

[1] This is an appeal against an award of exemplary damages. The appellant, Mr Fredericks, was assaulted when handcuffed and seated in the rear of a police patrol car. The assault was committed by a police constable. After a defended hearing in the District Court at Greymouth he was awarded the sum of $5,000. His counsel, Mr McCarthy, contends that this award is inadequate. Indeed, in his submission, grossly so.

Some further background

[2] The relevant events occurred on 8 September 2005. The appellant and a friend, Mr McGee, had been drinking at Revingtons Hotel in Greymouth. They had driven there in Mr Fredericks' car. They left the hotel at about 10.30 pm. In the

event Mr McGee drove the vehicle since it was thought that he was least affected by alcohol. The appellant was his front seat passenger.

[3] The vehicle was stopped just as it was about to leave the carpark to the hotel. Mr McGee was requested to undertake a breath test. He was hesitant to do so since he did not understand that he was on a public road. In any event he eventually took the test and failed it. He was then reluctant to accompany the police constables to the police station which eventually resulted in his arrest.

[4] Mr Fredericks, who until then had remained seated in the front of his vehicle, was requested to get out of the car. He was also reluctant to comply with this request there being a difference as to whether or not he could remove hockey gear from the boot of the car if he did so. This precipitated a request from Police Constable Connolly that he get out of the car. When he did not do so promptly the constable reached into the car and undid the appellant's seat belt. He was then forcibly removed. He was dragged to the ground and handcuffed, again forcibly. At that point Mr Fredericks was then placed back in the police car.

[5] I should interpolate at this point that the claim which the plaintiff brought in the District Court alleged false arrest and false imprisonment, and that he was assaulted at the time the handcuffs were placed on him. Judge Doherty, however, rejected these aspects of the claim. The exemplary damages which he ultimately awarded related solely to the assault which occurred in the rear of the police vehicle. Accordingly I am only concerned with the third cause of action. I need not refer further to the two other causes of action. Whereas Judge Doherty was required to analyse legal principles relevant to these further claims and assess the evidence on a much broader basis, I am able to focus upon only one aspect of the matter and then only in relation to the award of damages. The amount claimed with reference to the third cause of action was $100,000.

The Judge's decision

[6] The Judge summarised the evidence given by Mr Fredericks and also the evidence of Constable Connolly as follows:

> [21] The Plaintiff says he was assaulted three times when Constable Connolly was placing the seat belt around him. He accepted that he was abusive at this stage being somewhat confused and frustrated as to why he was in this predicament. He described three separate blows, each of them deliberately aimed and applied; the last of them appearing to have particular thought put into it by Constable Connolly. The plaintiff alleged the constable had partially withdrawn from the vehicle and then lunged back in to inflict the blow. He described his reaction as yelling at Constable Connolly to "fuck off" on the first two occasions. He said the third blow shut him up. This was corroborated by Mr McGee.
>
> [22] Constable Connolly denied striking the plaintiff.

[7] At that point the Judge referred to evidence obtained from a surveillance camera. This evidence had been obtained by Mr Fredericks, or on his behalf, albeit from a police surveillance camera which was mounted a short distance from the hotel carpark and frontage. In the event the Judge found the surveillance camera evidence to be of only peripheral help. It confirmed the position of certain of the persons who had given evidence before him but, for obvious reasons, did not show what had occurred in the interior of the car, being the pivotal consideration in relation to the third cause of action.

[8] In his judgment he then referred to the injuries sustained by the appellant. Mr McGee said that he had observed "reddish swelling" to the appellant's face on the night. The appellant himself said that he had sustained injuries essentially to his nose. There was some confirmation of this supplied by Dr Wood, the appellant's general practitioner. He said that he had seen the appellant 10 days after the event, at least as it was described by the Judge. Submissions made by Mr Sinclair suggested that this consultation was some greater period after the event, about 20 days. In any event the doctor described a swollen mucosa, but no fracture to that part of the nose.

[9] The judgment continued with a summary of the Judge's essential conclusions:

> [26] The matter comes down to assessment of the evidence of both the plaintiff and Constable Connolly. The plaintiff described three deliberate blows, two of which were in response to his rather unsavoury protestations directly to his assailant. His evidence had the ring of truth about it particularly when he described being hit the third time and he said that he "shut up" after that. The plaintiff struck me as a person who was telling the truth. He had never been in trouble before and had very little interaction with the Police and certainly nothing on this scale. He was a young man who had significant sporting achievements, representing the West Coast at hockey. That in itself carries with it discipline and responsibility. Whilst he had had an amount of beer to drink, from what I observed of him in the witness box it is doubtful that that would have had any significant impact upon his personality and his behaviour. The influence of alcohol can do strange things to young men (even those who are talented sportsmen) but this was a young man who I assessed as being of reticent and relatively subdued personality. He thought before he spoke, he listened carefully to questions and gave measured responses. He did not appear to me to be impulsive and I doubt that the influence of alcohol would have changed that. I see no reason for him to have embellished his evidence. If he was making it up or even embellishing it, his story would more than likely have been much more florid than that which he told.
>
> [27] On the other hand I think Constable Connolly downplayed his role in the matter. His evidence itself was littered with responses where he took refuge in an inability to recall. He exhibited a certain smugness in the witness box; a self-righteousness and arrogance which underpinned my impression of his behaviour on this night.
>
> [28] The evidence of Doctor Wood is corroborative of the fact that blows had been struck in some form to the plaintiff's nose. There is no other explanation for this damage and a cross-examination line that "hockey is a right rough game" bore no fruit.
>
> [29] I find that the plaintiff suffered a gratuitous assault (three separate blows) at the hands (or rather, elbow) of Constable Connolly when the plaintiff was restrained by handcuffs and in the back seat of a Police patrol vehicle.

[10] The next issue was termed "Quality of the Conduct". The Judge, in light of the relevant caselaw, posed the question whether the conduct of the constable was so egregious and outrageous as to warrant an award of punitive damages. As to this his assessment was:

> [31] The physical conduct (assault) itself was not of the highest degree imaginable. It was, however, deliberate and repeated, albeit each blow was transitory and the effects (injury) negligible. That is, however, secondary to the context of the situation.

> [32] Constable Connolly was in my view frustrated and wanted to teach the plaintiff a lesson because of his earlier resistance. His conduct carried with it a sense of retribution; of reinforced arrogance.
>
> [33] He was in a position of authority and power. He represented the arm of the executive that enjoys legislative powers enabling coercion against the ordinary citizen. Such powers ought only to be exercised legitimately. Any gratuitous violence against a citizen by a member of the Police force is reprehensible and grave. That the Police themselves may be targets of abuse and violence, cannot excuse the use of illegitimate force against a citizen, particularly when that citizen's vulnerability is heightened by the fact of lawful detention and effective immobilisation. This man was handcuffed and in the back seat of a police patrol car and in the circumstances completely unable to defend himself.
>
> [34] The Courts must be seen to protect the citizen in such situations. Usually this is done by applying the criminal law. No formal complaint was laid against Constable Connolly.
>
> [35] But was this conduct "truly outrageous" (*Burns v A-G* (CA 155/02, 30 June 2003, Gault, Keith, Glazebrook JJ)? I think it is. Right minded citizens would think that for a member of the New Zealand Police force to repeatedly assault someone in the plaintiff's position was abhorrent and something that deserved the condemnation and punishment of the Court.

[11] There is no quarrel with the terms of the decision to this point. Mr McCarthy advanced the case on the basis of the Judge's findings and did not seek to revisit any aspect of the evidence. Nor, for that matter, was there a cross appeal directed to the Judge's evaluation of what occurred and its consequences.

[12] The next heading in the judgment was "What then is the level of damages?". After reference to a number of cases the Judge identified the possible range of an exemplary damages award as between $5,000 to $30,000. He regarded the amount claimed by the plaintiff as totally unrealistic in light of the "muted" response from the courts in New Zealand to claims of this kind. He continued:

> [39] As I have opined earlier, the assault in this case was not of the highest degree but the context in which it was carried out made it truly outrageous. It is the context of it which puts it into the category deserving of an award of exemplary damages. If this had been a criminal matter and the constable found guilty, then it would likely have been dealt with by way of a fine. It is unlikely there would have been an award of emotional harm reparation but that could have been a possibility. The very fact of the finding of guilt and of a conviction in a criminal setting would in themselves have been a significant punishment for a serving police officer. Similarly, my findings of fact in this case may well have such an effect. That is, in my view, something that ought to be taken into consideration.

> [40] I reject the submission of counsel for the plaintiff that in maintaining modest levels of damages in these cases the Courts are "whimping out" (my phrase not his). Whilst there needs to be a deterrent effect inherent in any award of exemplary damages, in my view the place for ultimate deterrence and punishment for actions of a criminal nature is in the criminal courts. The real point is to provide to the plaintiff a measure of damages that reflect the fact that the Court has recognised a wrong that deserves condemnation has been done to him/her.
>
> [41] Albeit in a public law compensation setting, the High Court in *Archbold v Attorney General* [2003] NZAR 563 and this Court in *Warne*, awarded $15,000.00 and $10,000.00 respectively for assaults by police officers where the effects were more serious than this, but the quality of the wrongful conduct was similar. I see no reason to depart from a level of damages of that order or magnitude.

In the next paragraph he reached the conclusion that $5,000 was the appropriate award, given the circumstances of this particular case.

The submissions of counsel

[13] Mr McCarthy made detailed and forceful submissions. In the course of them he embraced many aspects of the Judge's decision, in particular his acceptance of the plaintiff's evidence and rejection of that evidence given by Constable Connolly. Predictably, Mr McCarthy agreed with the characterisation of the constable's conduct as outrageous and deserving of an award of exemplary damages. However, counsel was less enthusiastic about the Judge's approach to, and conclusion concerning, the quantum of the award.

[14] Mr McCarthy rightly accepted that the quantum of the award represented a discretionary evaluation on the Judge's part. He therefore shouldered the burden of demonstrating that the Judge's approach was wrong on one of the well-recognised grounds which must be demonstrated in order for a Court to intervene on appeal. In the result it was suggested that three of the grounds for upsetting a discretionary decision were made out in this case.

[15] With reference to relevant considerations, counsel submitted that the Judge had not properly recognised the deterrent role of exemplary damages. In addition, it was said that there was a failure to have regard to certain cases decided in both New Zealand and Australia. I shall refer to these shortly.

[16] Secondly, it was submitted that irrelevant considerations were brought to account. The Judge had referred to a scale of between $5,000-$30,000 in relation to exemplary awards. I think a better word is a range rather than scale. In any event Mr McCarthy submitted that it was wrong to assess the appropriate award in this case by reference to a range of this order. Properly analysed, counsel contended, a limiting range of this order does not exist.

[17] The third argument was that the decision reached was clearly wrong. This was a broad argument and it seemed to me it brought to account the points which had been raised in support of the contentions that relevant considerations were not brought to account while irrelevant ones were. In my view, this ground was the real basis of the appeal. Indeed, I think Mr McCarthy at one point of his written argument acknowledged that the points made in the earlier contexts were also relied upon under this general ground of appeal that the award was plainly wrong.

[18] A significant number of propositions were advanced under this head. I think they can be captured as four propositions. The first was that the deterrent role or function of exemplary damages was overlooked or at least underestimated in the decision under appeal. Counsel submitted that an award of $5,000 was simply inadequate and removed any incentive which might otherwise exist for systemic vigilance in establishing and maintaining procedures and systems designed to achieve oversight and thereby prevent egregious behaviour of this kind.

[19] The second submission was that the Judge had proceeded on the basis that "moderate awards" were mandated by decisions of the superior courts of this country. Mr McCarthy contended that this was not so. He relied upon *Midalco Pty Ltd v Rabenalt* (1989) VR 461, *Blackwell v AAA* Supreme Court of Victoria, 7283/92, decision 20 March 1996 and *G v G* [1997] NZFLR 49 (HC) as providing examples of awards far beyond the range which the Judge adopted as appropriate. In *Midalco* there was an award of AUS$250,000 by way of exemplary damages. Similarly, in *Blackwell*, a jury had awarded AUS$125,000 exemplary damages, although that sum was reduced to $60,000 on appeal. Finally, in *G v G*, Cartwright J had made an award of $85,000 in a case involving serious abuse committed by a husband against his wife.

[20] Mr McCarthy added that these decisions were frequently cited by counsel in subsequent cases, but it was his experience that they were routinely ignored in favour of a number of much more conservative judgments, particularly judgments of the Court of Appeal.

[21] In a related submission he identified observations of that Court in *Ellison v L* [1998] 1 NZLR 416, as the genesis of the moderate awards which have prevailed in most New Zealand cases. Indeed counsel referred to *Ellison* as having prompted the "mantra" of moderate awards in the present context. Mr McCarthy suggested that this was inappropriate, because upon analysis what was said in *Ellison* was strictly obiter and, importantly, the Court had not been referred to either of the Australian cases, nor to the decision of Cartwright J in *G v G*.

[22] The third general proposition was that an award of exemplary damages at the present level was calculated to deter potential plaintiffs from bringing claims of this nature and would therefore lead to the extinction of such claims and render the remedy of the exemplary damages redundant. The argument was developed by submitting that claims of this nature are difficult to bring. Typically they pit an individual citizen against officials of the State often, as in this case, police constables. It was necessary for the individual to produce evidence which would prevail in the face of denials from the other party. Hence, said Mr McCarthy, this was frequently high risk litigation. If plaintiffs brought claims in such circumstances, succeeded, and were then met with an award of the level that resulted in this case, there would be no or little incentive for others to pursue a similar path.

[23] Counsel added that an award of solicitor/client costs (as had been granted in this case) should be regarded as of no moment. Such an award simply restored the plaintiff to the position that he was in prior to prosecuting the case. In particular, such an award "should not counter-balance or assauge a low level of quantum", to use Mr McCarthy's words.

[24] The fourth proposition was to the effect that the present case should be seen as a defining one for the remedy of exemplary damages in New Zealand. Counsel described the award of $5,000 as "nominal". To my question of him Mr McCarthy

said that the appropriate award in this case was the amount claimed, $100,000. This, in turn, prompted the response from me that I was being asked to redefine the law in relation to exemplary damages in New Zealand and to do so in the face of clear decisions of both this Court and, more importantly, of the Court of Appeal, which had consistently affirmed the need for moderation in relation to exemplary damage awards.

[25] Mr McCarthy did not accept this. He relied upon the argument earlier made that when one looked at certain of the cases which he had cited, that there was authority in Australia and here (in *G v G*) which indicated a more expansive approach to exemplary awards.

[26] Although I have reduced the argument to these four propositions, Mr McCarthy made a number of other points. I shall not endeavour to mention all of them. I think the summary I have provided captures the essence of the argument.

[27] Mr Sinclair, on behalf of the Attorney-General, made four essential points. At the outset he doubted the efficacy of exemplary damage awards where liability was vicarious. He suggested, as has been stated in cases in both the United Kingdom and here, that there is a conceptual difficulty with exemplary damages where it is an employer, and not the employee (the actual tortfeaser), who is sued. That said, counsel acknowledged that this point was not one taken in the District Court and he did not seek to take it, at least on a substantive basis in this Court either. However, he did suggest that the vicarious liability dimension emphasised the need for moderation in relation to exemplary awards.

[28] The second point was a submission that the approach of Judge Doherty in the District Court had been entirely correct. Mr Sinclair said that there is a general principle in New Zealand that exemplary damages should be moderate. Counsel noted that the real deterrents for a police constable acting in the course of his duty were not so much the possibility of an award of exemplary damages, but rather that violent behaviour could be met by either a criminal prosecution, or just as likely by disciplinary proceedings. The real threat, or deterrent, was the risk of the loss of a career through proceedings in either forum.

[29] The third proposition advanced was that the Judge was not only correct in identifying a range of $5,000-$35,000, but correct as well in assessing this case as falling at the lower end of that range and thereby awarding a sum of $5,000.

[30] Finally, it was argued that the appropriateness of the award was confirmed when comparisons were made between the $5,000 figure and awards made for breaches of the New Zealand Bill of Rights Act 1990. In that context vindication of the breach, together with some degree of denunciation and public disapproval, had been marked by awards which were similar to the one made in this case. In particular, counsel referred to the judgment of Tipping J in *Taunoa v Attorney-General* [2008] 1 NZLR 49 (SC).

[31] With this review of the competing arguments in mind I can now turn to the essential issue in this appeal.

Was the award adequate to mark the breach?

[32] The Judge found that the constable had assaulted the plaintiff and in an outrageous manner which justified an award of exemplary damages. Despite Mr McCarthy's impassioned plea that I should go down the path of redefining the appropriate quantum of exemplary damages in New Zealand, I am not persuaded to do so. Despite everything that counsel said, I am in no doubt that the Court of Appeal in particular has spoken with reference to this remedy. It has said on any number of occasions that awards are to be pitched at a moderate level. I have considered, but I do not think, that *G v G* or the two Australian cases to which I have already referred, warrant my embarking upon a markedly different approach.

[33] But this conclusion is not necessarily determinative of the present appeal. It remains to consider the award in light of what I perceive to be the settled New Zealand position. The issue remains, even in light of that approach, was an award of $5,000 adequate or can it be said that the Judge erred in the discretionary evaluation which he made? I remind myself that it is not my function, sitting on appeal, to take a second look at the case absent the advantages which a trial Judge undoubtedly

enjoys in an evaluation of this kind. Rather, my task is to assess whether the award made was within the available range.

[34] I am not disposed to differ from the Judge's assessment of the case, particularly as to the quality of the constable's conduct. I adopt the assessments of Judge Doherty, as he expressed them in his reserved decision. He characterised the constable's behaviour as truly outrageous. Although he saw the physical element in this case as not extreme, he labelled the assault "deliberate" and "repeated". Moreover, the Judge rightly viewed the assault as aggravated by virtue of the fact that the plaintiff was in a vulnerable position, in the rear seat of a patrol car and handcuffed at the time of the violence.

[35] In relation to the constable's state of mind the Judge found that he was "frustrated" on account of his perception of the events which had just occurred. Hence he set out to "teach a lesson" to the plaintiff. The Judge found it was conduct born of a "sense of retribution" or "reinforced arrogance". Next there was reference to the important contextual consideration that the constable was in a position of authority and power. As the Judge described it, this was "gratuitous violence against a citizen [and therefore] reprehensible and grave".

[36] Finally, the assault was not transitory but rather repeated in that it involved three blows struck with an elbow, which warranted the label "abhorrent". I endorse all of these descriptions of the relevant behaviour.

[37] It only remains, then, to turn to the final aspect of the decision by which the Judge fixed the actual level of the award. I have referred earlier to paragraphs [39]-[41] which contain the relevant evaluation. In the final paragraph the Judge was influenced by the decisions in *Archbold v Attorney-General* [2003] NZAR 563 and *Warne v A-G* (District Court Wellington, 22 February 2008, CIV 2004-085-1274, Judge Thomas). He commented that "albeit in a public law setting" awards of $15,000 and $10,000 were made in those cases. He noted that they each concerned assaults committed by police officers where the effects were more serious than in the present case, but where the "wrongful conduct was similar".

[38] I have considered the judgments in *Archbold* and *Warne*. In the final analysis the two awards of $15,000 and $10,000 were awards of exemplary damages. It is the case that each Judge made a finding that s23(5) of the New Zealand Bill of Rights Act was also breached. Both indicated that an award to vindicate these breaches would have been appropriate but, in the event, were not required because awards of exemplary damages were made in relation to the claims in tort.

[39] Judge Doherty observed in paragraph [41] that he saw "no reason to depart from a level of damages of that magnitude", being the magnitude of the awards in these two cases. Nor do I. On a careful consideration of the two cases, and a comparison with this one, I agree that they were broadly similar. Moreover, in my view, consistency and justice indicates that the proper award in this case should at least have been at the lower level indicated in *Archbold* and *Warne*.

[40] I therefore intervene to the extent that I increase the exemplary damages from $5,000 to $10,000.

Costs

[41] The appellant has succeeded on appeal. In the District Court he was awarded solicitor and client costs and I am of the view that the same approach should apply in this Court. I therefore allow fair and reasonable solicitor and client costs. To that end counsel may submit a bill of costs which I will assess and approve on a fair and reasonable basis.

Solicitors:
Sumner Bay Law, Christchurch for Appellant
Crown Law, Wellington 6140 for Respondent