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IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

CV 15 of 2018

BETWEEN : YANG HONG HUI
- Plaintiff

AND : MO DE FENG
- Defendant

BEFORE HON. JUSTICE NIU

Counsel : Mr Siosifa Tu'utafaiva for plaintiff
Mr Clive Edwards for defendant

Trial : 25 June 2019

Submissions : By Mr Edwards 8 July 2019
By Mr Tu'utafaiva 5 September 2019

Ruling : 27 September 2019

RULING

Plaintiff's claim

[1] The plaintiff claims that the defendant caused emotional suffering to him and injuries to his eyes and lower part of his body when the defendant kicked him

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between his legs thereby causing him to fall and hit his face on a cabinet. He claims damages in the sum of \$120,000 for those.

Defendant's defence

[2] The defendant denies the allegations of the plaintiff.

The evidence

[3] Only the plaintiff gave evidence for himself and his claim and only the defendant and one witness gave evidence for the defendant.

Plaintiff's evidence

[4] The plaintiff stated in his evidence in chief that he was 74 years old, that he was born and raised in China and has been in Tonga for 24 years and operates a watch repair shop with his wife in Kolofu'ou. He stated that the defendant had been married to their daughter but that they are separated. He produced and confirmed that a brief of his evidence was true and correct.

[5] In that brief of evidence he stated as follows:

“In January 2016 I met Mo De Feng in a Chinese New Year Party with all our native friends. I asked Mo to give me the money. Maybe Mo felt embarrassed. In the evening on the 1st January Mo came to my watch shop with three other Chinese with bush knives in their hands. Mo knocked the door very loudly and called me to come out. I was very afraid. Mo then broke my window glasses. Finally, when I opened the door Mo De Feng suddenly kicked my lower part of my body where my penis is. I fell down and my head heavily hit the glass cabinet where all watch and other stuff are inside. I felt my head was severely painful. I slept that night. But, when I woke up at about 4 – 5 o'clock I felt my face was paralysed and also the water came out of my mouth and could not stop it. My eyes also were tearing and could not see clearly. So, I could no more able to work. In that morning I went to see the Chinese doctor Mrs Wei but I still did not feel better. Now my health is getting worse. I cannot control my urine. Early in

the morning I passed water on because I cannot get up quickly. Besides, I cannot eat anything. When I eat something I quickly vomit it out. I also cannot walk as my feet feel very weak. I feel very painful about all these. My wife also suffers high blood pressure and high sugar and must take medicine every day. Therefore, both myself and my wife need to go back to China for medical care and we are not able to do that because Mo De Feng does not pay us our money, and the \$120,000 compensation we claim. Now, I sincerely wish the Court will have the sympathy for us about our current difficulty and order Mo De Feng to pay us back our money and we will appreciate your kindness forever.”

That brief of evidence was signed and dated 16 July 2018 and it was in the Chinese language and the above transcript is a translation of it.

- [6] When questioned by his counsel in his evidence in chief as to his statement that his face was paralysed, he stated that he meant he could not do his watch repair work because he could not keep the magnifying lense in his eye because his eye was paralysed, that he could not feel his face and tears came out of his eyes and saliva came out of his mouth. He said that his face was painful. He said that in the first couple of months, the saliva continued and he then had acupuncture treatment costing him lots of money and now it was getting better but that the right side of his face was still painful and saliva was still coming out. As to the urine, he said that it still came out without him knowing and he had to use the large diapers. He said that before he was kicked by the defendant, he could run but after he was kicked he could not even walk properly.
- [7] Upon cross-examination by Mr Edwards, he said that he had gone to the toilet twice since he had come to Court at 8:30 that morning and that he had to go again after he started giving his evidence. He said that he would go 2 or 3 times at night and even then had to have the diaper on. He was shown 7 photographs which had been taken of the inside of his shop while he and his wife were working there last year. He agreed that his appearance in those photos was the same as he now appeared before the Court and that his face was not paralysed. He said that his face was OK but that his eyes were not good, and that it was not whether or not his

face was paralysed but that his eyesight was bad. He said that he had seen an eye specialist in Tonga but did not know his name or that he would come and give evidence. He said that because his eyes were not good, his wife had to do the repairs and what he was doing as shown in 3 photographs was checking the work his wife had done. He said that in those 3 photos, he had on a pair of spectacles with a magnifying lense attached to the left eye of the spectacles. He said he had normally used his right eye to hold the lense without any spectacles, but that since he was kicked by the defendant, his right eye socket could not hold the lense anymore and even that eye could not see properly anymore. So he had this pair of spectacles made in Fiji for his left eye and it had cost him \$600, whereas the single lense he had used on its own was \$300.

[8] Mr Edwards put to him that he had had the problem with his face, which was manifested by a twitch on the right side of his face already in 2013, and that the witness for the defendant would give evidence about it. The plaintiff replied that he had had no problem with his face in 2013.

[9] Mr Tu'utafaiva had no re-examination, and I asked the plaintiff whether he was as shown in the photographs sitting at the table where he normally used for repairing watches, and he said yes.

Defendant's evidence

[10] The defendant provided and read out in Court a brief of his evidence which consisted of some 17 paragraphs, but of which only 2 paragraphs are of relevance. They are as follows:

“14. On 31 January 2016 it was the New Year's Eve for the Chinese. I am the Vice-President of the Chinese community in Tonga and a function was being held at the Emerald Restaurant at Vuna Road, Kolofou, and was attended by the Chinese Ambassador, the Prime Minister of Tonga, Minister of Finance and other dignitaries as well as members of the Chinese Community.

15. I was busy at this function and was unable to see or speak with the plaintiff who was there. I was informed after the function that the plaintiff wanted to speak to me and I went over to his place at Taufa'ahau Road, Kolofo'ou to speak with him. I did not go there to assault him, and I deny the allegations that I caused him any injuries.”

[11] After reading his brief of evidence, the defendant was then cross-examined and he denied that he assaulted the plaintiff although he admitted that he was charged with and that he was tried and was found guilty of assaulting the plaintiff in the Magistrate's Court with the assault that he is being sued for in the present case. He said that he was also charged with causing bodily harm to the plaintiff but he was acquitted of that. He said that he did not appeal against his conviction for the assault.

[12] There was no re-examination and I had no question.

Evidence of the witness

[13] Mr Glen Tiiummnis Kaumavae (AKA Andre Manu) stated that he had known the plaintiff since 2013 when he started his watch shop where he is presently situated. He said he had noticed then in 2013 that the plaintiff was having the twitching on his face as he now has, and he has always had it up to now. He said that his face has been no different up to now. He said that on 17 October 2018, he went into the shop to have his watch repaired and he took the photographs whilst the plaintiff and his wife were both working there at the time. He said that he spoke with the plaintiff and that his face still twitched but that it was slightly better than it was in 2013. He said that the plaintiff was doing his work as he had been doing in all the time he had attended there in the past.

Submissions of the plaintiff

[14] Mr Tu'utafaiva had had Mr Edward's submissions since 8 July 2019, and he has only filed the plaintiff's submissions on 5 September 2019. Mr Tu'utafaiva straight off conceded that the claim of the plaintiff of \$120,000 was too excessive and instead submitted that \$15,000 was appropriate and reasonable and that it be

awarded for the pain and suffering which the plaintiff has suffered in consequence of the unlawful kick inflicted by the defendant upon his crotch.

[15] He submitted that the assault caused the plaintiff to fall and hit his head on the cabinet and it caused the plaintiff's face to be paralysed and his eyes not to see clearly and his abdomen to be painful when he urinated and that those conditions continue up to now – in particular, the loss of use of the right eye and urine incontinence.

[16] He submitted that those are pains and suffering which the plaintiff has suffered as a direct consequence of the unlawful kick which the defendant delivered to his crotch, and that this Court should assess those pains and sufferings by award of damages, and that such damages be reasonably assessed in the sum of \$15,000.

Submissions of the defendant

[17] Mr Edwards submitted that the plaintiff had the onus to prove and but failed to prove:

- a) that he sustained injuries from the assault by the defendant;
- b) that the injuries sustained by him has caused partial or complete loss of either of the eyesight of his eyes;
- c) that the injuries have caused him to lose control of his urination (incontinence);
- d) that the injuries have caused his stomach to vomit out any food he eats; and
- e) that the injuries have caused him to be unable to walk,

and that the plaintiff has failed to discharge that onus because he has not provided any medical evidence to prove any causal link between the kick and those conditions claimed by him.

[18] He also pointed out that despite the claim and assertions of the plaintiff, there was no evidence at all that he was not in control of his urination because he asked for

and was given leave to and he walked briskly to the toilet, during his evidence in chief, or that he was throwing up or vomiting anything he had eaten, so that he would be in a mal-nutrition condition, as confirmed in his photograph some 12 months ago, or that he could not walk properly anymore because he was walking around in Court quite normally.

- [19] As to the affected eye-sight, and or partial facial paralysis, he pointed out that the plaintiff had already had a facial twitching on the right side of his face since 2013 as confirmed by the evidence of the defendant's witness, Glen Tummnis Kaumavae, who had known him since 2013, and who had taken the photographs in the plaintiff's shop last year.

Consideration

- [20] The plaintiff does not specify or particularise in his statement of claim what type of damage he is claiming. He simply claims "damages against the defendant because of emotional suffering and injuries to his eyes and lower part of his body caused by the defendant." (paragraph 1) and in prayer (a) he prays for "\$120,000 compensation for the injuries suffered by the plaintiff and its effect on his life for more than 2 years."

The assault

- [21] The plaintiff has given sworn evidence that the defendant kicked him in his crotch, that is, on his penis, with such force that it caused him great pain and to fall down hitting his head on the display cabinet in his watch shop as he fell.
- [22] Against that evidence, the defendant has simply stated in his brief of evidence that he did not go there to assault him, and that he denied the allegations that he caused him injuries. In fact he does not deny that he kicked the plaintiff in his crotch or penis as the plaintiff says in his evidence or that he fell and hit his head on the cabinet.
- [23] Accordingly, I have to accept the evidence of the plaintiff that the defendant kicked him as he described and that he fell and hit his head on the cabinet as a result of the kick.

The injuries

- [24] Although the plaintiff said that when his head hit the cabinet he felt that his head was severely painful, and I have to accept that when he was kicked in his crotch (and penis) he suffered immediate intense pain (which caused him to fall and hit his head on the cabinet), the plaintiff has not given any evidence, and no evidence was given, of any injury that he sustained as a result of the kick to his groin or to his head when it hit the cabinet.
- [25] An injury can be an external injury and it can also be only an internal injury. An external injury can be verified by a cut or laceration of the skin, usually associated with bleeding. An internal injury also involves bleeding but no blood comes out. It spreads inside the body, and frequently just below the skin so that a bruise mark is manifested on the outside of the skin. That is what happens when one gets a “black eye” as a result of a punch delivered to that eye.
- [26] No evidence was given by the plaintiff as to any such external injury where there was cut and associated bleeding, or as to any internal injury manifested by a bruise mark, sustained by him in consequence of the kick or of the hitting of his head on the cabinet. I have to find that the plaintiff has failed to prove, as is his burden, that he sustained an injury or injuries in consequence of the kick delivered by the defendant.
- [27] I do not know, and no expert or medical evidence was given, whether or not an injury or injuries can be caused to the urinary system of the plaintiff by the kick delivered by the defendant to his penis, such as to cause the incontinence he describes has happened to him, without there being any injury being manifested by external bleeding or internal bleeding (bruising). I therefore have no factual basis to make any such finding, not only with regard to the incontinence but also with regard to the loss of sight of the plaintiff's right eye.

Damages

- [28] The plaintiff does not plead or state which type of damage he claims other than to say in his claim he had emotional suffering from his injuries and their effect in his

life for the past 2 years. In his submissions, Mr Tu'utafaiva submitted that damages be awarded to the plaintiff for his pain and suffering as a result of the kick delivered by the defendant. He submits that as a result of the kick, the plaintiff has suffered, in the past 2 years, loss of sight, incontinence and painful abdomen.

[29] As I have stated above, I do not know if that is a natural consequence of the kick delivered by the defendant. What I know is that the kick would cause intense pain in the groin and lower abdomen of the plaintiff but that it would dissipate in a matter of hours, and that there may be tenderness for a few days but then everything is back to normal thereafter. The plaintiff must therefore prove that in his case it was and is different and he must do that by adducing the evidence of an expert in that field and who had in fact attended to and treated the plaintiff in these past 3 years. No such expert evidence was called or produced by the plaintiff.

Pain and suffering

[30] Mr Tu'utafaiva submitted that the evidence proved that the plaintiff sustained great pain and suffering and that he be compensated by way of damages for that in the sum of \$15,000. In support of his point, he referred to *Kanfusi v Lasa & Ors* [1990] Tonga LR 139. In that case, the Court of Appeal stated the facts as follows:

“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 taken to the police station and was placed in the cell. 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 not have been saved even if medical 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.”

[31] He submitted that in that case, the Court of Appeal confirmed that pain and suffering was a head of damage to be assessed in the circumstances of the case. He submitted that it is reasonable to conclude that the kick between the legs and hitting the penis of a 70 year old man, and causing him to fall and hit his face on the cabinet must have caused intense pain, and it also caused his face to be paralysed and his urinary system to give him incontinence. He accordingly submitted that \$15,000 was a fair and reasonable compensation.

[32] As I have stated above, there is no evidence that the kick caused the loss of sight, the facial paralysis or the urinary incontinence. The only evidence I have is that the plaintiff did suffer intense pain in his groin and lower abdomen and severe pain in his head as a result of the kick. And that is all I can assess as damages for the pain and suffering. I would add that there was no evidence that the plaintiff hit his face on the cabinet when he fell after being kicked between the legs.

[33] In that case of *Kaufusi* that Mr Tu’utafaiva referred to, the Court of Appeal stated, in respect of pain as suffering, as follows:

“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 circumstance of the case. It is reasonable to assume that the crushed eyeball must have caused intense pain, but also reasonable that that state was short lived and there is no suggestion that he will experience trouble in future.” (at p. 141).

The Court of Appeal did not make any separate assessment for the pain and suffering. It included it in the overall sum of \$20,000 for all the damages (which included loss of amenities and economic loss) which the Court found were the more serious damages which the plaintiff in that case would suffer in future.

[34] In *Akau’ola v Fungalei & Ors* [1991] Tonga LR 22, the plaintiff suffered a temporary nosebleed, 2 black eyes and a broken jaw from assaults by two

policemen after a prolonged chase from Nuku'alofa to Lapaha. In assessing damages, Martin CJ stated as follows:

“He has suffered a temporary nosebleed, and received 2 black eyes which would have healed in a few days. He received a more serious injury to his jaw, and I accept that he was unable to eat solid foods for 2 weeks. I do not accept his complaints about other injuries to his body. For these injuries I assess damages at \$2,000. (p.24).

[35] In *Hsu & Hsu v Latu* [1991] Tonga LR 25, the plaintiff suffered a broken jaw as a result of a punch delivered by a security officer of a night club whilst attempting to take out the plaintiff from the club. The jury awarded damages in respect of the injury in the sum of \$8,000. In respect of the appeal that that sum was excessive, the Court of Appeal stated as follows:

“This submission has caused us some concern. We agree with Mr Hola that the verdict is very high by Tongan standards. We ourselves would not have awarded \$8,000. We would have thought that a verdict in the order of \$5,000 would have been more appropriate. But that is not to say that the verdict is so high as to warrant the Court setting it aside on appeal..

In the case of assault it is open to the jury to have regard not only to the actual physical damage to the plaintiff but also to the indignity suffered by the plaintiff. We think it was open to the jury to include some modest amount in its award to allow for damages of this kind. While we think the verdict is high we are of the opinion that it is not so high as to justify the making of an order that it be set aside.”

[36] That was 28 years ago and standards in Tonga have increased. The costs of living and value of money are such that such awards would not be excessive. I also have to consider the indignity of the assault and the advanced age of the plaintiff. In the Tongan custom, it is a great disrespect and an affront to hit an older person than yourself. In the present case, the plaintiff was 71 years old, the defendant being only as old as his own son. That is most disrespectful, and it must be regarded as such by this Court.

[37] I also consider that because of the advanced age of the plaintiff, it is reasonable to expect that the natural healing process which dissipates the pain in a much younger person, would take longer with a person of the plaintiff's age. I consider that it would take many weeks and even months for the effect of the kick to heal. I consider that a sum of \$12,000 would be reasonable for the pain and suffering which the plaintiff has suffered.

Conclusion

[38] Accordingly, I order that there be judgment for the plaintiff in the sum of \$12,000 and costs to be taxed if not agreed.

NUKU'ALOFA: 27 September 2019.



A handwritten signature in black ink, appearing to read "Niu J", is written over the seal.

Niu J
JUDGE