

**IN THE COURT OF APPEAL**  
**APPELATE JURISDICTION**

**CIVIL APPEAL NO. ABU 69 of 2007**  
**(High Court HBC 371 of 1993)**

**BETWEEN** : **ATTORNEY GENERAL OF FIJI**

**Appellant**

**AND** : **DR. ANIRUDH SINGH**

**Respondent**

**Coram** : **Calanchini P**  
**Almeida Guneratne JA**  
**Alfred JA**

**Counsel** : **Mr. R. Green for the Appellant**  
**Mr. N. Barnes and Mr. M. Chand for the Respondent**

**Date of Hearing** : **16 November 2015**

**Date of Judgment** : **3 December 2015**

**J U D G M E N T**

**Calanchini P**

[1] I have had the advantage of reading in draft form the judgments of both Guneratne JA and Alfred JA and I agree with their Lordships' conclusions and their reasons.



**Almeida Guneratne JA**

- [2] On the 24<sup>th</sup> of October 1990, the plaintiff-respondent (hereinafter referred to as the plaintiff) was abducted, assaulted, tortured and inflicted with injuries by the collective acts of the 1<sup>st</sup> to 5<sup>th</sup> defendants. The nature of the injuries so inflicted as alleged by the plaintiff are referred to in paragraph [5] of the plaintiff's statement of claim. (vide: page 70 of the Record of the High Court RHC).

**Basis of the Claim**

- [3] At paragraph [8] of his statement of claim, the plaintiff pleaded that the

*"first to fifth Defendants at all material times were members of the Fiji Military Forces and servants and/or agents of the Government of Fiji and Sixth Defendant being the legal representative of the Government of Fiji is vicariously liable for the acts of the first to fifth Defendants."*

(vide: RHC p.71)

**Statement of Defence**

- [4] The 6<sup>th</sup> defendant (the Attorney General) while admitting that the first five defendants were members of the Fiji Military Forces (hereinafter referred to as RFMF) at the relevant time (vide: paragraph 4(b) of the Statement of Defence at p.77 of the RHC), he did not challenge the legal capacity in which he was sued.
- [5] The defence was that "the alleged acts or omissions that form the basis of the claim by the plaintiff cannot in law be imputed vicariously to be the act or omission of the Defendant." (vide: paragraph 4).

**The Judgment of the High Court on Liability – RHC pages 6 to 30**

- [6] After trial, the learned High Court Judge by his Judgment dated 1<sup>st</sup> November, 2006 gave judgment for the plaintiff. The present appeal is against that judgment.



**The learned High Court Judge's findings on the question of liability of the 1<sup>st</sup> to 5<sup>th</sup> Defendants**

- [7] On the evidence as revealed from the RHC the 1<sup>st</sup> to 5<sup>th</sup> defendants had been charged with abduction and causing grievous harm. They had given themselves up to the Police and made statements admitting their involvement in the impugned events constituting abduction, assault and torture. Having pleaded guilty they were sentenced to 12 months imprisonment but suspended for 15 months though fined a total of \$340 each. (see: paragraphs [18] to [19] of the Judgment of the High Court at page 10 of the RHC)

**Grounds of Appeal**

- [8] In the Appellant's Amended Notice of Appeal dated 16<sup>th</sup> November, 2007 the following grounds of appeal were urged. (vide: pages 4 to 5 of the RHC).

- "1. *That the learned Judge erred in law and in fact in failing to adequately assess the totality of the evidence before him on the issue of vicarious liability.*
2. *That the learned Judge erred in law and in fact in his application of the case authorities to the facts of the subject case to determine vicarious liability.*
3. *That the learned Judge erred in law and in fact in holding that the Appellant was vicariously liable in that its servants were acting in the course of their employment using improper modes.*
4. *That the learned Judge erred in law and in fact in that he failed to take into account relevant considerations and/or took into account irrelevant considerations in arriving at his judgment.*
5. *That the learned Judge erred in law and in fact in holding that the torture of the Respondent was closely connected to the act of surveillance and gathering information.*
6. *That the learned Judge erred in law and in fact by not holding that:*
  - a) *The first five Defendant soldiers were on a frolic of their own and their acts were independent from the*



*orders they were given and therefore the Appellants were not vicariously liable.*

- b) Sotia Ponijiasi, the first Defendant in the High Court matter, did not have lawful authority from the Republic of Fiji Military Forces to place the Respondent under surveillance and in fact acted over and above his orders.*
  - c) The assault of the Respondent is not part of and is not closely linked to the acts of gathering information and surveillance.*
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- 7. That the learned Judge erred in law and in fact in awarding excessive and disproportionate damages of \$75,000.00 for pain, suffering and loss of enjoyment of life to the Respondent.*
  - 8. That the learned Judge erred in law and in fact in awarding excessive special damages of \$75,000.00 to the Respondent for loss of career.*
  - 9. That the learned Judge erred in law and in fact in awarding exemplary damages of \$100,000.00 to the Respondent.*
  - 10. That the learned Judge erred in law and in fact in making an award of costs in favour of the Respondent."*

[9] In a Supplementary Notice of Appeal dated 24<sup>th</sup> September 2015, the following grounds of appeal have been urged.

- "1. That the Learned Judge erred in law and in fact in holding that there was a Unit established within the Fiji Military Force called the Special Operation Security Unit. The Special Operation Security Unit is not the employer of the implicated servicemen; the employer is the Fiji Military Force.*
- 2. That the Learned Judge erred in law and in fact in finding that the functions of the Special Operations Security Unit were to gather information and surveillance, without addressing the Constitutional and Statutory functions of the Fiji Military Force. The 1990 Constitution and the Fiji Military Forces Act [Cap: 81] clearly designate the authorised functions of the Fiji Military Force. The servicemen involved in the abduction of the Respondent were members of the Fiji Military Forces.*



3. *That the Learned Judge erred in law and in fact in failing to properly apply the principles in the case of Lister and Others -v- Hasley Hall Limited [2001] A.C. 215 to the facts of the subject case to determine vicarious liability.*
4. *That the Learned Judge erred in law and in fact in not considering the intentions of the servicemen as a factor in determining whether the Appellant is vicariously liable for their actions.*
5. *That the Learned Judge erred in law and in fact in failing to adequately assess the connections between authorised functions of the Fiji Military Force, as the employer of the servicemen implicated in the abduction of the Respondent and their unauthorised actions."*
6. *That the Learned Judge erred in law and in fact in holding that the Appellant was vicariously liable in that its servants were acting in the course of their employment using improper modes.*
7. *That the Learned Judge erred in law and in fact in awarding excessive and disproportionate damages of \$75,000.00 for pain, suffering and loss of enjoyment of life to the Respondent.*
8. *That the Learned Judge erred in law and in fact in awarding excessive special damages of \$75,000.00 to the Respondent for loss of career.*
9. *That the Learned Judge erred in law in awarding exemplary damages of \$100,000.00 to the Respondent.*
10. *That the Learned Judge erred in law and in fact in making an award of costs in favour of the Respondent."*

### **The Principal Question of Liability**

[10] The RHC further reveals that the said five defendants had been served with the proceedings in that case and Judgment in default of defence entered against them for various torts as the learned Judge noted in his judgment. How the plaintiff had been treated by the said defendants also has been recorded by the learned High Court Judge. (see: paragraphs (1) to (17) of his Judgment) and I do not see any reason to crowd this Judgment in repeating the same. In any event, the evidence led by the Plaintiff had gone unchallenged at the trial in so far as the actions of the said 1<sup>st</sup> to 5<sup>th</sup> defendants were concerned.



- [11] Consequently, the matter for determination stood reduced to whether the 6<sup>th</sup> Defendant (the present Appellant) was vicariously liable for the conduct of the 1<sup>st</sup> to 5<sup>th</sup> Defendants.
- [12] Witness Jioje Konrote who had been a career soldier for 25 years in the RFMF from 1966 to 1999 testified to the existence of a Unit of the RFMF, (the SOSU) a Unit that had been set up after the events of 1987. He also spoke in regard to the reasons for the setting up of such a unit, succinctly recorded by the learned trial Judge in his Judgment. (vide: paragraphs [29] and [30] of the learned High Court Judge's Judgment at page 12 of the RHC.
- [13] Witness Sakiusa Raivoce who had been a Lt. Colonel in the Army had also been aware of the existence of the said SOSU, though he deposed that he was not aware when it had been set up.
- [14] Sitiveni Rabuka, on the other hand, who had been a Major General and Commander of the RFMF pleaded ignorance of the existence of the SOSU at the material time and seemed to take exception to the existence of such a Unit on the basis that, the creation of such a Unit had not been gazetted. This in my view, was a technical exception whereas the issue for consideration was whether *defacto* such 'a unit' was in existence, in as much as the 1<sup>st</sup> to 5<sup>th</sup> defendants were admittedly members of the RFMF.
- [15] In their written records of interview at the material time the third defendant had accepted that he was a member of the SOSU and so did the fifth defendant although he was heard to say that he did not know what it stood for. Then there was the evidence of the 4<sup>th</sup> defendant who admitted to being a member of the SOSU and furthermore the evidence of the 1<sup>st</sup> defendant who said he was in charge and even gave orders.



- [16] The learned High Court Judge accepted the evidence of Konrote and Raivoce and rejected the evidence of Sitiveni Rabuka as recapitulated above. That evidence stands exemplified by further evidence as revealed in the RHC which the learned Judge referred to in paragraphs (33) to (34) of the Judgment.
- [17] I am convinced that the said SOSU was a Unit of the RFMF and the 1<sup>st</sup> to 5<sup>th</sup> defendants being members of the said SOSU were employees of the RFMF who committed the impugned acts as such.
- [18] I could not find any provision in the Royal Fiji Military Forces Regulations (viz: Regulation 7(2), 8(1) and 8(2) or any other) relied upon by the Appellant that support his submissions.
- [19] I shall return to this aspect later in another context. Accordingly I reject Ground 1 urged in the grounds of appeal in the said Supplementary Notice of Appeal.

**Re : Submissions of the Appellant's Counsel on Ground of Appeal 2**

- [20] Mr. Greene, making submissions on behalf of the Appellant submitted that, the learned judge erred in law and in fact in finding that the functions of the SOSU were to gather information and surveillance, without addressing the Constitutional and statutory functions of the Fiji Military Forces.
- [21] He relied on Section 94 (3) of the 1990 Constitution and Section 3 (2) of the Fiji Military Forces Act [Cap. 81] for that submission. (vide: Paragraph [20] *ibid*) Section 94(3) states thus:

*"It shall be the overall responsibility of the Republic of Fiji Military Forces to ensure at all times the security, defence and well being of Fiji and its people."*



- [22] What is 'overall?' It means 'over everything', 'in every direction' 'all over all through' 'pre-eminently' (see: The Shorter Oxford English Dictionary, Vol. II, 2<sup>nd</sup> ed., p.1401).
- [23] Section 94 (3) of the 1990 Constitution imposed "overall responsibility" on the Fiji Military Forces to ensure at all times the security, defence and well being of Fiji and its people".
- [24] What is a Constitution? It is the Supreme law of a country (Section 2 of the 1990 Constitution) and determines the relationship of the citizen to the state (Collins : Law Dictionary", W.J. Stewart, 2<sup>nd</sup> ed. Harper Collins).
- [25] It is in evidence that the Respondent was the head of an anti state organisation. He had even been engaged in burning the Constitution.
- [26] Did not the conduct of the Respondent have the potential to adversely affect the security, well being of Fiji and its people at the time?
- [27] Were not the 1<sup>st</sup> to 5<sup>th</sup> defendants obliged to ensure the security, well being of Fiji and its people" by investigating the plaintiff's activities?
- [28] As noted by the learned High Court Judge the 5<sup>th</sup> defendant who held the rank of captain at the relevant time in his record of interview with the police had been asked several questions as to what he had detailed the 2<sup>nd</sup> to 5<sup>th</sup> defendants to do. He had replied thus:

*It began when I noticed in the Daily Post Newspaper the burning of the Constitution of Fiji. Reading the paper I know that the group was led by Doctor. I see that the students were used to highlight the intention Group Against Racial Discrimination. To my understanding the Constitution was approved by the people of Fiji and the chiefs of Fiji – to burn the Constitution is an act of disrespect to the highest degree to the chiefs of Fiji.*

*Q10. For what did you detail these people?*

*A. I told them to keep this man – the doctor under surveillance. On Sunday 21/10/90 they returned to brief me of what was required. They were again detailed to watch his house, movement to his work place, informed me by night on Tuesday 23/10/90.*



*Q11. Did you meet people on Tuesday 23/10/90?*

*A. Yes, they gave me a message, his belongings were packed and it appeared that he was about to move somewhere. I told them to keep him under watch during the night until daylight 24/10/90. If he wishes to escape. He has to be stopped. If he refuse he has to be taken by force. I told them if they manage to get hold of doctor I am informed that he be treated for such disrespect act he led.*

*Q12. Did they tell you that they got doctor?*

*A. They rang me about 7.30am on Wednesday and informed me that they are yet to get doctor. They were told to carry on with the surveillance and to get hold of him if possible.” (see : pp.14 – 15 of the RHC).*

[29] The learned judge also noted that the other defendants had talked in their police interviews about the instructions to keep the plaintiff under surveillance, the use of a military vehicle and radio equipment, the receipt of orders from Lieutenant Ponijiasi and the reporting back to him of their various activities and sightings.

[30] The 4<sup>th</sup> defendant had said that, instructions were given by his superior officer to be one of the few hunting Dr. Singh. The operation had started that day. They had not rested and had continued tracking and observing the movements and activities of Dr. Singh. They radioed the result to the military camp. They interrogated him about the burning of the constitution and he had admitted leading the group. He was punched whenever he refused to answer any questions. They had tied his hands around his back and had made him sit beside a huge tree. His head and face were still covered. The defendants had then started questioning the plaintiff as to why the Constitution had been burned and some other things.

[31] Furthermore, it was whilst questioning the plaintiff that the defendants had cut his hair, ‘slightly’ burnt him by ‘a falling cigarette’.

[32] In an undated statement Brigadier General E.G. Ganilau, Commander of the RFMF and Lt. Colonel Isireli Dugu in his undated FIC into the alleged kidnap both denied that they or the RFMF gave instructions in regard to the activities of the “defendant servicemen in the incident involving the assault” because “The RFMF cannot in the



course of its employment, authorise soldiers under its command to execute tasks or partake in operations that are manifestly unlawful.” (p.18 of RHC).

### **Missing the Wood for the Trees in the context of the law on Vicarious Liability**

[33] That institutional stand is a clear case of missing the wood for the trees. It fails to see the very edifice on which the law relating to vicarious liability is built on. Accordingly I reject Ground 2 of the Grounds of Appeal.

[34] As Professor Winfield observes “No sane or law abiding Master ever hires a man to tell lies, give blows or act carelessly. But that is not what course of employment means. A wrong falls within the scope of employment if it is expressly or impliedly authorised by the Master or is an unauthorised manner of doing something which is authorised, or is necessarily incidental to which the servant is employed to do.”

(See: Winfield on *Torts*, p.638 and see also Denning L.J.’s comments in **Navarro -v- Moregrand Ltd.** [1951] 2 TLR 674 at pp.680 – 681).

### **The “Connection Test” in cases of Vicarious Liability**

[35] The said defendants were certainly not authorised to torture and inflict injuries on the Plaintiff. But as Salmond explained “a master is liable for acts which he has not authorised, provided they are so connected with acts which he has authorised, that they may rightly be regarded as modes – though improper modes of doing them” [Salmond on *Torts*, (1<sup>st</sup> ed.) pp. 83 – 84] which has been cited by the Appellant himself in his written submissions – at p.9].

[36] In the more recent work on the law relating to vicarious liability by Salmond and Heuston (21<sup>st</sup> ed., at p. 443), the learned authors have explained that, an act occurs in the course of employment where it is:

*“either (a) a wrongful act authorised by the master or (b) a wrongful and unauthorised mode of doing some act authorised by the master.”*

[37] The designated task by the Military Forces was to “ensure the security, well being of Fiji and its people” as was decreed by Section 94 (3) of the (1990) Constitution. It



was in pursuance of that designated task that the 1<sup>st</sup> to 5<sup>th</sup> defendants were required to monitor the plaintiff's activities for which purpose the plaintiff had to be kept under surveillance and information had to be gathered.

[38] Thus, what the defendants did was a wrongful and unauthorised mode of doing what was required of them to do.

[39] Consequently, the "Connection test" and the Criterion of "a wrongful and unauthorised mode of doing an act authorised to do" stood satisfied in the instant case.

[40] Section 3 (2) of the RFMF Act decrees that: "The Forces shall be charged with the defence of Fiji, with the maintenance of order and with such other duties as may from time to time be defined by the Minister."

[41] A bare reading of that provision shows that, the duties of the Fiji Military Forces are not confined to "the defence of Fiji" (as argued by the Appellant) from "external threat" but also to "maintain order" internally when read with Section 94 (3) of the Constitution. This is precisely what the 1<sup>st</sup> to 5<sup>th</sup> defendants did when interrogating the plaintiff in order to gather information on his activities including his act of burning the constitution. Certainly, in my view, the said five defendants did not go on "a frolic of their own" (see for a more recent case on that, (**Rose -v- Plenty** [1976] IWLR 141.

#### **Re : Grounds (3 and 4) of Appeal**

[42] Viewing the matter in that light, the provisions of the (1990) constitution and the Military Forces Act as well as the passages from Salmond and Salmond and Hewston on the law of Torts (Supra), relied upon by the Appellant himself go against the Appellant's contention rather than go to assist him. The learned High Court Judge had not failed to properly apply the principles in the case of **Lister and Others Hasley Hall Limited** [2001] AC 215. Consequently, the Appellant's contention that the Judge had not considered the intentions of the 1<sup>st</sup> to 5<sup>th</sup> defendant, as a factor in determining whether the appellant is vicariously liable for their actions, is as much as,



it was not their intentions that were relevant but their acts being an unauthorised mode of doing what they were expected to do.

- [43] What was the job on which the 1<sup>st</sup> to 5<sup>th</sup> defendants were engaged as members of the Fiji Military Forces? It was to ensure at all times the security, defence and well being of Fiji and its people. In doing that job the said defendants committed the wrongful acts they committed. It is a question of fact in each case whether the impugned acts related to the sphere of the employment or to the mode of performing them. As has been said, “*the matter must be looked at broadly, not dissecting the servant’s task into its component activities ...*” (per Diplock L.J in Ilkin -v- Samuels [1963] 1 WLR 991 at 1004)
- [44] The said defendants were tasked with the “overall responsibility of the Republic of Fiji Military Forces to ensure at all times the security, defence and well being of Fiji and its people” (Section 94 (3) of the 1990 Constitution).
- [45] It was to further the business of their master, the Fiji Military Forces and not for their benefit that the said 1<sup>st</sup> to 5<sup>th</sup> defendants committed the impugned acts.
- [46] I have perused the several authorities cited on behalf of the Appellant as well as the Respondent. I have also looked at the precedents relied upon by the learned High Court Judge in the light of the facts in the instant case.
- [47] I find the English Court of Appeal decision in Dyer -v- Munday [1895] 1 QB 742 to be particularly useful. In that case the employee had committed an assault upon the plaintiff in seeking to retrieve some property belonging to his Master. Lopes L. J. writing a separate Judgment while concurring with the Master of Rolls held thus:

*“... For all acts done by a servant in the conduct of his employment, and in furtherance of such employment, and for the benefit of his Master, the Master is liable, although the authority that he gave is exceeded.*

*... There is no distinction in this respect between the effects of a tortious and a criminal act, provided such acts are done by the*



*servant in the conduct of his employment and in the interest of his Master.” (at p. 742)*

[48] Lord Esher, M.R. in the same case had held thus:

*“Then it is suggested that if the excess complained of amounts to the commission of a criminal offence, that would take the case out of the rule which makes the master liable for the acts of his servant. But if we look at Bayley –v- Manchester, Sheffield, and Lincolnshire Ry. Co. (2) and Seymour v Greenwood (3), it appears that the acts complained of in both those cases were criminal acts. In neither case was the ground taken that because part of the excess was criminal the master was exempt from liability.” (at page 746).*

[49] The liability of the master does not rest merely on the question of authority, because the law says that if, in the course of carrying out his employment, the servant commits an excess beyond the scope of his authority, the master is liable.

[50] In Rigby L.J.’s judgment he had expressed the matter very clearly.

*“As to the other point raised in this appeal, it seems to me that some confusion has arisen, owing to the use of different expressions which in my opinion mean the same thing. If the expression “scope of authority” means “authority”, the case would be different; but it seems to me that it has exactly the same meaning as the expression “course of employment,” and the act complained of must be done in the course of employment of the person doing it, though it may be beyond any authority actually given to him. The law on the matter was laid down by Willes J. In Bayley -v- Manchester, Sheffield, and Lincolnshire Ry. Co.: “A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so entrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant, but in the course of the employment.” I can find no authority for distinguishing the application of this rule between tortious and criminal acts of the servant.” (at page 748).*

[51] At this point two references may be made to American Law as a matter of interest. Professor Warren Seavey wrote in “Speculations as to Respondeat Superior” that, “The cases now tend to hold that the Master is liable for such personal assaults of the



servant arising out of a transaction which the servant had been authorised to conduct as one reasonably closely connected with it in time and space.”

[52] In a note, [1932] 45 Harvard Law Review 342, it is said: “*That a Master may be liable for his servant’s intentional torts has now become firmly established. But it is usually essential that the servant’s conduct has some connection (the emphasis is mine) ... .. immediately inspired by something connected with the servant’s work.*”

[53] In the instant case, the 1<sup>st</sup> to 5<sup>th</sup> defendants had no personal quarrel with the plaintiff. Their impugned conduct however was inspired by that something connected with their work, that is, to investigate into the plaintiff’s activities and keep him under surveillance *inter alia* to “ensure at all times the security... and well being of Fiji and its people” which was the “overall responsibility” of the RFMF. (Section 94(3) of the 1990 Constitution, supra).

[54] I have already expressed the view that, the 1<sup>st</sup> to 5<sup>th</sup> defendants were members of the RFMF and the SOSU a part of the RFMF.

[55] I have not found any misdirection and/or non direction or anything perverse on the part of the learned High Court Judge on the aforesaid aspects. I found there has not been anything perverse therein for me to interfere with.

### **Conclusion**

[56] Therefore I reject Grounds 3, 4, 5 and 6 of the grounds of appeal and conclude, for the aforesaid reasons that, the 6<sup>th</sup> defendant was vicariously liable for the tortious acts committed by the 1<sup>st</sup> to 5<sup>th</sup> defendants as being employees of the RFMF and the SOSU as being a Unit engaged in activities under the RFMF.

### **The Question of Damages**

[57] Now I proceed to deal with the question of Damages.

### **Re : Grounds (7 to 9) of Appeal urged in the Supplementary Notice of Appeal**



[58] By his ruling dated 4<sup>th</sup> September, 2007 the learned High Court Judge made an award of damages in a total sum of FJD\$250,000.00 with interest against the Appellant and a sum of FJD\$150,000.00 against each of the 1<sup>st</sup> to 5<sup>th</sup> defendants.

[59] Before the orders had passed the seal of Court Counsel for the plaintiff-respondent and the 6<sup>th</sup> defendant-appellant had sought clarification of the said ruling as to which sums precisely have been awarded against which defendants. (vide: p.63 of the RHC).

[60] Consequently, the learned Judge clarified his ruling of 4<sup>th</sup> September, 2007 by his order dated 27<sup>th</sup> September, 2007 in the following terms:

*“1 (a) The sum of \$75,000.00 is awarded to Dr. Singh in respect of pain, suffering and loss of enjoyment of life.*

*(b) The further sum of \$75,000.00 is awarded in respect of special damages, namely loss of career.*

*(c) The sum of \$100,000.00 is awarded in respect of exemplary damages.*

*(d) An interest rate of 5% is set. In respect of compensatory and exemplary damages that interest is calculated from the date of service of the writ and at 5%. In respect of the special damages the rate is 2½% , namely half of 5%, to run from 24<sup>th</sup> October 1990, the date of the wrongful acts.*

*2(a) All six defendants are jointly and severally liable for the compensatory and special damages, namely the sum of \$150,000.00 with the interest thereon.*

*(b) The sixth defendant alone is liable for the \$100,000.00 exemplary damages together with the interest thereon.”*

[61] The computation of the respective sums payable by the respective defendants is recorded in the Registrar's Certificate (at pp. 65 – 66 of the RHC).

**Re : The sum of \$75,000.00 awarded in respect of pain, suffering and loss of enjoyment of life – General Damages**

[62] Pain and Suffering Although this phrase does suggest a double head of damage, in fact it means no more than the suffering attributable to the injury itself and the consequences flowing therefrom. (vide: John Munkman, *Damages for Personal*



*Injuries and Death*, 3<sup>rd</sup> ed., 1966 Butterworths. See also: **Bresatz –v- Prazibilla** (1962) 108 CLR 541 at 548.

### **Relevant factors**

[63] The factors included in the phrase “injury itself and consequences flowing therefrom” may be discerned from decided cases as follows:

- (1) both past and future pain and suffering

**West and Sons Ltd. -v- Sheppard** [1964] AC 326.

- (2) both the intensity of the injuries and duration

**Clark -v- Kramer** [1986] WAR 54 at 65.

- (3) mental anguish caused by the injuries

**Forrest -v- Sharp** [1963] 107 SJ 536.

- (4) curtailment of capacity to enjoy life through physical handicaps

**Cutts -v- Chumley** [1967] 1 WLR 742.

[64] In the light of the aforesaid factors, I shall now refer to the nature of the injuries inflicted on and suffering the plaintiff was subjected to.

### **Nature of the physical pain and injuries**

[65] The learned High Court Judge in his ruling recapped the physical injuries inflicted on the plaintiff.

[66] After referring to the plaintiff’s own evidence (vide: paragraph [9] of his ruling, p.34 of the RHC), the learned Judge recapped the physical injuries caused to him as contained in two reports submitted by Dr. Brian Cameron which were as follows:

*“His injuries noted at the time of admission were:*

- 1. Facial bruising and swelling around the left eye with sub conjunctival haemorrhage.*



2. *Rope burns around both wrists.*
3. *Fractures of right radius, left hand and left little finger.*
4. *Abrasions both hands.*
5. *Superficial burns of left shoulder and right forearm consistent with cigarette burns.*
6. *Contusions of anterior chest wall.*
7. *Decreased sensation of left hand due to neuro praxia, bruising of radial nerve from the wrist rope.*

*All his injuries were consistent with the history given by the patient of being tied, struck and burnt."*  
(pages 133 – 134 of the Supplementary RHC).

- [67] That was on 24<sup>th</sup> October, 1990 when the plaintiff had been admitted to hospital and the doctor had given a second report on 6<sup>th</sup> November, 1990 which was to the following effect.

*"In addition to the injuries previously noted, the patient developed skin lesions on his trunk and legs which were probably due to insect bites received on the day of the abduction. While in hospital, he also developed a cellulitis infection of the left hand due to one of the abrasions. This is now resolving and he should be discharged home this week (two weeks after the injuries).*

*The present status of prognosis of his injuries follows. The bruises and scrapes are healing and should not cause permanent disability. The fractures are all expected to heal within six weeks without complication. He will probably have some permanent stiffness of the left little finger. The nerve bruising of the left hand is resolving and should not result in permanent disability.*

*In summary, the only permanent physical disabilities will be some minor scars and stiffness of the left finger. Although the patient seems well adjusted psychologically following his barbaric episode of torture I would also expect there to be some long term psychological adjustments to be made which might require professional counselling in the future."*

(page 132 of the Supplementary RHC).

- [68] Those two reports were followed by a third report dated 29<sup>th</sup> January, 1991 which the learned Judge has referred to at paragraph 12 of his ruling. This may be reproduced thus:



*"Dr. S. C. Ramrakha, MBBS and Dr. Raju C. Ramrakha of Balmain in Australia gave a further report on 29<sup>th</sup> January, 1991. They state, 'Dr. Singh consulted us on 4/12/90. (The injuries are then listed) and they continue,*

*'When we saw him on 4/12/90, the fracture in the right hand appeared to be healing. Although the right hand was grossly swollen and discoloured he was able to make a fist. The left hand was still very much discoloured and grossly swollen and movements of the wrist and the fingers were grossly limited. The little finger was stiff on extension.'*

*'There was discolouration of the tissue around the left orbit and loss of visual acuity in the left eye. On fundal examination there was a cataract in the left eye consistent with a concussion injury. He was referred to Dr. A L McKay, Ophthalmological surgeon who confirmed the findings of a cataract in the left eye. He noted cupping of both optic nerves, the left side being worse and also diagnosed glaucoma. ... He has also suffered severe injuries to his eyes especially the left side for which he would need ongoing specialist care.'* (pages 129-130 of the Supplementary RHC).

#### **Some brief reflections**

- [69] The above gives a vivid account of pain and suffering and their intensity and duration.

#### **Mental anguish caused by the injuries and curtailment of capacity to enjoy life through physical handicap**

- [70] On that aspect, the learned Judge recapped what is stated in the report given by Dr. S. C. Ramrakha and Dr. Raju C. Ramrakha which is as follows:

*"In addition to the physical injuries Dr Singh sustained he also described psychological symptoms since his ordeal. ... Since the attack, he has suffered from regular global head aches, occasionally present on waking but usually occurring late mid morning and lasting half to one hour.*

*He feels that he is more absent minded and lost for words. He occasionally forgets what he is saying in mid sentence. He has had one episode of difficulty in expressing himself, the medical term for which is Aphasia. Since the injury he also describes dreams, these commonly occur when he is falling asleep and he hears loud noises which he describes as himself screaming. Other dreams are very realistic dreams where he sees his body being mutilated. The frequency of these dreams is increasing. For some months after the attack he complained of difficulty sleeping, and of being afraid of being dragged out of his bed. He tends to stay indoors and is afraid of walking down the street in Suva. He has also noted a*



*recurrence of stuttering. ... After an attack of this nature a post traumatic stress reaction is quite common. The symptoms he describes such as dreams, sleep disturbance, stuttering and agoraphobia like symptoms are very common.*

*Dr. Singh seemed to be a very psychologically well adjusted man. Indeed given the severity of his attack one would have expected more symptoms.*

*The prognosis with respect to these psychological conditions cannot be ascertained for some time.” (page 130, supra).*

- [71] In addition to the two doctors’ report, the learned Judge made reference to a report given by Selina Kuruleca, a trained and psychotherapist which was that the plaintiff suffered.

*“Severe psychological distress and emotional trauma, in addition to the physical trauma at the hands of his captors. Distress of his psychological condition and emotional trauma and his reporting of the abduction impresses that at the time of the abduction Dr. Singh displayed symptoms consistent with the diagnosis of post traumatic stress disorder (PTSD).*

*It is also my opinion that the client was likely to continue display symptoms consistent with PTSD for several months after the abduction. Symptoms which would have affected his ability to perform as a fully functioning individual.”*

(paragraph [15] of the learned Judge’s ruling which report I did not find either in the RHC or the Supplementary RHC but in her evidence she spoke to a range of PTSD symptoms which she said the plaintiff had displayed. (see: pages 144 to 148 of the RHC).

- [72] The learned judge also made reference to an affidavit of one Dr. Eferemi Waqainabete which is supposed to have stated:

*“[17] Based on the medical reports presented to me (those set out above), I cannot say that Dr Singh suffered any permanent injury as the result of the beatings he incurred in 1990. ... given the lack of the final assessment of Dr. Singh’s physical injuries and the absence of an ongoing recent medical review, it is not possible to assess whether he has suffered any permanent, physical incapacity for which he can be compensated.”*

(See: paragraph [17] of the ruling. However, I could not find any trace of that affidavit either in the RHC or the Supplementary RHC. The fact that such an affidavit was read is however recorded. See: page 151 of the RHC).



- [73] The defence had called Dr. Yvonne Entico, a psychiatrist, who also spoke to symptoms associated with PTSD such as fear, hopelessness and horror, remembering, avoidance and hyper-arousal. She had met with the plaintiff on a date she said she could not recall for less than one hour. She had got the impression that the plaintiff might have PTSD. "He said when he was in U. K. he saw someone in uniform and he was reminded of what happened to him and became fearful. Remembering is a symptom. ..." (at pages 152 – 153 of the RHC).

**The Learned High Court Judge's Observations on the evidence and deductions**

- [74] The learned Judge's observations and the deductions he drew from the evidence as recounted above are contained in paragraphs [21] and [22] of his ruling (p.40 of the RHC). I shall reproduce them for convenience. The learned Judge held:

*"[21] Even though there might have been little or no lasting physical injury from such acts as the beatings, hooding and cigarette burning, damages should also reflect the trauma. Further, Dr. Singh describes how, fairly soon after the commencement of his ordeal, he felt that he was going to die. Damages must reflect this and the effect of being hooded and beaten, the fear he felt when the tyre was placed close to him and set on fire, the loss of sensation in his hands and his thought 'what do hands matter when my life is at stake'.*

*[22] I look to the period it took for him to physically recover. I do find that there was post traumatic stress disorder which was very strong after these events but gradually fading over the ensuing twelve to twenty-four months. Despite the fact he is described as not now suffering from PTSD and is psychologically very well adjusted, the memory of this episode and all that comes with it will be with him for the rest of his life. It is difficult to determine, aside from other factors, what effect this ordeal had upon his relations with his wife and family. There must be some allowance for this."*

- [75] Consequently, a sum of \$75,000.00 was awarded as damages.



**Appellant's submissions against that award and the Plaintiff (Respondent's) Submissions in support of the same**

- [76] Learned counsel has conceded that, in the instant case the plaintiff has actually suffered pain as a result of being attacked during his abduction and that, he can be compensated. (Appellant's written submissions dated 24<sup>th</sup> September 2015 at paragraph 3.6).
- [77] However, he was heard to challenge the quantum on the basis that, (a) there was no evidence of continuing pain and suffering (b) the medical records were inconclusive as to the extent of the injuries (c) any permanent disability (d) any future physical and mental health effect and (e) negative stigma or alienation.
- [78] On the other hand, the plaintiff's (Respondent's) Counsel counter was based on the following factors namely, that,
- (a) an exact principle cannot be laid down for awarding damages for pain and suffering;
  - (b) the learned trial Judge, after hearing all the evidence including the medical evidence had specifically found that the physical injuries had cleared up only after approximately 12 months and therefore it was not correct to say that there had not been continuing suffering;
  - (c) one of the injuries is that the plaintiff was suffering from Post Traumatic Stress Disorder; (PTSD)
  - (d) because of the delay in bringing the proceedings it was not possible to assess exactly as to when the injuries healed or whether the plaintiff had suffered any permanent physical incapacity.
  - (e) the plaintiff's personal awareness of the pain and the suffering (on which the learned Judge had accepted the plaintiff's evidence);



- (f) the line of personal injury awards made by courts in several jurisdictions are outdated and moreover had not been in relation to deliberate (wilful) tortious acts as in the instant case.
- [79] Counsel referred the Court to several authorities in support of his contention reflected in the Plaintiff-Respondent's written submissions dated 2<sup>nd</sup> November, 2015 at paragraphs [65] to [80] which I do not propose to repeat here and I do not think the Appellant has met them in his written submissions or in his counter-submissions.
- [80] Though, perhaps not in a detailed analysis, the learned trial Judge himself has addressed the grounds upon which the appellant challenged the award in question which I have recounted at paragraph [74] above and I do not find any misdirection or non-direction or anything perverse in the learned Judge's deductions.

**Nervous shock and mental anguish in the context of intentional wrongful acts**

- [81] It is established law that, where nervous shock is the result of an intentional wrongful act (as opposed to a negligent act) there is no particular difficulty in awarding damages in a personal injury case. (vide: **Wilkinson -v- Downton** [1897] 2 QB 57 per Wright J, **Janvier -v- Sweeney** [1919] 2 KB 316 (Court of Appeal in England) and compare **Bunyan -v- Jordan** [1937] 57 CLR 1 (High Court of Australia).
- [82] I am in respectful agreement with the opinion expressed in Winfield's Law of Torts that, the principle in **Wilkinson-v- Downton** *supra* is inapplicable unless the harm is nervous shock. (See: Winfield *supra* at page 41) Just as much as "*true nervous shock is much a physical injury as a broken bone or a torn flesh wound*", (Eldredge, *Modern Tort Problems*, p.76), so would mental anguish in the case of a plaintiff in a personal injury case, particularly a plaintiff who ends up displaying PTSD symptoms as in the instant case.



## Conclusion

- [83] For the aforesaid reasons I affirm the said award of \$75,000.00 made by the learned trial Judge.

## Ground 8 of the Grounds of Appeal – the award of \$75,000.00 as special damages

- [84] It is established in the law that, while “general damages” are to be presumed (See: Winfield on *Torts*, *supra* where several cases are cited at p.678) but “special damages” means “the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the plaintiff’s claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial.” (Winfield, *supra* where several early authorities are cited).

## Had the plaintiff done that?

- [85] The plaintiff’s statement of claim is at pages 70 to 73 of the RHC. In paragraph [9] thereof, under the heading *Particulars of Special Damages*, the plaintiff claims

- “(a) Costs of plaintiff’s travel to Australia after abduction.
- (b) Telephone and other communication costs between U.K. and Fiji brought about by the perpetration of the criminal acts.
- (c) Costs of wife’s trip to Australia to meet plaintiff largely to mitigate trauma.
- (d) Cost of at least one trip back to the U.K. and
- (e) Costs of loss of career at U.S.P.
- (and that) (full particulars shall be given at the trial of this action).”

- [86] So, the procedural requirement of pleading and particularising the special damages claim has been met with in the statement of claim.

- [87] However, it would appear that, the plaintiff had abandoned the item pleaded in (b) above. (at page 156 of the RHC). It is noted as “Not claiming telephone costs, etc.”



Contained in a schedule of special (damages) which apparently had been filed by consent.

- [88] It is again another matter for regret that the said schedule filed of 'consent' is not in the brief of the record of proceedings furnished to me. Thus one does not know what encompassed 'etc' other than telephone costs, etc."
- [89] Which of the said other items averred in paragraph 9(a) to (e) (other than in (b)) had been abandoned?
- [90] Thus, one is left to conjecture and I can only say in the circumstances (because, the record of proceedings do not throw any light on that matter taken in conjunction with the submissions made on behalf of the Appellant where he challenged the item in paragraph 9(e) of the statement of claim as to "loss of career", and not the items pleaded and particularised in paragraphs 9(a) and (c), while postponing my comments on the item pleaded in paragraph 9(d) for the reason that, it is, in my view, related to the item pleaded in paragraph 9(e).
- [91] In the circumstances, I shall proceed on the premise that, the said reference to "etc" contained in the aforesaid judicial notation is a flourish. Taking that fact along with the evasive schedule on "special damages" filed of 'consent' there had, apparently not been a challenge to the items of special damages pleaded in paragraph 9(a) and (c) of the plaintiff's statement of claim.
- [92] Consequently, I felt fortified in thinking that my inquiry must be confined to items (d) and (e) as pleaded in the statement of claim of the plaintiff for the Appellant argued in the Ground of Appeal urged in his Supplementary Notice of Appeal that, the award of \$75,000.00 was "excessive" and not on the basis that some award was not awardable. (see: the terms of the said Ground 8 of Appeal at page 5).
- [93] The thrust of counsel's contention was that, the said quantum had been awarded for "loss of career" as well and, no contention was advanced in regard to the items pleaded and particularised in paragraphs 9(a) and (c) of the plaintiff's statement of claim.



[94] In the result, the items pleaded in paragraph (a) to (c) remained in tact and what remained for me to consider was the plea in regard to “loss of career” pleaded in paragraph 9(e) read with paragraph 9(d) in the plaintiff’s statement of claim. Items (a) to (c) being medical and travel expenses which were recoverable.

[95] The learned trial Judge did not award the said sum on the basis of “loss of career” (vide: his ruling at 43 of the RHC). He awarded the said sum on the basis of “detriment to his career.”

**“Loss of career” as against “lost opportunity” and “detriment to career”**

[96] While a distinction has to be drawn between “loss of career” which the plaintiff claimed, and “detriment to career” (on which basis the learned judge dealt with the matter), I agree with the Appellant’s submissions that it was owing to the plaintiff’s own actions going to the U.K. to work without obtaining leave from the University of the South Pacific etc.) that the said situation had come about.

[97] The Appellant also submitted that, “the respondent-plaintiff” is not entitled to damages relating to loss of career (which as afore noted by me, was not the basis on which the learned Judge awarded the said sum of \$75,000.00 and, not even for “loss of opportunity” but for “detriment caused to the progress - his career at the University of the South Pacific”). After all the plaintiff had secured employment in the U.K. as well as the proceedings reveal. So, there was no “loss of career” but “a lost opportunity” to pursue in the University of the South Pacific. The same applies to item 9(d) pleaded in the said statement of claim.

[98] However, having regard to the plaintiff’s statement of claim, the Appellant has conceded that, “a sum of \$30,000.00 would be fair and reasonable.” (vide: paragraph 4.12 of the Appellant’s written submissions dated 24<sup>th</sup> September, 2015) which in my



view appears to be a concession made by the Appellant on account of the matters pleaded and particularised in paragraphs (a) and (c) in the statement of claim.

- [99] On a balance and upon consideration of the afore-mentioned factors, I am inclined to make an award of \$30,000.00 for the claim based on special damages.

**Re : The award of exemplary damages**

- [100] In the Supplementary Notice of Appeal dated 24<sup>th</sup> September, 2015 the Appellant has challenged the award of exemplary damages thus:

*“That the learned judge erred in law and in fact in awarding exemplary damages of \$100,000 to the Respondent”. (vide: Ground).*

- [101] Placing reliance on two authoritative English decisions (viz: **Rookes -v- Barnard** [1964] AC1129 and **Broome -v- Caselle Co. Limited** [1972] AC 1027 and reiterating the reasons urged in the submissions dated 24<sup>th</sup> September 2015, it was submitted on behalf of the Appellant that, an award of exemplary damages was not appropriate in this case.

**The reasons adduced in support of that contention**

- [102] The reasons adduced in support of that contention may be noted as follows:
- (a) That, regardless of the gravity of the offences committed against the plaintiff the fact remains that they were criminal acts for which the five defendants have been punished under the criminal law.
  - (b) That, the 6<sup>th</sup> defendant, through no fault of his own except as an employer of the five defendants, is now vicariously liable for the unlawful conduct of the said five defendants.
  - (c) That, to punish the state by awarding exemplary damages against the 6<sup>th</sup> defendant is to simply pass the burden on to tax payers.



- (d) That, there were other effective means of conveying a strong message to servants of the State who commit deliberate wrong doings such as dismissal or increasing the award under other relevant heads of damages (eg. Compensation).

[103] I shall now take these reasons cumulatively and deal with them accordingly.

[104] That, the five principal offenders (1<sup>st</sup> to 5<sup>th</sup> defendants) were convicted of what was undoubtedly a criminal act is not in dispute. But, the present action being an action in tort, there was nothing in the law that prevented the plaintiff from recovering damages, including exemplary damages against the 1<sup>st</sup> and 5<sup>th</sup> defendants provided a case for the same could have been made out. It is trite law that, in relation to an impugned act, the proceedings that may give rise to a cause of action are complimentary. But the learned High Court Judge did not award exemplary damages against the said defendants.

**The High Court Judge's reason for not awarding exemplary damages against the 1<sup>st</sup> to 5<sup>th</sup> defendants**

[105] Adverting to the English decision in **Archer -v- Brown** (1985) QB 401, the learned Judge refrained from awarding exemplary damages against the 1<sup>st</sup> to 5<sup>th</sup> defendants (vide: p.51 of RCR) apparently persuaded by the judicial view expressed in that decision by Pain, J when he held that,

*“... What seems to put the claim under this head out of Court is the fact that exemplary damages are meant to punish and the defendant has been punished.”* (vide: at p. \_\_\_supra).

**What Archer -v- Brown decided**

[106] A reading of that decision shows that it was an action based on deceit where the defendant had been unjustly enriched, albeit, monetarily.



### **Classes of cases where exemplary damages are awarded**

[107] From past precedents in developed jurisdictions three such classes could be discerned.

(i) Where they are decreed by statute.

(vide: Reserve and Auxiliary Forces

(Protection of Civil Interests) Act 1951, Section 13(2) in the U.K.)

(ii) Where the defendant's conduct has been calculated to make a profit for himself which may justify exceeding the compensation in an award of general or special damages payable to a plaintiff.

(iii) Where the conduct of defendants is found to be oppressive, arbitrary or unconstitutional being servants of the Government.

### **Relevance or otherwise of the decision in Archer -v- Brown to the Instant Case**

[108] There is no statute comparable to the said Act of 1951 in the U.K. on the Statute Book of Fiji.

[109] The 1<sup>st</sup> to 5<sup>th</sup> defendants' conduct were not calculated to make a profit for themselves (in monetary terms) *A fortiori*, the 6<sup>th</sup> Respondent did not stand to gain monetarily by the 1<sup>st</sup> to 5<sup>th</sup> defendants' conduct.

### **Misapplication of the thinking in Archer -v- Brown to the instant case constituting a misdirection by the learned High Court Judge**

[110] Accordingly, I have no hesitation in holding that, the learned Judge misapplied the rule in **Archer -v- Brown** to the facts of the instant case, which constituted a misdirection. The same reasoning applies to **Broome -v- Cassel & Co. Ltd.** (1972) AC 1027 which the learned Judge adverted to. Those cases have no relevance to the class of cases where the conduct of the defendant is found to be oppressive, arbitrary or unconstitutional being servants of the government; which is the class the instant case falls into.



**Rookes -v- Barnards [1964] AC 1129 followed by Broome -v- Cassell et al (supra) in England**

- [111] The learned High Court Judge adverted to the aforesaid decisions and relied heavily on the thinking reflected therein. But, the very dicta he relied on show, particularly those in **Rookes'** case that, the House of Lords confined English law to three particular categories in which exemplary damages might have been awarded even against wilful wrongdoers, such as the 1<sup>st</sup> to 5<sup>th</sup> defendants.

**The Australian and New Zealand Approach**

- [112] I found that, in the Australian and the New Zealand approach no such restrictions have been applied. (See for Australia, **Uren -v- John Fairfax et al** (1966) 117 CLR 118 and **Australian Consolidated Ltd -v- Uren** (1966) 117 CLR 185 and for New Zealand, **Taylor -v- Beere** [1982] 1 NZLR 81 (CA) ).
- [113] Exemplary damages were awarded in those cases where the defendant was found to be guilty of conscious wrongdoing in contumelious disregard of another's rights (at p.96 per Somers, J in **Taylor's** case (supra) or has committed a flagrant violation of the plaintiff's rights (at p.212 per Windeyer, J in the **Australian Consolidated Ltd.** case (supra).
- [114] That 'intention' was clearly there in the minds of the 1<sup>st</sup> to 5<sup>th</sup> defendants, revealed from the way they treated the plaintiff by torturing and inflicting injuries on him.
- [115] True, the said acts committed by the 1<sup>st</sup> to 5<sup>th</sup> defendants, flagrant, conscious and contumelious as they were, though, they were in the interests and/or furtherance of the State for the evidence reveals that, the plaintiff had been involved in activities against the State culminating in even burning the Constitution of the day. But how could that enthusiasm have visited the 6<sup>th</sup> defendant to have been made amenable to exemplary



damages particularly when no such damages were ordered against the 1<sup>st</sup> to 5<sup>th</sup> defendants for whatever reason?

**Intentional tortious acts as distinct from negligent acts**

[116] In that context it would be pertinent to mention here the interjection made by His Lordship the President in the course of the hearing and that is,

[117] Could an ‘intention’ on the part of the principal perpetrators be vicariously transferred and/or imputed to the Attorney-General, as the principal state officer who has been sued in this action? Could the plaintiff reach the 6<sup>th</sup> defendant for purposes of securing an exemplary award for damages without obtaining the same against the principal offenders?”

[118] What is intention? “It is to want and plan to do something.” (See: Collins Law Dictionary (2<sup>nd</sup> ed. At p. 125).

[119] To start with, it is to be noted that, the employer of the 1<sup>st</sup> to 5<sup>th</sup> defendants was the Military Services and not the Attorney General. He was sued on the basis of being the principal State officer, the Military Service being an organ of the State.

[120] Secondly, there is no evidence on record to show that, the 6<sup>th</sup> defendant wanted and planned the way in which the 1<sup>st</sup> to 5<sup>th</sup> defendants handled the plaintiff.

[121] Thus, the reason for drawing a distinction between liability *per se* on the basis of it being vicarious and in making an award for exemplary damages flowing from that liability. While ‘intention’ would not be relevant in that first stage it would be otherwise in the latter.



[122] Where ‘intention’ cannot be imputed to a functionary within an institutional framework, such a functionary cannot be held liable for exemplary damages in a tortious act as distinct from an award for general and/or special damages.

[123] Furthermore, just as much as liability has been vicariously imposed on the 6<sup>th</sup> defendant which this Court has found to have been established, (and therefore to the detriment of the 6<sup>th</sup> defendant on the said legal basis), where the principal offenders have not been found liable to pay exemplary damages, for whatever reason, that exoneration must also visit the 6<sup>th</sup> defendant to his advantage.

[124] In the light of the aforesaid factors which I have considered, I hold that, the 6<sup>th</sup> Respondent was not liable to pay exemplary damages which renders redundant for me to dwell specifically and separately on the reasons adduced on behalf of the Appellant as recapitulated in paragraph [102] above.

[125] For the aforesaid reasons I would strike off and set aside the award of exemplary damages.

**Re : Ground 10 of Appeal – Award of Costs**

[126] Although urged in the Supplementary Notice of Appeal dated 24<sup>th</sup> September 2015, learned Counsel for the Appellant did not pursue that matter at the oral hearing.

**Alfred JA**

[127] I have had the advantage of reading in draft the judgment of my learned brother Guneratne JA. I agree with what he has said on the issues of liability and quantum and wish to confine my observations to the issue of exemplary damages. This is



because on this appeal this Court is called upon to decide whether exemplary damages may be awarded against the Appellant on the footing that he (representing the State) is vicariously liable for the tortious actions of the 1<sup>st</sup> to the 5<sup>th</sup> defendants in the civil action, from which this Appeal stems. I will refer to those 5 defendants as the defendants.

[128] According to the judgment of the trial judge, the defendants pleaded guilty in the Magistrates' Court to charges of abduction and causing grievous harm. They were each sentenced to concurrent terms of 12 months imprisonment suspended for 15 months and also fined a total of \$340.00 each. The Respondent was to receive \$1,500.00 of the fines by way of compensation. The crimes occurred on 24 October 1990 and the sentences were imposed on 22 November 1990, as punishment of the defendants who were soldiers who acted in gross breach of discipline and committed an unlawful act which was oppressive or arbitrary.

[129] Before I proceed any further I need to stress the distinction between aggravated damages and exemplary damages. Aggravated damages are part of compensatory damages paid to the victim of a tort where the manner it was carried out was such as to injure his proper feelings of dignity and pride (see Clerk -v- Lindsell on Torts (19<sup>th</sup> edition). Its quantum is consequently higher as it is intended to compensate the victim for the injury to his feelings and not to punish the tortfeasor for his wrongful behaviour. If it does then the award would be struck down on appeal. This is because the element of punishment is properly and exclusively the province of exemplary damages. These damages have in the past also been termed as penal or vindictive damages. Today, they are called punitive or exemplary damages which terms are synonymous. Such damages are awarded to teach the defendant that tort does not pay and to deter him and others from similar conduct in the future per Lord Hailsham in Broome -v- Cassel & Co Ltd [1972] AC 1073.

[130] The locus classicus of exemplary damages is the decision of Lord Devlin in the House of Lords in: Rookes -v- Barnard [1964] A.C. 1129. Lord Devlin said there were



only 3 categories of cases in which exemplary damages could be awarded. These were:

- (i) Where there had been oppressive, arbitrary or unconstitutional action by servants of the government.
- (ii) where the tortfeasor's conduct had been calculated to make a profit for him which might exceed the damages payable to the injured party.
- (iii) Where exemplary damages are expressly authorized by statute.

[132] Here the factual matrix places the tortious conduct of the defendants within the first category. But does that make them liable to pay exemplary damages and the State vicariously liable also.

[133] The function of exemplary damages in the instant case would have been to punish and to deter. In the cases that arose from the troubles in Northern Ireland from 1969 to 1998 exemplary damages were awarded against the Ministry of Defence or the Northern Ireland Office or the Chief Constable of the Royal Ulster Constabulary under the principle of vicarious liability. These were to signify Judicial condemnation of the conduct of the soldiers or prison officers or police officers who had committed the outrageous action. The rationale for these awards can be gleaned from the words of Lord Hutton in Kuddus –v- Chief Constable of Leicestershire [2002] 2AC 147, that “it may be very difficult to identify the individual wrongdoer so that criminal proceedings may be brought against him to punish and deter such conduct”.

[134] No such difficulty existed in the instant case because the wrongdoers had been identified, had been convicted, and had been punished by the criminal court.



[135] Indeed the punishment followed so closely on the heels of the crime that there had been no disconnect as is common in criminal cases due to the long passage of time between the crime and punishment. The fact that the actual perpetrators have been punished for their wrongs removes the necessity for the State to be punished and deterred by an award of exemplary damages against it which was the rationale for the United Kingdom awards. I say this as a matter of principle and law. I am here relying on the persuasive authority of the 1998 decision of the High Court of Australia in: **Gray -v- Motor Accident Commission** 158 ALR 495. Gleeson CJ said that exemplary damages may not be awarded where the criminal law had been brought to bear on the wrongdoer and punishment inflicted, because the purpose for awarding exemplary damages has been wholly met if punishment is exacted by the criminal law for then the offender is punished and others are deterred. There is therefore no need for any award of exemplary damages.

In my opinion, if exemplary damages may not be awarded against the defendants then they may also not be awarded against the Appellant on the footing of vicarious liability.

[136] Further, in the particular situation of this matter, another bar to the award of exemplary damages has arisen from the trial Judge's Ruling upon Quantum of Damages. In para 63, he states "In my judgment, in a Category One kind of case, when the individual servants of the State have faced criminal proceedings and been sentenced, it is wrong for a court to make an award of exemplary damages against them. The Fiji Military Forces as a body faced no kind of criminal or other punitive proceeding, if such were possible. For these reasons I find it consistent with principle and the purpose of exemplary damages for an award to be made against the sixth defendant but not against the remaining five." In the Judge's Clarification of Ruling upon Quantum of Damages, he states in para [2] 2(b) that "The sixth defendant alone is also liable for the \$100,000.00 exemplary damages together with the interest thereon".



[137] The Judge did not give the reason why he ruled that, only the (Appellant) alone was liable for exemplary damages. It could not be because the State was in some way responsible, because it was common ground that the action of the defendants had not been instructed nor approved by higher authority. If it were on the ground of vicarious liability, the State cannot be vicariously liable for payment of exemplary damages which the defendants have expressly been excluded from payment. If vicarious liability means the State steps into the shoes of the defendants, it would then not be liable to pay exemplary damages, for the simple reason the defendants are not liable to pay them.

[138] In my opinion, in any event the judge erred in law in stating that it is consistent with principle and the purpose of exemplary damages for an award to be made against the sixth defendant but not against the remaining five. This is because in an action in tort where all 6 defendants are sued together, a decision that some defendants are not liable to pay exemplary damages, does not allow exemplary damages to be awarded in the single judgment, which must be entered against all (see McGregor on Damages, 17<sup>th</sup> edition). Therefore, the moment the trial judge excluded the defendants from paying exemplary damages he could not order in the same judgment that the Appellant pay exemplary damages.

[139] For all the above reasons, the award of exemplary damages cannot stand, and the Appeal against its award should be allowed.

**Orders:**

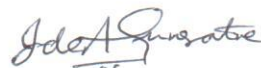
1. *Appeal against liability is dismissed.*
2. *Appeal against quantum is partly allowed by substituting for the sum awarded for special damages \$30,000 in place of \$75,000.00 and by setting aside altogether the sum awarded for exemplary damages.*



3. *The Appellant together with the five defendants are jointly and severally liable to pay to the Respondent \$75,000.00 for general damages with interest and \$30,000.00 for special damages with interest together with the costs awarded in the court below.*
4. *Parties to bear their own costs of the appeal.*



**Hon. Justice W. Calanchini**  
**PRESIDENT, COURT OF APPEAL**



**Hon. Justice Almeida Guneratne**  
**JUSTICE OF APPEAL**



**Hon. Justice D. Alfred**  
**JUSTICE OF APPEAL**