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LAVERY v. MINISTRY OF DEFENCE[1]

Damages—Plaintiff assaulted by a member of an Army Patrol—Awarded aggravated damages—Whether exemplary damages should be awarded—Whether soldier a "servant of the government"—Whether aggressive conduct.

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The appellant who was then aged 16 years was assaulted by a member of an Army patrol who shoved a knee against the appellant's private parts and struck him with the butt of a rifle on the head. The appellant's head was cut and bled freely. The soldier and another member of the patrol then fastened "plastic type" handcuffs around the appellant's ankles and feet. A sizeable crowd gathered and showed hostility to the Army patrol. Fifteen minutes later vehicles arrived and the appellant was taken to hospital and discharged that evening. The appellant sued the respondent for damages for assault and battery. The respondent admitted liability and the nature and degree of the assault was not challenged. The appellant suffered no serious or permanent physical consequences. The learned Additional Recorder of Belfast awarded the appellant damages of £1,000 which sum included an amount for aggravated damages but not for exemplary damages. The appellant appealed against the award contending that the case was a proper one for exemplary damages and that the award should be significantly increased.

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Held, allowing the appeal, that the appellant's entitlement to damages could be considered under the following heads:

(a) general damages in respect of pain and suffering and loss of amenities and enjoyment in life (see page 102A to F);

(b) aggravated damages as compensation for injury to a person's feelings. In the case of assault and battery they may be properly awarded if in addition to the physical injury the victim also suffered indignity or humiliation: here the appellant's youth, his reserved personality and the nature of the assault were relevant considerations, it was also relevant that the crowd were hostile to the soldiers and sympathetic to the appellant and so any humiliation felt would have been less; (see page 103A to D).

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(c) exemplary damages which are in essence punitive, they may be awarded when the actions of a servant of the government, such as a soldier acting in aid of the civil power are oppressive and when the punitive element was not sufficiently met within the compensatory award. The conduct of the soldier was a deliberate and unjustifiable abuse of the lawful power to stop and question persons and a proper award to include exemplary damages was £2,500. (See pages 104H and 107A).

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The following cases are referred to in the judgment:

Broome v. *Cassell & Co. Ltd.* [1972] A.C. 1027; [1972] 2. W.L.R. 645; [1972] 1 All E.R. 801 H.L. (E).

Kelly v. *Faulkner* [1973] N.I. 31 Q.B.D.

O'Connor v. *Hewitson and Another* [1979] Crim L.R. 46

Rookes v. *Barnard* [1964] A.C. 1129 [1964] 2 W.L.R. 269 [1964] 1 All E.R. 367 H.L. (E).

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[1] In the Queens Bench Division before Kelly L.J.: 20 January, 3 February, 13 April 1984.

White v. *Metropolitan Police Commissioner* (1982) Unreported, 24 April 1982, Q.B.D.

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APPEAL from an order by the learned Additional Recorder of Belfast whereby he awarded the appellant Francis Joseph Lavery damages of £1000 for assault and battery by the servants and agents of the respondent. The facts appear sufficiently in the judgment of Kelly L.J.

S. Treacy for the appellant.
W. A. Campbell Q.C., and *D. N. Lockie* for the respondent.

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Cur. adv. vult.

KELLY L.J. The plaintiff (appellant), Francis Joseph Lavery of 135 Antrim Road, Belfast (whom I shall call the appellant) now aged 19 years was assaulted by a member of an Army foot patrol and suffered injuries. He sued the defendant/respondent the Ministry of Defence for damages for assault and battery in the Belfast Recorder's Court. The Ministry admitted liability and His Honour Judge Porter Q.C. awarded him £1,000 damages stating that this award included a sum for aggravated damages but not for exemplary damages. The appellant appeals against this award and contends that this is a proper case for exemplary damages and that his award should thereby be significantly increased.

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The facts are that on the morning of the 8 July 1981, the appellant then aged 16 years and living at 14 Dawson Street, Belfast, which is off the New Lodge Road was walking with two male companions along the New Lodge Road about 10.45 a.m.. Earlier that morning about 7.45 a.m. he had attempted to go to his employment in another area of the city but rioting in the locality of his work place had prevented that. A hunger striker had died in the very early hours of the morning and widespread rioting in a number of areas of the city had quickly erupted. But it had abated in the New Lodge area and at the time the appellant and his companions were walking there all was quiet. There was still however an Army presence about and about 10.50 a.m. the three young men were halted on the road by an Army foot patrol. They were searched, asked for their names and addresses and where they were coming from and going to. They gave this information and they were allowed to proceed. They resumed their walk down the New Lodge Road but about forty yards further on, a second Army patrol consisting of four soldiers stopped them. This patrol took them into a corner of Lepper Street which runs off the New Lodge Road and placed them against the gable wall there. The appellant who was first in line was asked by a soldier of the patrol his name and address and where he was coming from and going to. Once again he gave this information. Then the soldier told him to sit down on the ground. He asked "What for?" The soldier's reply to this was to shove his knee with force between the appellant's legs against his private parts and when his head came forward as a result he struck him with the butt of his rifle on the head. The appellant was knocked to the ground. He re-arranged himself to sit there with his back to the gable wall in the like position his two companions had gone into on the directions of the patrol. His head was cut and bleeding freely as he sat there.

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The soldier who had committed the assault and another then produced plastic type handcuffs which they fastened tightly around the ankles and feet of each of the young men including the appellant. They were told an Army sergeant was coming to arrest them. They sat in this position on the pavement against the wall. People from the surrounding houses had come out on to the street and a sizeable crowd, mainly women, gathered. They showed their hostility to the foot patrol, shouting and screaming abuse and at least one man tried to intervene. Ten to fifteen minutes later a military personnel Saracen drew up and about the same time an ambulance summoned by a member of the public arrived. A soldier lifted the appellant up and by the armpits manouvered him, his ankles still handcuffed, towards the back of the Saracen. The ambulance attendant then stepped forward and asked to take the appellant to hospital. At first the soldier refused but after some words, he released the appellant to him and he was placed in the back of the ambulance. The attendant asked the patrol if they had any objection to the handcuffs being removed but he received no reply and when he asked them for a means of doing so they again ignored him. He borrowed a pair of scissors from a member of the public and cut them off. In evidence the attendant said the appellant was at the time, bleeding from the head and was shocked. There was blood in his hair and down his neck. He saw he was shaking in the ambulance on the journey to hospital and he covered him with blankets.

I interrupt this narrative to state that not only was liability admitted before me but the circumstances, nature and degree of the assault and battery in the detail I have recounted it was accepted and not in any way challenged. No evidence was called on behalf of the respondent. In cross-examination no suggestion was made that the appellant's manner or conduct to the patrol had in any way been cheeky or provocative. No explanation was put forward to mitigate the assault. The appellant made a complaint to the police who investigated the matter and passed a file to the Director of Public Prosecutions. He decided not to prosecute.

The appellant suffered no serious or permanent physical consequences. He was taken to the Mater Hospital and had two stitches put in his head. An X-ray of his skull showed no damage. He was not detained overnight. He said his head felt very sore. He had planned to go on holiday on the following day but postponed setting out for a day because he felt unwell. Nor further hospital attendance or treatment was necessary. He felt very nervous for some time after the assault when Army patrols were in the area and would not go out of the house. He still feels some nervousness. In an agreed medical report, Mr. John Colville F.R.C.S. who examined him on the 21 February 1983, found a very slightly raised 2 cm. scar in the left parietal part of the scalp about 10 cms. above the ear. Mr. Colville's comment was:

> "This young man has a small injury which is consistent with a blow to the head with probably a small sharp object. This has healed quite well with a slight elevation of scar which is not of particular consequence. He possibly is a little aware of the scar when he is brushing or washing his hair but otherwise I would not expect any conscious appreciation of this.
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> His comment about being nervous with regard to soldiers can be accepted at its face value. His general presentation to me is that of quite a reasonable young man who has not overcapitalized on his injury."

The appellant's entitlement to damages in this case can be considered under the heads of general damages, aggravated damages and exemplary damages. He suffered no pecuniary loss. He undoubtedly starts off with an award of general damages. It will be of course in respect of pain and suffering and loss of amenities and enjoyment of life. The evidence as to the precise nature and duration of the pain and suffering was very sketchily led in evidence but reasonable inferences from the agreed and unchallenged facts enable me to be satisfied on most aspects of this. I approach the head of pain and suffering in this way.

(1) Pain felt in his private parts and head when the injuries were inflicted. In all probability there was sickening and nauseating pain felt for a short time in respect of the blow to his private parts. For a longer period, for a day or two, he would have suffered pain in his head. The appellant described it as "very sore".

(2) Some slight discomfort felt while sitting on the ground with his ankles tightly "handcuffed" and some slight discomfort when being "walked" to the car. All this would be mild and of 10 to 15 minutes duration.

(3) Nervous after the accident. That he suffered and still suffers nervousness was not challenged. He complained about it approximately 1½ years after the assault, on the 24 February 1983 to Mr. Colville and in evidence before me which is now 2½ years afterwards. I accept his nervousness as genuine. It is reasonable to hold that it held its peak for some months after the assault but that it has since been declining in severity and that its basic apprehension only increased to nervousness at the sight of an Army patrol in the street. I think it is reasonable to award damages on a basis of intermittent nervousness and apprehension for six months and thereafter for mild apprehension for about two years.

Then under the head of loss of amenities, he is entitled to damages for a moderately marked diminution in the enjoyment of his social life say for a few months following the assault, when he stayed at home, apprehensive of meeting Army patrols. But following that time his social excursions must have gradually returned to their pre-assault days with perhaps a mild degree of apprehension clouding their full enjoyment. Of course the heads of pain and suffering and loss of amenities in this repsect are to some degree interwoven. Then there is the minor matter that he had to postpone his holiday for one day because he felt unwell.

These then are the consideration on which I would assess general damages.

I turn now to the question of aggravated damages and whether they should properly be awarded in this case. Since the decision in *Rookes* v. *Barnard* [1964] A.C. 1129, it is recognised that aggravated damages should be looked at in a distinct category from general damages and of course from exemplary damages.

Halsbury's Laws of England (4th Ed) paragraph 1189 states:

> "Aggravated damages are designed to compensate the plaintiff for his wounded feelings; they must be distinguished from exemplary damages which are punitive in nature and which may only be awarded in a limited category of cases.
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> In cases decided before 1964 (i.e. *Rookes* v. *Barnard*) the distinction between aggravated and exemplary damages was not always appreciated, and the terminology used in such cases is therefore unreliable."

Aggravated damages are completely compensatory. They contain no punitive element. They are awarded to the person wronged as a compensation for injury to his feelings. In the case of assault and battery they may be properly awarded if in addition to the physical injury suffered, the victim also suffered indignity or humiliation. Such feeling may have been brought about by many circumstances touching the assault and battery. They may have been induced by the form and nature of the assault by the standing age or disposition of the victim, by the participants who committed it, by where it was committed and before whom it was committed.

One of such circumstances to be considered in this case is the youth of the plaintiff at the time of the assault. He was 16 years. In the witness box—even at 19 years now, he appears to be a quiet and reserved young man—not at all to use the slang "a hard man" and I take into account the reality that the manner of plaintiffs in witness boxes does not always match their manner on the street. I think Mr. Colville was saying much the same thing when he described him as "a reasonable young man who has not over capitalized on his injury". This makes me think he was a reasonably sensitive youth when he was 16 years and this is not inconsistent with his complaint of subsequent nervousness when meeting Army patrols after his assault. The nature of the assaults is also relevant, in particular being "kneed" on the private parts, being made to sit on the pavement, having his ankles "handcuffed" and being walked towards the Army Saracen in this state. Still another factor is that some of this was committed before a crowd of people. But it is also relevant that the crowd was hostile to the soldiers. Their sympathy was with the appellant and so any humiliation and loss of face felt would in these circumstances be less. However my conclusion is that in all the circumstances a sum should be added for aggravated damages to the general damages.

Lastly I turn to the question of exemplary damages and this was the main issue of appeal. Mr. Treacy for the appellant submits that the circumstances of this assault fit clearly into the first of the three categories set out by Lord Devlin in *Rookes* v. *Barnard* (supra) proper for an award of exemplary damages. This category he described as "oppressive, arbitrary or unconstitutional action by the servants of the government" action by servants of the Crown. Mr. Campbell Q.C. for the Ministry submits that the case does not necessarily fall within this category in that a confrontation of this kind involving a soldier and a member of the public is more likely to attract only aggravated damages. In any event he argued the award of £1,000 is enough even if it is a proper case for exemplary damages because as Lord Hailsham stressed at page 1060 in his speech in *Broome* v. *Cassell & Co. Ltd.* [1972] A.C. 1027 the Court should ask itself even in a case where exemplary damages may be awarded whether the sum proposed for general and aggravated damages was enough not only for the purpose of compensating the victim but also for the purpose of punishing and deterring the defendant.

Exemplary damages are in essence punitive. They are intended in the words of Lord Hailsham in *Broome* v. *Cassell & Co.* (supra) at page 1073

> "to teach the defendant and others that 'tort does not pay' by demonstrating what consequences the law inflicts . . ."

The phrase "tort does not pay" came from Lord Devlin in *Rookes* v. *Barnard* (supra) where he said at page 1227,—

"Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay."

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That they should be awarded at all in any situation has been the subject of much discussion and the rationale for awarding them has been criticised as unsound in that their award confuses the civil and criminal functions of the law. *McGregor on Damages* (14th Ed.) at paragraph 309 sums up the opposition shortly in this way:

"The central argument against them is that they are anomalous in the civil sphere, confusing the civil and criminal functions of the law; in particular it is anomalous that money exacted from a defendant by way of punishment should come as a windfall to a plaintiff rather that go to the state."

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But then the author counters this by continuing:

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"On the other side, a major justification of exemplary damages is that their existence provides a suitable means for the punishment of minor criminal acts which are in practice ignored by police too caught up in the pursuit of serious crime."

However the law as it stands permits the award of exemplary damages in the three categories of cases set out by Lord Devlin in *Rookes* v. *Barnard* (supra) and this was approved and affirmed by the House of Lords in *Broome* v. *Cassell & Co. Ltd.* (supra). The one relevant to this case, the first, was discussed and amplified by Lord Devlin in *Rookes'* case at page 1226. He said:

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"Where one man is more powerful than another it is inevitable that he will try to use his power to gain his ends; and if the power is much greater than the other's, he might, perhaps, be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service."

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The authorities suggest that a soldier, acting in aid of the civil power, falls within the description "servants of the government". Lord Hailsham in *Broome's* case at page 1077 said it would obviously include the police and in *O'Connor* v. *Hewitson and Another* [1979] Crim.L.R. 46 the court, although it did not decide that police officers came within the description at least considered whether exemplary damages should be awarded in a case of assault by them. Gibson L.J. appeared to accept in *Kelly* v. *Faulkner* [1973] N.I. 31 that unlawful arrest and detention by police and Army authorities could in certain circumstances lead to exemplary damages.

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And in *White* v. *Metropolitan Police Commissioners* (The Times, 24 April 1982) Mars-Jones J. made an award of £20,000 by way of exemplary damages to each of two plaintiffs against the police commissioner for false imprisonment and malicious prosecution.

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If as I think is the case the member of the foot patrol can be said to have been a servant of the government, there can be little doubt that his conduct

to the appellant was "oppressive" within the ordinary meaning of that word, in that he sought to subjugate him by force and constrict him. So on the face of it the perpetrator of the conduct complained of and the conduct itself fits into the first category of Lord Devlin. Mr. Campbell for the defendant disagrees and urges that this category is really directed against government departments rather than against the misconduct of soldiers assaulting citizens in the streets. I do not find anything in the authorities to restrict it thus. Indeed Lord Reid speaks to the contrary in *Broome's* case at page 1087–1088. There he said, speaking of Lord Devlin's first category:

> "With regard to the first I think that the context shows that the category was never intended to be limited to Crown servants. The contrast is between 'the government' and private individuals. Local government is as much government as national government and the police and many other persons are exercising governmental functions."

However it does not follow that if the case falls within one of Lord Devlin's categories, exemplary damages must be awarded. Lord Diplock in *Broome's* case at page 1129 said:

> ". . . this statement of the categories was not intended as a definition to be construed as if it were enacted law."

Lord Hailsham in the same case said, at page 1082:

> "That the mere fact that the case falls within the categories does not of itself enable the jury to award damages purely exemplary in character."

It cannot mean that every citizen who is assaulted on the streets by a soldier or police officer is entitled to exemplary damages. It depends on all the circumstances of the case. They will include, as Lord Devlin said, at page 1228 in *Rookes'* case, "everything which aggravates or mitigates the defendant's conduct". For example in *O'Connor's* case (supra) the Court of Appeal in England said, at page 47, "The plaintiff's proposition that exemplary damages had to be awarded where a police officer had abused his authority was unacceptable" and they appeared to have held that exemplary damages as well as aggravated damages could be ruled out of an award of damages for assault where the plaintiff's own conduct was provocative.

That, whether an award of exemplary damages should be made at all even when the wrongful conduct has been brought within Lord Devlin's first category must further depend on the circumstances of the particular case, is a necessary and accurate statement of the law in my view. But the generality of that statement may not always be helpful in application. But I think it is refined and made more pointed and helpful when considered in the light of dicta by Lord Devlin in *Rookes'* case and of Lord Hailsham in *Broome's* case.

Lord Devlin said at page 1228:

> "In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish

him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum." A

Lord Hailsham said in *Broome's* case at page 1082:

"They can and should award nothing unless . . . they are satisfied that the punitive or exemplary element is not sufficiently met within the figure which they have arrived at for the plaintiff's solatium in the sense I have explained . . ." B

Lord Devlin felt that in most cases, aggravated damages can do the work of exemplary damages, saying at page 1230 in *Rookes'* case:

"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 propery can generally be punished as C 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."

To these dicta should be added the sensible and practical approach if I may respectfully say so suggested by Lord Reid in *Broome's* case at page D 1098C. There he said:

"The difference between compensating and punitive damages is that in assessing the former the jury or other tribunal must consider how much the plaintiff ought to receive, whereas in assessing the latter they must consider how much the defendant ought to pay. It can only cause confusion if they consider both questions at the same time. The only E practical way to proceed is first to look at the case from the point of view of compensating the plaintiff. He must not only be compensated for proved actual loss but also for any injury to his feelings and for having had to suffer insults, indignities and the like. And where the defendant has behaved outrageously very full compensation may be proper for that. So the tribunal will fix in their minds what sum would be proper as compensatory damages. Then if it has been determined that the case is a F proper one for punitive damages the tribunal must turn its attention to the defendant and ask itself whether the sum which it has already fixed as compensatory damages is or is not adequate to serve the second purpose of punishment or deterrence. If they think that that sum is adequate for the second purpose as well as for the first they must not add anything to it. It is sufficient both as compensatory and as punative damages. But if G they think that sum is insufficient as a punishment then they must add to it enough to bring it up to a sum sufficient as punishment. The one thing they must not do is to fix sums as compensatory and as punitive damages and add them together. They must realise that the compensatory damages are always part of the total punishment."

Applying these guidelines to the present case, a case where aggravated H damages were, in my view, properly awarded, I ask the question what total sum is sufficient not only to compensate the plaintiff for the assault suffered

in all the circumstances, but to teach the defendant that this sort of conduct does not pay and hopefully deter its repetition.

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I think the conduct of the soldier concerned, some of which was acquiesced in by the other members of the patrol, was a deliberate and unjustifiable abuse of the lawful power to stop and question a citizen. This power is a necessary one, entrusted to the security forces to aid their difficult task of maintaining law and order in the streets of this city and elsewhere throughout the Province. It is a power which at times must be exercised frequently to maintain an efficient standard of peace-keeping. Inevitably it involves confrontation between soldier and citizen and police officer and citizen and a sensitive confrontation at that with the power to stop search and question delicately poised against the rights of the citizen. The lawful exercise of these powers demands moderation and tact on the part of the security forces at all times and when they seek to exercise them in confrontation with unco-operative citizens in hostile and dangerous areas, it demands forbearance and discipline, as well. Nevertheless the security forces must be reminded that these powers which necessarily and lawfully reduce the freedom and privacy of the subject must not be abused. The present case was a blatant and quite unjustified abuse of lawful powers. It should not happen again, the defendants should be told.

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I do not think that the award of £1,000 by the learned County Court Judge is adequate to include the elements of punishment or deterrence.

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My conclusion is that a proper award to include exemplary damages, should be £2,500.

Accordingly I grant a decree to the appellant for £2,500 and costs.

Order accordingly.

Solicitor for the appellant: *Kevin Hart.*
Solicitor for the respondent : *Crown Solicitor.*

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