

IN THE HIGH COURT OF FIJI

At Suva

Civil Jurisdiction

CIVIL ACTION NO. 0371 OF 1993

Between :

DR. ANIRUDH SINGH  
s/o Charan Singh

Plaintiff

- and -

SOTIA PONIJASI  
WAQA VAKALOLOMA  
UATE QALO  
ILIESA RAIQISO  
SAMUELA KENI  
ATTORNEY GENERAL OF FIJI

First Defendant  
Second Defendant  
Third Defendant  
Fourth Defendant  
Fifth Defendant  
Sixth Defendant

Counsel : Mr. F. Haniff for the Plaintiff  
Mr. L. Daunivalu for the Sixth Defendant

Dates of Hearing : 1st September and 3rd October 2006

Date of Judgment : 1st November 2006

JUDGMENT

[1] On 24th of October 1990 the plaintiff Dr. Anirudh Singh, left his home to go to work at the University of the South Pacific. He was walking along Rewa Street. Two of the first five defendants were walking along the footpath towards him. One of them struck him in the face and he fell to the ground. Other defendants crowded around as a car sped up from

behind. Dr. Singh was gagged with a strip of white cloth and put in the car. His face was then pushed down between his knees. He was told, "shut up, you bastard, or we will kill you".

- [2] Fifty dollars was taken from his back pocket. The journey continued for some time with stops and turns. Dr. Singh thought at first that they would be heading for Army Headquarters. He realised after a while that they were not.
- [3] Eventually the vehicle came to a halt on an unsealed road. The door opened and he was told "remain silent and do as we tell you to. Keep your eyes closed". He was then blind-folded. He was able to see that he was in a bushy-sided, dirt road somewhere. A hood was pulled over his head and tied around his neck. It was tied so firmly his nose was flattened against his face. He could not breathe normally. He felt as though he was suffocating. The possibility that he was going to be killed was then "a stark reality in my mind". They went over rough terrain with bushes and protruding tree roots. After approximately five minutes of stumbling walk he was pushed into a sitting position and tied up. His wrist watch was pulled away. His hands were tied behind his back with cord. His feet were also tied together. A thicker rope was tied around him and another rope around his neck, which was pulled backwards.
- [4] His pockets were turned out or ripped apart and a list of names and telephone numbers he always kept in his shirt pocket was taken. His shirt was ripped leaving his chest bare. The knots of the ropes dug into his wrists and he began to loose sensation in both hands.
- [5] Suddenly all around him became quiet. He was told in a stern, low voice "you will remain absolutely quiet, or you will not live. Is that understood?" Dr. Singh replied "yes".

- [6] He was then hit with full force on his left jaw. Another blow landed on his head. He was asked "yes what?" and replied "yes, sir".
- [7] Dr. Singh was beginning to feel suffocated and was gasping for breath. He knew he could not last long like that but did his best to exercise enough self control to overcome the sense of asphyxia. He tried to regulate his breathing as best he could.
- [8] He then heard a heavy thump as if a large object, like a sand bag, was being dumped on the ground close to him. He imagined that he would be killed, his body weighted with the sand bag and then dumped in the sea. He said "the panic was rising again and this time it seemed uncontrollable".
- [9] He could hear conversation in the Fijian language. He heard metallic clicking like guns being checked.
- [10] He then felt warmth against his right leg. Dr. Singh realised they had lit a tyre close to him. He was then told "we will roast you alive".
- [11] He was then asked a large number of questions about his associates and friends, his activities, the address he gave on an arrival card in Nadi, and other questions. From time to time he was hit and the noose around his neck tightened. His head throbbed and his face "was battered senseless". He had no sensitivity in his hands. He asked for the cords to be loosened. The response was more blows with fists and kicks at his body.
- [12] He was asked why he had burnt the Constitution. He replied "because I was opposed to it". He was again hit about the head. After a while he heard food utensils being used and one of his captors eating. He stayed in his place for a considerable time until he was able to make out through

the dimming light that it was afternoon. He heard that one of the landrovers nearby was being used as a means of communication between his captors and others. He had the impression that a vehicle had been used to ferry people backwards and forwards.

- [13] About an hour after dark his feet were untied and he was forced to stand up. The knots on his hands were untied. His hands were swollen and numb.
- [14] His captors then untied the hood and took off the blindfold. It was not totally dark, half light. He saw that he was sitting in the middle of a tropical wood. The faces of his captors were covered with dark balaclavas and they wore jackets, jeans and gloves. They stood facing him in a menacing pose. They then unleashed more blows upon him. He was beaten to and fro until he felt himself sinking into unconscious. After about five minutes the blows stopped. He felt numb and senseless and hardly able to think. His face was puffed and he thought he had lost the sight of his left eye.
- [15] His captors exchanged further consultations in low whispers. He gained the impression that they were "commandos on a mission, they were planning their next action". He was made to lie on his side and while one stood on his right hand another put his left hand over an exposed route. He thought they were going to cut off his hand. They took a metal pipe and beat his hands. They then did the same with his right hand. His injured hands were then held up by one of his captors and then let drop. His hair was cut off with a pair of scissors. After some more time one of them lit a match and started to burn the cut hair at the tips.
- [16] All but one of his captors left and for the first time in approximately eleven hours he felt there might be hope. The remaining captor then told him he was free to go and disappeared into the darkness.

- [17] Dr. Singh wondered if this was a trap. He shifted to a new position some yards away and sat down again. He heard a landrover start in the near distance, and then drive away. He stood in the middle of the dark forest, with his face swollen, unable to see through his left eye, his hands swollen and hanging useless by his sides and oozing blood. He managed to make his way until he found a dirt road.
- [18] Five days earlier, on the 19th of October, the front page of the Daily Post Newspaper had carried the headline "Hindus Burn Constitution". There was a photograph of several persons burning what was described as "Fiji's New Constitution". The caption continued "at left is the chairman of GARD, Dr. Anirudh Singh". GARD stood for Group Against Racial Discrimination. The first five defendants, Sotia Ponijiasi, Waqa Vakaloloma, Uate Qalo, Iliesa Raiqiso and Samuela Keni were later charged with abduction and causing grievous harm. They had given themselves up to police and made statements admitting their respective involvement in these events.
- [19] On the 22nd of November 1990, having pleaded guilty, they were each sentenced to twelve months imprisonment concurrent on each count suspended for fifteen months and fined a total of \$340.00 each. One thousand five hundred dollars of the fine was to go to Dr. Singh by way of compensation.
- [20] It is not disputed that at the time of these events all five were serving soldiers or officers in the Republic of Fiji Military Forces (RFMF). The five defendants have been served with the proceedings in this case and judgment in default of defence entered against them for various torts.
- [21] The plaintiff claims against the sixth defendant, The Attorney General, that the state is vicariously liable for the actions of those soldiers on that

day. The sixth defendant denies this. This is the principal issue in this case.

[22] I have before me the unchallenged evidence of Dr. Singh. I have also heard evidence from Sitiveni Rabuka, Sakiusa Raivoce and Jioje Konrote. I have an agreed bundle of documents and Saula Koro's affidavit in reply to interrogatories, filed on 4th of July 2006.

[23] In this judgment I am only addressing the issue of whether or not the sixth defendant is vicariously liable for the actions of the first five. The question of damages and other relief will be dealt with separately and, in the case of the Attorney General, if there is an adverse finding. The Fiji Human Rights Commission has made application to be heard on the question of damages if such a finding is made.

[24] It is clear from the dates of the incidents and year of filing of this case that there have been considerable delays in the coming to trial of this action. There is no need for me to go into those matters in this judgment.

[25] Both counsel supplied closing written submissions in which they dealt with the law and the facts. In the context of a master and servant relationship, the plaintiff's counsel cited the dictum of Lord Steyn in *Lister and Others v. Hasley Hall Limited* [2001] 1 A.C. 215 at p.223 where he said :

“Vicariously liability is legal responsibility imposed on an employer, although he is himself free from blame, for a tort committed by his employee in the course of his employment.”

[26] Similarly in *Majrowski v. Guys and St. Thomas's NHS Trust* [2006] 3 W.L.R. 125, Lord Nicholls stated, at page 128, :

“Vicarious liability is a common law principle of strict, no fault liability. Under this principle a blameless employer is liable for wrong committed by his employee while the latter is about his employer’s business. The time-honoured phrase is ‘while acting in the course of his employment’. It is thus a form of secondary liability. The primary liability is that of the employee who committed the wrong.”

- [27] It is not disputed that all five defendants were members of the Fiji Armed Forces at the time of these acts.
- [28] The plaintiff’s witness Jioje Konrote had been a career soldier for twenty five years. He enlisted in the Royal Fiji Military Forces in May 1966. He finally retired in December 1999. Although he was not in Fiji at the time of these events he testified to the fact that there was a unit known as the “Special Operations Security Unit”, (SOSU). He said it was one of many such units set up after the events of 1987. The setting up of such a sub-unit was the prerogative of the Commander, Sitiveni Rabuka. The purpose of the unit was to collect and collate information that was required at that particular time, namely about anything likely to destabilise the country, bearing in mind the turbulent period after 1987.
- [29] He stated it would be for the unit commanders to select the soldiers they wanted in any particular unit. He continued that part of the training would be in intelligence and information collection and covert techniques. Once information was collected, it would be analysed by members of the intelligence unit to find out if it warranted any further follow-up action or the formulation of any plans.
- [30] He stated at that time SOSU did not have any particularly sophisticated equipment, it was usually “the use of eyes and ears supplemented by people coming forward. It would be normal equipment such as radios”.

Mr. Konrote stated that the members of the SOSU were on call "24 hours a day, 7 days a week".

- [31] Sakiusa Raivoce was a Lieutenant Colonel in the army in 1999. He was aware of the existence of SOSU but did not know when it had been set up. He was in a different unit. He was unable to say if it was a covert unit. In cross-examination he agreed that whether or not a person was in any special unit he was not allowed to commit unlawful activities.
- [32] Sitiveni Rabuka also gave evidence. He stated that at that time he was a Major General and Commander of the Fiji Military Forces. He stated that he was not aware of the existence of a Special Operations Security Unit and, in particular, during the years 1987 to 1990. He stated that if such a formal unit was incorporated it would have to be gazetted. He stated he did not remember signing a Gazette notice to that effect. He stated he was aware of the Taukei Movement but was not aware of GARD nor the Fiji Youth and Students League (FYSL). He stated that he had heard about the burning of the 1990 Constitution and that it was a serious time in the history of Fiji. He had no personal view about the act of burning the Constitution. He stated that any unit which had not been gazetted would be unlawful and unknown. He said there could have been unauthorised instructions given to soldiers by immediate superiors. If such instructions were given the army would take action, unless they had been brought before a civil court.
- [33] In their written records of interview at the time Qalo accepted he was a member of SOSU ; Keni a member of 'SOS' although he didn't know what it stood for ; Raiqiso a member of a Special Operations Unit and Ponijiasi said he was in charge and gave the orders.
- [34] In his affidavit in answer to interrogatories, a currently serving officer, Lieutenant Salo Koro with access to records, at paragraph 9 stated that



Sotia Ponijiasi joined the "Special Operations Security Unit" in November 1989 and was the team leader for that unit. Lieutenant Koro continued that the other four defendants were also members of that unit and were not on leave at the times in question.

[35] I accept the evidence of Jioji Konrote and Sakiusa Raivoce. In any event there was no real challenge to what they said. It is inconceivable that Sitiveni Rabuka was not aware of the existence of that Unit or at the very least came to hear of it soon after these events. I cannot place reliance upon his evidence in these matters.

[36] Sotia Ponijiasi was promoted to the rank of Captain in November 1989. He was made team leader for SOSU. In his record of interview to the police he was asked (Question 9, page 40 agreed bundle) what he had detailed defendants two to five to do. He replied :

"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 detailed 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 people meet 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 7.30 a.m. 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."

This is a translation into English from the original Fijian in which the interview was conducted. This also applies to the records of interview of the other defendants.

[37] The other defendants talk in their interviews about the instructions to keep Dr. Singh 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.

[38] Iliesa Raiqiso (page 57 of the Agreed Bundle) in his record of interview was asked :

"Q7: Can you recall on the morning of Wednesday last 24.10.90 where were you on that morning.

A: I was preparing to execute the task at Rewa Street.

Q8 : Tell me what sort of preparation is that ?

A: On that Friday when the Fiji Post published the burning of the Constitution by Dr. Singh and his team, an instruction was given by my superior officer to be one of the few hunting Dr. Singh and identify his working address and his residential address. The operation started that day.

...

Q19: On Wednesday 24/10/90 tell me what did you and your commander do ?

A: We did not rest and continued tracking and observing the movements and the activities of Dr. Singh. We radioed the result to the military camp.

Q25: Tell me what treatment made to Dr. Singh when he was detained in the forest.

A: His hands were tied behind his back and seated under a big tree. We interrogated him about the burning of the Constitution and he admitted leading the group. I reached his shirt pocket and found two pieces of paper . One is a receipt ... and the other paper written some telephone numbers ... He was punched whenever he refused to answer any questions.

[39] At question 41 of the interview of Uate Qalo (page 71, agreed bundle) he is asked :

"Q41: What did you do to him whilst holding him up in the bush?

- A: Where tied his both hands around his back and made him sit beside a huge tree. His head and face was still covered. We then started questioning him.
- “Q42: What did you ask him in questioning ?
- A: We all took part in questioning him as to why they burn the Constitution, who all took part in the burning of the Constitution and some other things we also questioned him which I now cannot remember.
- Q43: Did he respond to what you questioned him ?
- A: Yes but it was not clear because his mouth was also covered.
- Q44: Did he mention to you any of his accomplice ?
- A: Only that man whose name appeared in the paper namely Praveen and the rest I now cannot remember.
- Q45: Did you do anything to him whilst questioning him ?
- A: We only cut his hair and he also got burnt from my cigarette when it fell off from me. His hair which was on the ground was burnt by us and he also got slightly burnt from that.
- Q46: What did you use to cut his hair with ?
- A: We used a pair of scissors we took along with us.
- Q47: How long did you keep him in that place ?
- A: Until darkness.

Q48: What happened when it became dark ?

A: We then released him and then told him that he could go.

Q49: What about you people ?

A: We came back to our car boarded and left to the camp had our briefing before leaving for home."

The other defendants in their records of interview admit doing various Acts consistent with the allegations of Dr. Singh.

[40] The five defendants were not only making enquiries and gathering information about the burning of the Constitution and those involved but were also enquiring about the address Dr. Singh gave on an arrival card at Nadi Airport.

[41] In an undated statement Brigadier General E.G. Ganilau MC, MSD PSC, Commander the Republic of Fiji Military Forces stated that neither he nor the RFMF ordered nor instructed the activities of "the defendant servicemen in the incident involving the assault on Mr. Anirudh Singh. The assault on Mr. Singh are prohibited acts under the laws of Fiji. This is why they were accordingly convicted by the courts. The RFMF is an institution whose role is to assist the police in the maintenance of law and order. 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", (Page 167 agreed bundle).

[42] Lieutenant Colonel Isireli Dugu, in his undated "FIC into the alleged kidnap of Mr. Anirudah Singh" stated :

"The alleged kidnap of Mr. Anirudah Singh first came to my notice after reading it in the local newspaper (Fiji Times) on the morning of Thursday 25th October, 1990.

In my capacity as the Commanding Officer of the soldiers alleged to be involved in this unfortunate incident I would like to state here that neither I nor the RFMF issued any instruction either verbally or in written form that influenced the cause (sic) of action(s) that these soldiers were accused to have carried out.

I suspect that the burning of the 1990 Republic of Fiji's Constitution by the Students League Association of which Mr. A. Singh played a role, was the event that sparked off the incident.

This concludes my statement." (page 166, agreed bundle).

- [43] The plaintiff's case is not that an order was given to seek out Dr. Singh and beat him because of his part in the burning of the Constitution and his membership of guard and FYSL. The plaintiff's case is that there was a covert unit, the Special Operations Security Unit. Its purpose was to carry out surveillance and gather information. This is precisely what they were doing when they abducted Dr. Singh bound and hooded him, assaulted him and interrogated him. The Plaintiff says that the test for vicariously liability is not whether the employer ordered the acts or they were part of the duties of the employees concerned. The plaintiffs say that :

"The correct approach is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and to ask whether looking at the matter in the round it is just and reasonable to hold employers vicariously liable."

- [44] This is the dicta of Lord Steyn in delivering the opinion of the Privy Council in the case of *Bernard v. Attorney General of Jamaica* [2004] UKPC 47 at para. 18.
- [45] In *Majrowski v. Guys and St. Thomas's NHS Trust* [2006] 3 W.L.R. 125 the House of Lords again adopted the 'connection' test in defining the principles of vicarious liability when Lord Nicholls (at page 128) stated :
- "A precondition of vicarious liability is that the wrong must be committed by an employee in the course of his employment. A wrong is committed in the course of employment only if the conduct is so closely connected with acts the employee is authorised to do that, for the purposes of the liability of the employer to the third party, a wrongful conduct may fairly and properly be regarded as done by the employee while acting in the course of his employment."
- [46] Reference was made to the cases of *Lister v. Hesley Hall Limited* [2002] 1 A.C. 215 and *Dubai Aluminium Company Limited v. Salaam* [2002] U.K.H.L.48. In the former case the warden of a school boarding house had sexually abused resident children. The question was whether the employers were vicariously liable. In the leading opinion a single ultimate question was posed, namely " ... whether the wardens tort was so closely connected with his employment that it would be fair and just to hold the employers vicariously liable", (page 230 C). All the members of the House of Lords took the view that the answer was "yes" because the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties in the boarding house.
- [47] Lord Steyn at paragraphs 18 and 19 in *Bernard* (supra) continued thus "Lister is, however, important for a number of reasons. It emphasised clearly the intense focus required on the closeness of the connection

between the tort and the individual tortfeasor's employment. It stressed the need to avoid terminological issues and to adopt a broad approach to the context of the tortious conduct and the employment. It was held that the traditional test of posing, in accordance with Salmond's well known formula, the question whether the act is "a wrongful and unauthorised mode of doing some act authorised by the master" is not entirely apt in cases of intentional wrongdoings ... This test may invite a negative answer, with a terminological quibble, even where there is a very close connection between the tort and the functions of the employee, making it fair and just to impose vicarious liability. The correct approach is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and to ask whether looking at the matter in the round it is just and reasonable to hold the employers vicariously liable. In deciding this question a relevant factor is the risks to others created by an employer who entrusts duties, tasks and functions to an employee".

- [48] In the Dubai Aluminium case the House of Lords considered the principles in *Lister* in a different context. The question was whether a solicitors firm, a partnership, was vicariously liable for the fraudulent act of one of its partners who, together with others, had defrauded the Dubai Aluminium Company. Lord Nicolls at page 377 stated :

"Perhaps the best general answer is that the wrongful conduct must be so closely connected with acts the partner or the employee was authorised to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful conduct may fairly and properly be regarded as done by the partner while acting in the ordinary course of the firm's business or the employee's employment. Lord Millet said as much in *Lister v. Hesley Hall Limited* ...



“... the policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimisation).”

[49] At page 248 of *Lister*, Lord Millet stated :

“So it is no answer to say that the employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negative of his employer's duty ...”

[50] Were the wrongful acts of these five defendants so closely connected with their functions and duties as members of SOSU that the State can reasonably be held vicariously liable for their tortious actions ? Has the employer “introduced the risk of the wrong and is thereby fairly and usefully charged with its management and minimisation”? Could it be said that the evidence is just as consistent with a few soldiers meting out a punishment beating for the act of burning the Constitution ? Is there also a policy issue given the context of the actions, as being those carried out by serving soldiers and not by, for example, employees of an ordinary commercial company who took it upon themselves to do these acts ? It is, of course, for the plaintiff to prove his case.

[51] The sixth defendant in closing submissions reiterated that the The Attorney General's Office and the Fiji Military Forces have consistently maintained their disapproval of the actions of the five defendants. In two separate and clear declarations the disapproval of the army was made

known. The five defendants themselves acknowledged that their actions as complained of were individual and not part of their military duties. Further they were not part of any official duty or taken in furtherance of any lawful authority sanctioned by superior officers.

[52] The sixth defendant cited the case of *Hague v. The Deputy Governor of Parkhurst Prison* [1991] 3 ALL E.R. 733. In this case Hague, a convicted prisoner, claimed damages against the Home Office for assault battery and false imprisonment by some of the prison officers. Lord Bridge, at p.745 stated :

"... a prison officer who acts in bad faith by deliberately subjecting a prisoner to a restraint which he knows he has no authority to impose may render himself personally liable to an action for false imprisonment as well as committing the tort of misfeasance in public office. Lacking the authority of the Governor, he also lacks the protection of (the law). But if the officer deliberately acts outside the scope of his authority, he cannot render the Governor or the Home Office vicariously liable for his tortious conduct."

[53] The sixth defendant says this case and dictum are directly in point, even though it came before the authorities of *Lister and Others*.

[54] The respondents continue that this present case is factually distinct in that the army was not involved at the time in assisting the police with internal security and had no reason to be arresting and questioning people. There were no instructions or directions given to the defendants to undertake any such activity, there were no clear directives on the operations of the SOSU, and their core duties were far removed from illegal abduction and assault. It was submitted therefore there could be no connection between what the defendants did and what they were employed to do.

[55] I find that the following is established on the face of the evidence :

1. A unit had been established in the army called the Special Operations Service Unit. It operated independently. It was known to senior commanders.
2. Its functions were to collect information generally, conduct surveillance and collect information on anyone likely to destabilise the country and report it back for intelligence analysis. They were entitled to and did use army vehicles and other equipment. They were trained in covert techniques.
3. Defendants 1-5 were serving members of the RFMF and members of the Special Operations Service Unit.
4. In the days before the abduction of Dr. Singh the five defendants were carrying out surveillance on him and reporting back to their immediate commanding officer.
5. All five defendants were aware that Dr. Singh was one of those who publicly burnt the Fiji Constitution.
6. All five defendants were involved in the abduction and beating of Dr. Singh.
7. Dr. Singh was taken to a remote location bound and hooded.
8. Whilst there over a period of approximately twelve hours he was questioned.
9. Those questions related to the names of others who had participated in the burning of the Constitution, his contacts in Fiji

and overseas, his involvement with overseas organizations and his address on an airport arrival card. A notebook containing names and telephone numbers was removed from him.

10. When he failed to answer questions or did not do so satisfactorily he was further beaten.

11. Certain acts of humiliation were inflicted upon him. It could be that these were done to elicit answers or as revenge for his act of burning the Constitution or both.

[56] This case is close in character to that of Lister. In that case there was no suggestion that the employer encouraged, condoned or directed any kind of sexual abuse. Nevertheless the acts of abuse were found to be so closely connected with the course of employment that the employers were fixed with vicariously liability. In this case there is nothing on the evidence to suggest that the RFMF directed the acts of abduction and beating.

[57] However, in my judgment, those acts are so closely related to that of the gathering of information that I consider the sixth defendant is fixed with vicarious liability.

[58] The Unit existed to survey and gather information on certain people. Dr. Singh was just such a person. He was under surveillance for a few days before the abduction. When abducted he was asked questions of the kind the Unit would want answers to. When he didn't reply he was beaten. Army vehicles and equipment were being used. Periodic reports were sent back to RFMF headquarters. The defendants were going to and from their army base. There was a failure by the RFMF to take any disciplinary action afterwards in respect of the soldiers, (see : below, paragraph 60).

- [59] I consider that there is a broad and important policy support for this decision. If any unit of a disciplined force is charged with the gathering of information and watching people then it is most important that that force exercises the greatest diligence and active control over the unit to ensure that the unlawful use of force or other wrongful acts are not employed in its activities. There must exist the clear knowledge that if members of that unit do act unlawfully, then vicarious liability will be affixed to the force itself.
- [60] There is a further and equally disturbing aspect to this whole case. Within a few days of this incident and certainly by the time of conviction and sentence senior commanders of the army were well aware of these events. There had been publication in national newspapers. When asked what position would the army take if a soldier was convicted in a civil court Jioje Konrote replied "normally he or she is discharged". Sakiuse Raivoce when asked about this stated "if (a serviceman is) convicted by the civil court, his position in the army will be affected. It depends on the commander, he can be discharged. It depends on the severity. If there is a civil conviction of a serving soldier, then army will look at it and decide what to do ... it depends on the severity of the case, (he would) normally be discharged by the commander if they are guilty in a civil case".
- [61] Although these men had not been sentenced to terms of immediate imprisonment they had been sentenced to suspended prison sentences for two serious offences.
- [62] All five defendants (save for Sotia Ponijiasi, retired in 1997) are still today serving soldiers in the army with no apparent detriment to their careers. There is no evidence that at any time any consideration was given to disciplining or discharging any of them. The first defendant Sotia

Ponijiasi was, in fact, shortly afterwards posted overseas with a United Nations Mission, a well sought-after posting.

[63] This failure to take any kind of action against any of these defendants can only be perceived as condonation of their actions by the RFMF. These were not trivial acts of indiscipline. They reflected seriously upon the characters of those concerned. It is difficult to see how any course other than immediate discharge could be followed. This not only reinforces my judgment as far as the question whether or not their activities were closely connected with their ordinary duties, but also reinforces the broad policy reason for affixing vicarious liability to the RFMF.

[64] I do not overlook the nature of the government in 1990, the fact that the 1990 Constitution superseded the 1970 Constitution and that indeed there was a new Constitution in 1997. The sixth defendant did not seek to raise in anyway any legal points arising from this state of affairs.

[65] In closing submissions the sixth defendants counsel also raised a particular provision set out in the Royal (Now Republic of) Fiji Military Forces Act, Cap.81. Section 3 states :

“The Force 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.”

[66] The respondents say that the five defendants acts could not in any way be described as fitting within the tasks with which the Force is charged and cannot therefore have been within the course of their employment. They were not done for the protection of Fiji against outsiders, internal defence or civilian tasks usually within the province of the police. There

was no question of maintenance of order, since there was no disorder requiring military intervention.

[67] The sixth defendant also cited section 52 of the act which comes in Part VIII - "Legal Proceedings and Offences" and is entitled "Immunities of Soldiers" and reads :

"52 - (1) No action shall be brought against any officer or soldier for anything done by him under this Act unless the same is commenced within three months after the act complained of was committed nor unless notice of such action has been given at least one month before such action was commenced.

(2) Any action brought against any officer or soldier for anything done by him under the this act the plaintiff shall expressly allege in his statement of claim that such act was done either maliciously or without reasonable and probable cause or through gross negligence, and if at the trial of such action he fails to prove such allegation he shall be non-suited or a verdict shall be given for the defendant."

[68] It is not disputed that these proceedings were commenced more than three months after the act complained of were committed. The Statement of Claim does refer to acts being done maliciously.

[69] The sixth defendant argues that if the acts that the first five defendants carried out were done under the Royal Fiji Military Forces Act then the plaintiff has clearly failed to comply with section 52 in that the action was not commenced within three months, no notice was given one month before the commencement of the action and the Statement of Claim fails

in its pleading to comply with subsection 2. If the acts complained of were not done under the Act then they clearly could not be within the course or service of the five defendants with the military forces.

[70] I do note that this section and its particular provisions have not been pleaded in the defence or raised at any other time. It can reasonably be said that some of the limbs of section 52 are open to attack as being unconstitutional. That has not been argued before me and I make no ruling thereupon.

[71] At paragraph 4 of the defence filed on 16th September 1993 the sixth defendant was at pains to point out that the five defendants' acts were "not acts done as part of their military duties", they were "not part of any official duty or taken in furtherance of any lawful authority sanctioned by the Commander of the Fiji Military Forces or any of his superior military commanders", "the acts and or omissions of the first five defendants were so separate and distinct from any official act that they would in law be expected to perform that the Government of Fiji as their ultimate employer cannot be liable vicariously" and "the acts of the first five defendants were prohibited acts by the Law of Fiji, and therefore cannot be within their sphere of employment as members of the Fiji Military Forces".

[72] The sixth defendant in its pleading and indeed in the way their case has been presented has pointed out that the tortious acts committed by the five defendants were not done in the course of their employment or indeed constituted "anything done by [them] under this Act ...". In these circumstances the limitations upon bringing an action as set out in section 52 do not come into play, presuming that they are constitutional.

[73] The modern law of vicarious liability clearly recognises that an employee might commit tortious and indeed criminal acts which were not ordered,



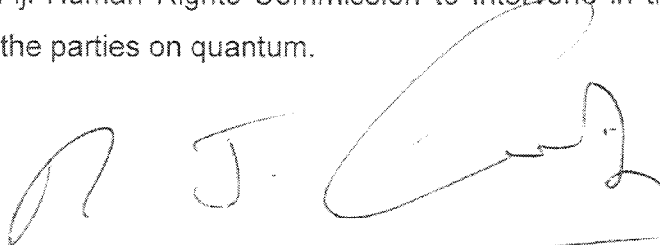
connived at or condoned by his employer yet the employer be vicariously liable. The question is the "closeness of connection between the wrongful act and the employment".

[74] The parallels between this case and the case of Lister are close. The policy considerations are the same.

[75] There is a distinction between acts done under the Act which were carried out "either maliciously or without reasonably and probable cause or through gross negligence" and acts which are done otherwise than under the Act but are so closely connected to ones that are as to fix the state with vicarious liability.

[76] In these circumstances, I do find that there were tortious acts as pleaded in the Statement of Claim committed by the first five defendants. I do not find that the defence under section 52 of the Royal Fiji Military Forces Act is available to the five defendants nor consequently the sixth defendant. I find that the tortious acts committed by the five defendants were so closely connected with their employment and in particular the functions and purposes of the Special Operations Security Unit that the sixth defendant, representing the State, is vicariously liable for those tortious acts.

[77] Accordingly I give judgment for the plaintiff. I will now hear the application from the Fiji Human Rights Commission to intervene in this case. I will also hear the parties on quantum.



(R.J. Coventry)

JUDGE