IN THE HIGH COURT OF FIJI

At Suva

Civil Jurisdiction

CIVIL ACTION NO. 0137 OF 2003

Between :

JAMES PILLAY — **Plaintiff**

- and -

REPUBLIC OF FIJI MILITARY FORCES — **First Defendant**

THE ATTORNEY GENERAL OF FIJI — **Second Defendant**

Counsel : **Mr. D. Prasad for the Plaintiff**
Mr. K.L. Tuinaosara for the Defendants

Date of Hearing : **18th, 19th & 20th September 2007**
Date of Judgment : **18th December 2007**

JUDGMENT

[1] James Pillay says that on 2nd November 2000 his mother told him that she had heard on the radio there was trouble at the Queen Elizabeth Military Barracks. Those barracks are approximately 2-3 miles from his house. Mr. Pillay collected his children from school and brought them home. Between 3.00 and 3.30 p.m. he was outside his house in the compound waiting for a lift to go to the shops to stock up on food. Whilst

standing there he heard a "sizzling noise". He was hit in the stomach by a bullet. He felt strong pain and saw blood coming out of the bullet hole.

[2] He was taken to the CWM Hospital. There Dr. Frederick Merchant, a Consultant Surgeon, repaired his abdomen. There were breathing difficulties and Mr. Pillay was admitted to the intensive care unit. A decision was later made not to remove the bullet as it would be difficult to find and the assessment that, as it was not causing any pain or potential harm, it would be safer to leave the bullet in Mr. Pillay.

[3] Mr. Pillay was in hospital for eighteen days before returning home. There was continuing pain and a hernia which required further treatment. He says he was a self-employed mechanic and this incident and its continuing effects have caused problems of working and other financial losses.

[4] Mr. Pillay accepts that members of a unit called the Counter Revolutionary Warfare Unit (CRW) committed an act of mutiny at the Queen Elizabeth Barracks on that day. Indeed the Commander of the Armed Forces and other senior officers had to flee for their lives. There was much gun fire through the day and towards the evening exchanges of fire as loyal troops overcame the mutiny.

[5] Counsel for Mr. Pillay states that his case is brought in negligence. He alleges that it is the duty of the Fiji Military Forces to keep proper control of their men and weapons and to ensure the safety of the people of Fiji. He argues that it was well known from the events of May 2000 that the CRW, at that period, was an unreliable unit. There had been an attempt at a traditional reconciliation by a ceremony held a few days before this incident. The CRW, which previously had had its own armoury then, as the result of a post-May accord, held its weapons at the central armoury under the control of the Chief Armourer. Those weapons were held in a

particular bay and members of the CRW were permitted to come and clean them once per month. That had taken place on two occasions before the day in question. Counsel alleges that given the unreliability at that time of the CRW care should have been taken when they came to clean their weapons to ensure they did nothing wrong and they should not have had access to any kind of ammunition for those weapons.

[6] Counsel for the plaintiff continued that nothing was done to prevent and resist the takeover of the barracks by the CRW soldiers, there were no army or police units touring the area immediately surrounding the barracks warning people to stay indoors when the firing broke out and nothing was done to inform the public that bullets could travel great distances including that from the barracks to Mr. Pillay's house.

[7] The defendants denied liability. They first argued that the plaintiff has failed to prove that in fact he was hit by a bullet from the Barracks or any soldier's gun and that it could not be said with any certainty that what was lodged inside Mr. Pillay was indeed a bullet.

[8] Defence counsel continued that what occurred on that day was a wholly unexpected criminal act of mutiny by a small group of soldiers. These acts could not have been foreseen or prevented and indeed came as a shock to the Chief Armourer and loyal soldiers who at first could not believe what was happening until they themselves were threatened and "suppressive" fire started from the mutineers. "Suppressive" was described as that sent out by soldiers to frighten and keep down the heads of anyone in the immediate vicinity and not specifically aimed at any particular person or object.

[9] Counsel for the defendants continued that Mr. Pillay on his own evidence was injured somewhere between 3.00 and 3.30 p.m. On the defence evidence the loyal troops did not commence their counter attack and

firing until after 5.00 p.m., long after Mr. Pillay had been injured and taken to hospital.

[10] Defence counsel continued that in these circumstances there was no duty of care as the acts were criminal and those concerned had been court marshalled and sentenced to lengthy periods of imprisonment. He added that even if there was any duty of care it had not been breached as when the mutiny happened the loyal troops quickly and efficiently did everything possible to contain the mutineers, looked to the safety of people in the immediate vicinity of the Barracks and suppressed the mutiny.

[11] I have heard the evidence of the plaintiff himself, Dr. F. Merchant and Dr. J. Taka. For the defence I have heard the evidence of Joseph Morris, Corporal Finau and Aca Rayawa. I have before me an agreed bundle of documents together with written closing submissions of the parties and their oral addresses to those submissions.

[12] There is little dispute between the parties concerning what each of their respective witnesses said in evidence. There are enormous disputes over the inferences and findings of fact and law I should make as a result of the evidence.

[13] The first question is 'Was James Pillay hit by a bullet?' The second question is, "Did that bullet come from the Queen Elizabeth Barracks having been fired by a member of the Fiji Military Forces, whether mutinous or loyal." I will deal with these two questions together.

[14] There is no dispute that Mr. Pillay was standing outside his house on 2nd November between 3.00 p.m. and 3.30 p.m. when he heard a sizzling noise at about the same moment as something hit him in the stomach. He felt immediate pain and was taken to the hospital.

[15] The Consultant Surgeon who attended him was Dr. Frederick Merchant. I accept him to be an expert in surgical and medical matters and qualified to give the opinions which he did. He was trained and worked in the United States of America in the Chicago Hospital Trauma Unit and then in Texas. He stated he had seen approximately five thousand gun shot wounds over twenty years of work. By gun shot he meant pistols, rifles and shot guns. It was fortunate that a man with that experience was present at the CWM Hospital in Suva on that day.

[16] He showed and explained documents 5A, B and C to the court. These were X-rays taken of Mr. Pillay's abdominal area on 28th April 2006. X-ray A was taken from the front and X-rays B and C from each side. He pointed out a "radio opaque image ... consistent with a bullet ... consistent with the history and has all the radio opaque features of a bullet". He said he had also used X-rays at the time he operated upon Mr. Pillay. These X-rays apparently are not now available. He said there was nothing he was aware of that was inconsistent with the object in Mr. Pillay's stomach being a bullet.

[17] Dr. Josaia Taka next gave evidence for the plaintiff. He is a Consultant Radiologist. He qualified in 1968 and worked as a Consultant Radiologist at the CWM Hospital before moving to Suva Private Hospital in January 2001. He examined the X-rays, documents 5A, B and C. He said those X-rays showed an "opaque foreign body, dense, sharp on one end, two to three centimeters in length in front of the pelvic ring just to the right of the first sacral spine. All I can say it is a metallic object, because of the density". He confirmed in cross-examination that it was a foreign body but he did not know what it was.

[18] There was no direct evidence from the defence about the object in Mr. Pillay's stomach but it was pointed out that his house was approximately

three miles from the Barracks. It was accepted that bullets can travel that far.

[19] I have not heard any evidence from either party as to the precise distance from the Queen Elizabeth Barracks to the home of Mr. Pillay. Further, no evidence has been led as to the topography of the ground between the Barracks and Mr. Pillay's home. The defence have had the opportunity to lead evidence to show that the distance concerned was beyond the range of any of the weapons being fired on that day and that the intervening ground or buildings between the Barracks and Mr. Pillay's house rendered it impossible or unlikely that he could have been hit by a bullet fired from those barracks.

[20] Neither party produced a plan of the relative positions of the Barracks and the home or questioned Mr. Pillay as to which direction he was facing when he felt the pain to his stomach.

[21] It is pertinent to note that defence witnesses described the sound of bullets as "sizzling," the same description as Mr. Pillay. Mr. Rayawa talked about the mutineers putting out "suppressive" fire, the kind of fire that would be aimed slightly higher than that intended to hit a particular person or object. There was no evidence and no suggestion or any alternative explanation as to what the bullet shaped, radio opaque object was that could be seen on the X-rays. There is no evidence before me of any other gun battles or indeed discharge of fire arms anywhere else in the Suva area at or about the time when Mr. Pillay was injured.

[22] In the circumstances, I am satisfied that the object showing up on the X-rays and lodged in Mr. Pillay's stomach is a bullet. I am satisfied that he was hit in the stomach by that bullet between 3.00 and 3.30 p.m. on 2nd of November 2000. I am also satisfied that that bullet came from a firearm that was discharged at the Queen Elizabeth Barracks. There is

simply no other explanation on the evidence for what happened and all the evidence I have received is entirely consistent with it.

[23] I now address the question as to whether that bullet came from a gun fired by a mutinous soldier, a loyal soldier or someone else. I find that on the balance of probabilities the bullet which hit Mr. Pillay in the stomach was fired by one of the mutinous soldiers. In this regard, I look particularly to the evidence of Aca Rayawa. In November 2000 he was an officer with the First Infantry Company but attached to the Army Legal Service. At that time he was on special leave to study for his final law examinations. He was at the University of the South Pacific Campus when he telephoned his wife about 1.00 p.m. She was a serving police officer and told him that there was gun fire at the Queen Elizabeth Barracks and people were being advised to take cover. He went home and got his battle dress and then reached the Barracks a little after 2.00 p.m. He said that even from Nabua Police Station "I could hear hissing sound of bullets and bullets whistling over us. CRW were putting out what is called suppressive fire. It is used to cause shock and awe, to have heads down and do what they wanted, to secure their objectives".

[24] Mr. Rayawa continued that the first task was to assess the number of loyal forces and assemble them in one place. He continued, it is the duty of every soldier to suppress mutiny. They needed to do a reconnaissance and get arms. He stated this was between 2.00 and 3.00 p.m. He said at this time there was no engagement, but plans were being made to launch a counter attack before last light. He stated he was aware of negotiations with the mutineers and that they had been given a deadline of 5.00 p.m. to put down their weapons to avoid any further bloodshed. He stated he was the most senior officer present, he had received training in Fiji and at Sandhurst in the United Kingdom and he planned a quick battle attack as time was of the essence. He continued it was after 5.00 p.m. going on to 6.00 that we fanned out into

assault formation. They were still hoping that the CRW soldiers would surrender, but they did not. The attack was then made and was successful.

[25] James Morris is a Warrant Officer II and was and still is the Chief Armourer at the Barracks. He stated that weapons are held at the Armoury and there are procedures which must be followed before they are issued. They are issued for guards who are on duty at the Barracks and the authorisation has to come from the National Operations Centre with a countersigned list of names of those who can draw the weapons. The Armoury is out of bounds to all ranks except qualified armourers. He said it is a secure building with steel doors which are locked and grilles upon the windows. On the face of Mr. Morris's evidence apart from the named guards on duty that day the only other persons holding firearms were the CRW soldiers.

[26] The evidence points to the fact that at the time Mr. Pillay was hit it is probable only the mutineers were firing.

[29] This is an action brought in the tort of negligence. Counsel for the plaintiff puts his case in this way, (page 3, closing submissions),

> "The RFMF soldiers are highly trained and skilled people. They are to maintain strict care when using guns and to see that civilians do not get hurt during the gun battle. Moreover since it was the "state of emergency" they were responsible for maintaining peace and order. They were also under a duty to inform the public that should a gun battle ever take place the public are strictly to stay indoors and that bullets could travel long distances, (this should have been informed during the shoot out at the Military Barracks)."

[30] He continued there were no or insufficient announcements to the public, police or military patrol vehicles were not touring residential areas telling people to stay indoors, giving out leaflets or making people aware that bullets can travel long distances. Counsel continued that,

> "The Military at all times knew and if they did not know they ought to have known through its intelligence officers what was in the minds of CRW soldiers if any as some CRW soldiers did take part in the Speight (May 2000) coup.
>
> "Mr. Rayawa also said that CRW soldiers were also investigated in their role in May 2000 coup and later some were charged and sentenced. The Military were investigating their involvement yet allowed CRW soldiers on 2nd November 2000 to enter the armoury and clean their guns.
>
> "The Military was totally negligent in its duty. They were at the material time under the state of emergency guardians of Fiji and still allowed CRW soldiers to still clean their weapons. Had proper precautions been taken there would never had been a mutiny."

[31] Counsel for the plaintiff said it as entirely foreseeable that civilians could get hurt as the soldiers are skilled and trained personnel and know the range a bullet can travel. There was enough time to advise all civilians in Suva to stay indoors when shooting broke out, but the defendants failed to do so.

[32] In response, counsel for the defendant argued that there was tight security kept on all weaponry at the Barracks and there was a system whereby only named and authorised persons could draw weapons. He continued there was,

"No expectations that CRW would turn on their comrades that day, conduct a mutiny and take over the armoury at gun point against unarmed soldiers. All witnesses state that the actions of the CRW were criminal, betrayal and sheer disregard of standard of army rules and values. They all state that the incident was warfare. The Fiji Court of Appeal has also agreed with this in The State v. Sitiveni Ligamanada Rabuka (Criminal Appeal AAU0007 of 2007) at page 2 paragraph 3 where it is stated "... full scale warfare then developed between loyal soldiers and the rebels in the course of which several soldiers were killed or wounded".

"The RFMF was at all times performing its duty of controlling the armoury and only a super being or "superman" could have wriggled himself out as the unarmed men were held at gun point inside the armoury and other places by the mutineers."

[33] Counsel for the defendants continued that there was no evidence to show that anyone was targeting Mr. Pillay or indeed shooting in the direction of Samabula where his house was. It is submitted the CRW actions that day were not in the course of their duty. "The facts given by the witnesses are too obvious that the CRW was not acting in the course of their duty and therefore the defendants cannot be liable for their actions. They were at war with their very own comrades at arms. They had all subsequently been found guilty of mutiny and imprisoned. If Mr. Pillay was injured by a stray bullet from the CRW then the RFMF could not be liable as CRW was carrying out a criminal activity well outside the ambit of their duty".

[34] Counsel then cited the case of Dr. Anirudh Singh v. Sotia Ponijiasi and Others, Civil Action No. 0371 of 1993.

[35] The Fiji Court of Appeal gave direct consideration to the issues highlighted here in the case of Muni Lata Kumar against The Commissioner of Police, Commissioner of Prisons and the Attorney General of Fiji (Civil Appeal ABU 59 of 2004). At page 2 the Court set out the facts,

Facts

"[2] On 19th May 2000 when George Speight aided by a number of heavily armed members of a Unit of the Fiji Military Forces took over the Parliament of the Fiji Islands and in doing so took the majority of the members of the Parliament, including the Prime Minister, hostage.

"[3] On 29th of May the President His Excellency Ratu Sir Kamisese Mara was forced to stand down. On 29th of May the Commander of the Armed Forces took charge of what was described as the Interim Military Government of Fiji.

"[4] On the 4th of July there was a mutiny at Labasa and the Army Barracks were seized. On 6th July armed rebels seized Monasavu Power Station. On 19th July after the signing of an Accord Speight and his supporters left Parliament and moved to Kalabo. On 26th and 27th July members of the police and the armed forces, using armed force, overpowered Speight and his supporters.

"[5] The Judge accepted that some days after Speight and his supporters took control of Parliament, and members of Parliament hostage, there was a break out of prisoners from the Naboro Prison.

"[6] Among those escaping were three men one of whom is said to be a notorious criminal. There is no evidence on the material before us to indicate the circumstances in which this escape took place. There was nothing to indicate whether it was related in some way to the civil disturbances to which reference has been made or not. We regard it however as a reasonable assumption there was some connection between the two and in any event what occurred must be considered in relation to a background of great civil unrest.

"[7] The three escaped prisoners, on their own, or with others made their way to the Monosavu Dam which had been taken over by persons associated with Speight and his supporters. At some point it is accepted that the three escaped prisoners acquired arms including a pistol and three M16 rifles.

"[8] ...

"[9] On 19th May 2000 the President had made public emergency regulations and on 2nd July 2000 the Interim Government issued an Emergency Decree. The Judge took the view that the broad effect of what he described as very similar provisions, was to confer upon the police and the armed forces acting jointly, responsibility for maintaining law and order. No submissions were made to us contrary to this view. We have seen a copy of the Emergency Decree and accept it contemplates that the police and army both had responsibility in restoring law and order.

"[10] During the course of the disturbances various road blocks were set up by the army, and the police, in some cases jointly and in others by the police or the army alone. These were established

at strategic points throughout the country for the purposes of establishing that control at which the decrees were aimed.

"[11]...

"[12]...

"[13] On arrival at Sawani, Corporal Kumar (the plaintiff) and Constable Ali were approached by an unarmed army sergeant who explained he had received a report that a missing vehicle was in the area with armed Fijians. The Sergeant requested that he be driven to the Qiolevu road block.

"[14]... They decided to go and search, and using the police vehicle and an army van carrying four more armed soldiers, the whole party went some six kilometers along the road where they came across a vehicle similar to that which had been reported missing. ... an army warrant officer left the vehicle to investigate. As he was doing so shooting commenced. The soldiers who were in the rear of the police vehicle jumped out and ran for cover. The driver was able to get out but Corporal Kumar seems to have been sitting in the middle of the front seat and was unable to get out.

"[16] It is not clear on the evidence but it appears that Corporal Kumar may have been injured at that time. Whether that is so or not on the facts accepted by the Judge, Alifereti Nimacere then appeared and went up to the police vehicle. He tried to get Corporal Kumar out of the vehicle, hit him several times with his weapon and then shot him dead as he lay on the ground in front of him.

"[17] It is accepted that at all times Corporal Kumar and Constable Ali were unarmed, nor they wearing any special protective clothing. The police in Fiji are not now and were not then armed.

"[18] It seems that neither of the policemen were aware that shooting might occur until they arrived at Qiolevu when the warrant officer told them shooting was possible. It is on those facts that the appellant (the plaintiff and widow of Corporal Kumar) based her claim against the defendants."

[36] The Court of Appeal later continued,

"[42] The appellant maintained however that what occurred must be considered against the background of what was happening in Fiji at that time and which was described by counsel as being one of a kind. We should say that the evidence with regard to the conditions in Fiji was scanty. Nevertheless we accept from the submissions of counsel on both sides, who relied on it for opposite purposes, that we are entitled to take judicial notice of the fact that armed disturbances had taken place and were continuing in Fiji, that people including one policeman had died as a result of the disturbances and that police officers charged with maintaining civil order could expect to be confronted with situations which could only be categorised as dangerous and where fire arms might well have been involved.

"[43] ...

"[44] ...

"[45] The question on whether a duty of care exists between a police commander and officers under his command has been before the courts on a number of occasions. We accept that the nature of the relationship means that the nature of the duty of care must be considered in the light of that relationship which defines its scope but we do not doubt the existence of a duty of care in particular circumstances. We accept that one of the circumstances which limits the operation of the duty of care, but does not exclude it, is public policy. There are undoubtedly circumstances where the nature of the obligations which members of the police accept as such that they are exposed to risk and where it would be quite unreasonable that there should be a claim as a result. Cases also establish that where decisions have to be made in the heat of the moment on inadequate information and an officer exposes a subordinate to risk, he or she could not be subject to civil liability.

"[46] We are prepared to accept therefore that a duty of care rested on the Commissioner of Police to ensure that Corporal Kumar was not exposed to unnecessary or avoidable risk where the nature and extent of that risk could be foreseen and precautions taken to avoid it.

"[47] In the circumstances of this case the evidence fell short of establishing that any Commander could have foreseen the situation which developed. ... What happened to Corporal Kumar was appalling but it is difficult to see that it could have been a situation which could have been foreseen by the Commissioner of Police or one which any instructions to police could have avoided. With some reluctance therefore we conclude as did the Judge in the Court below that while the appellant may have established a duty of care she had not

established the breach of that duty sufficient to establish liability in the circumstances of this case.

"[48] ...

"[49] Even if the risk to which Mr. Kumar was exposed was foreseeable we think that in terms of the cases public police requires that liability be negated. Corporal Kumar was engaged in cooperating with the army and in fact had a guard of eight armed soldiers, whose obligation it was to confront any armed persons who were encountered. The necessity to ensure public order is a significant responsibility of the police and could be affected if officers charged with obligations to ensure that public order was maintained or restored needed to look over their shoulders in general situations because of a possibility of some subsequent actions for damages. The undesirability of this was considered in the Dorset Yacht (see below) and illustrated further by the decision of May J in Hughes v. Nunn [1991] 4 L All E.R. 278. Corporal Kumar's death did not occur because he was deliberately and knowingly sent into a situation of danger for which he was not prepared. The situation which led to his death developed in a way which could not have been foreseen by his senior officers and in our view it would be quite contrary to public policy to find in the circumstances of this case liability existed."

[37] There are major differences between this case before me and the case of Kumar. For example, Kumar was a serving police officer whereas James Pillay is a member of the public. That action was against The Commissioner of Police and Others and in this case the action is against the Fiji Military Forces. The person causing the harm to Kumar was an escaped prisoner, in this case it was mutinying soldiers.

[39] I briefly consider section 52 of the Republic of Fiji Military Forces Act which states,

> "(1) No action shall be brought against any officer or soldier or 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) ..."

[40] The action before me is brought against the Fiji Military Forces themselves as opposed to any officer or soldier within those forces and secondly neither the plaintiff nor the defendants suggest that what the mutinous soldiers were doing was done by them under the Republic of Fiji Military Forces Act. Question of vicarious liability cannot arise.

[42] This is not a circumstance where there is a Military Forces exercise going on, nor is it as a result of lawful orders from senior officers but as part of an act of armed mutiny. I have found that the bullet that struck Mr. Pillay came from the gun of a mutineer. In these circumstances, what is the duty of care owed by the Military Forces to members of the public? Counsel for the plaintiff did not seek to persuade the court that had the mutiny come completely out of the blue that any duty of care would have been breached. He places his argument against the background of events in Fiji over the preceding months. That background was the one outlined by the Court of Appeal in the section labelled. "The Facts" in their judgment in the Kumar case. It is an agreed fact between the parties that the principal army unit involved in the takeover and the siege of Parliament was the CRW Unit. The evidence of the defence witnesses is that this particular Unit had its own armoury separate from the main armoury before the events of May 2000. Following the Accord

which brought the siege to an end the CRW weapons were not kept in their own armoury but at the main armoury in a separate bay. Further, the defence witness' evidence is that they were only allowed access once a month to those weapons to clean them. The 2nd of November was the third time upon which they had had that access. Further, it is the defence evidence that only a few days before 2nd of November there had been a traditional reconciliation ceremony between the CRW Unit and other members of the armed forces.

[43] Plaintiff's counsel argues that against this background there was a reasonably foreseeable risk, namely that CRW Unit members were still unreliable and this was recognised by dispossessing them of their weapons and only allowing them access once a month to clean them. He says that clearly shows the Military Forces foresaw a real risk of further unlawfulness by members of the CRW. That unlawfulness would necessarily carry with it a risk of death, injury and harm to members of the public particularly by gunfire. Counsel further urges that the simple precaution, even if access to weapons was to be allowed, of denying all access to ammunition would have rendered the events of 2nd of November virtually impossible. He says that simple precaution was not taken with calamitous results.

[44] Counsel also puts forward the argument that once the mutiny did take place the Military Forces were negligently slow in warning the members of the public by radio broadcast, touring loud speaker and other means to remain indoors and in particular informing them that stray bullets could go considerable distances, miles and not just yards.

[45] Defence counsel responded that the Military Forces can simply not be held liable for acts which were totally criminal, amounted to mutiny and for which the perpetrators have been convicted and sentenced to lengthy gaol terms. He said there is no evidence of any intelligence that such a

mutiny was to take place. He could have urged that a reconciliation ceremony had taken place a few days prior and that in itself would have considerably reduced or extinguished any lingering doubts as to the reliability of the CRW. Counsel for the defence pointed the tight security at the armoury, safeguards upon issuing of firearms, the steel doors and grilles which secured the building itself, the tight procedures for issue of arms and the limited circumstances in which they were issued.

[46] Defence counsel continues that when the mutiny did break out the actions of the defendants must be considered in the circumstances of those moments. He said the Military Forces contained the mutineers within the Barracks, alerted people in the surrounding districts to remain indoors, attempted to negotiate a peaceful resolution and mounted a successful counter attack and end of the mutiny within hours.

[47] I do note that plaintiff counsel only touched upon the question of public policy, whereas counsel for the defence raised the issue and cited cases in support.

[48] Counsel for the plaintiff rests part of its case on the suggestion that insufficient was done and quickly enough to contain and suppress the mutiny and to warn and make safe those in the surrounding areas. I will consider this point first.

[49] This was a mutiny by a trained and determined group of men. For those whom it immediately affected it was an immense surprise and shock. I accept their evidence on this. On the evidence before me the mutinous soldiers were contained within the Barracks area. Within a reasonably short time Army and Police officers were setting up road blocks in the immediate surrounding areas and warning people of the danger and what to do. Within a few hours messages were being put out on the radio to the effect that there were events at the Queen Elizabeth

Barracks involving gun fire and therefore danger to people in the immediate surrounding areas. It is easy in hindsight to say what could and should have been done and how quickly. The first concern would naturally be for those in the immediate vicinity. As time progressed that concern could widen out to those who still at risk, but at less risk than those in the immediate vicinity of the Barracks.

[50] The mutiny took place in the morning. It appears that none of the mutineers went outside the area of the Barracks. Within a few hours a task force to counter the mutiny had been formed, an attempt to resolve it peacefully had been tried, a plan of attack agreed and the plan put into effect. By mid to late evening the mutiny had been suppressed and there was no further out break of gunfire. Efforts were made by the police and army to warn people.

[51] Therefore, on the evidence before me, I cannot find that the Fiji Military Forces were negligent in the speed or manner with which they dealt with the mutiny and looked to the safety of the public. It must also be remembered that James Pillay was hit by the bullet between 3:00 and 3:30 pm on that day. Given the circumstances, it cannot be said the Fiji Military Forces were negligent in stopping the mutinous suppressive fire by that time. This is not the end of the case. Even if there was no negligence by the RFMF in reacting to the mutiny I must look to whether there was any other negligence by the RFMF.

[52] I look to see whether there was a duty of care on the Republic of Fiji Military Forces, whether they were in breach of that duty and whether it was foreseeable that Mr. Pillay would be injured and there was some special relationship between him and the RFMF beyond that of the general public. There are also important considerations of public policy to take into account.

[53] Section 112(1) of the Constitution states,

> "The Military Force called the Republic of Fiji Military Forces established by the Constitution of 1990 continues in existence."

Section 3(2) of the Republic of Fiji Military Forces Act (cap 81) states,

> "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."

[54] These are great and important responsibilities. The Republic of Fiji Military Forces is a body established by the Constitution, given their duties and responsibilities by the Constitution and the Act and are subject to the Constitution, the Republic of Fiji Military Forces Act and Law.

[56] Before May 2000, the Fiji Military Forces were one cohesive unit, acting under and respecting one command. By the time of the events of this case, the Military Forces were apparently under one command and respecting and acting in accordance with it. However, on the face of the evidence before me, there were suspicions that the loyalty and reliability one of unit, the CRW, was not one hundred percent. There had been an 'Accord' and parts of that unit had participated in the events of May 2000, including the lengthy siege of Parliament. They had not been permitted to retain their own armoury; their own weapons had been placed in a separate bay in the main armoury, that main armoury was under the control of Chief Armourer and not an Armourer from the CRW unit. They were only allowed access to it once a month to clean their weapons. Further, the very fact there had been a reconciliation ceremony a few days before high lights the fact that there were doubts about the

reliability of this unit. It could not be assumed that because such a ceremony had taken place that their reliability was assured.

[57] What is the duty of care upon the FMF in these circumstances ? In my judgment there is a three fold duty :

1. The Fiji Military Forces have a duty to ensure that guns, ammunition and weaponry are kept under their control and do not fall into the hands of anyone who will misuse them.

2. There is a duty on the Fiji Military Forces to ensure and maintain discipline among all its members at all times.

3. There is a duty to take immediate and effective measures to ensure the public are kept safe if there is a breach of either or both of duties 1 and 2.

[58] I have found above that there was no breach of duty 3. Was there a breach of duty 1 and/or 2 ?

[59] Counsel for the defendants in his written submissions has set out strong arguments to say there was no duty of care upon the respondents in the circumstances of this case. Even if there was , then there was no breach of the duty of care occurred as there was no special relationship between the respondents and Mr. Pillay above and beyond that of any other member of the public. Further public interest considerations mean that there should not be liability in any event.

[60] In the case of Ancell v McDermott [1993] 4 ALL ER 355 the plaintiff's wife was killed in a car accident when her car skidded on diesel fuel spilled on the road. Police officers knew about the diesel fuel but had taken no relevant action to prevent an accident. The English Court of

Appeal held that the police were under no duty of care to protect road users from, or to warn them of, the hazard which the police had discovered while going about their duties on the highway. The Court found there was no sufficient special relationship between the wife of this particular plaintiff and the police which gave raise to a duty to prevent the harm. It was found to be against public policy to impose such a wide duty of care.

[61] In the case Osman v. Ferguson [1993] 4 ALL ER 344, the English Court of Appeal held that although there was an arguable case there was a special relationship between the plaintiff's family and the investigating police officers, it would nevertheless be against public policy to impose a duty of care. This case involved the specific targeting of one young boy by a paedophile, a fact which was known to the police.

[62] I also look at the cases of Alexandrou v. Oxford [1993] 4 ALL ER 328 and Hill v The Chief Constable of West Yorkshire [1989] AC 53, a suit brought by the parents of a victim of the "Yorkshire Ripper", a serial killer.

[63] In this regard I have also specifically looked to the dicta in the case of Kumar v. Commissioner of Police and Others, see above. It must be remembered that there are significant differences of fact between that case and this.

[64] Counsel for the plaintiffs also put before me and I take into account the cases of the Home Office v. The Dorset Yacht Company Ltd. [1970] UK HL 2 and Godfrey v. New South Wales [2] [2003] NSW SC 275.

[65] Were the FMF in breach of their duty of care to ensure that weapons did not fall into the hands of anyone who would misuse them ? There are two parts to the answer to this question. In the normal course events the FMF must ensure guns, ammunition and weaponry are kept in secure

stores, a record is kept of guns and ammunition and weaponry from the moment of its arrival in the possession of the FMF until its final disposal or destruction. This necessitates sets of rules and practices, registers and regulars check. It also necessitates the nomination of persons who are in charge and responsible for these items.

[66] These are the measures one expects to be in place and maintained at all times. On the evidence before me, there is nothing to suggest that the FMF has breached its duty of care under heading 1 in this regard.

[67] It is not sufficient however to stop there. The FMF must at all times assess and be alert to individual instances of those who should not be in possession of firearms, for example, soldiers who are exhibiting symptoms of mental instability, those who are showing hostility towards other members of the forces or other persons (for example an estranged wife) and those whose loyalty and acceptance of command is in doubt.

[68] In normal times, if a mutiny of the kind which happened in November 2000 came out of the blue and there were no breaches of the general provisions to keep weapons safe then there would be no breach of the duty of care. However, as I have found above, the CRW was not regarded as reliable. There were the events of May 2000, the closing of their own armoury and moving their weaponry to the main armoury, the limited access and the reconciliation ceremony.

[69] The guns themselves used on that day could not cause extensive harm without ammunition. I do find the FMF was in breach of its duty under heading 1 in that it allowed men who were not regarded as one hundred percent reliable access not just to guns but to the ammunition as well. Had there been access to guns but not the ammunition then the events of that day in November could not have taken place.

[70] Was there a breach under Duty 2? For the same reasons as stated above in relation to Duty 1, I find that there was a breach by the FMF of its duty to ensure and maintain discipline amongst all its members. Again, had the mutiny come entirely out of the blue then there would not have been a breach. The plain fact is that the loyalty and obedience of the CRW were under suspicion and it was the duty of the FMF to ensure and maintain the discipline of those officers.

[71] Given these breaches the duties of care was it foreseeable that a gun battle would breakout and that people outside the barracks would be hurt?

[72] In my judgment, given the events of May 2000, and the ensuing events and given the strength of feeling, I do find it foreseeable that if discipline was not maintained then some members of this Unit might well take violent action. Feelings were still strong from the events of May as evidenced by the fact that a reconciliation ceremony was deemed necessary, the fact this Unit had been dispossessed of its own armoury and weapons and only had access to that weaponry once a month supports this.

[73] Accordingly, I find that it was foreseeable that if there was a breach of Duty of Care 1 and or 2 that there was a real danger of exchanges of fire.

[74] The duty to ensure that guns, ammunition and weaponry do not fall into the wrong hands must be a high duty. The reason is simple. When guns and ammunition fall into the wrong hands they are used and are highly dangerous.

[75] I cannot overlook the fact that the Queen Elizabeth Barracks are surrounded by residential areas. This necessarily means that if there is any kind of unlawful shooting then the public in the immediately

surrounding areas is at high risk. The "radius of risk" necessarily must be the range of the weaponry held at the barracks.

[76] This very circumstance necessarily means there must be a special relationship between those charged with ensuring the duties of care are maintained and members of the public who are within the "radius of risk". In my judgment the very fact that Mr. Pillay was hit by a bullet which came from the Queen Elizabeth Barracks means that he was within the "radius of risk". There was a special relationship above and beyond that owed to any ordinary member of the public in Fiji.

[77] Counsel for the respondent has properly argued that should I reach these conclusions then in any event liability can not be established as there is a public policy interest in holding so. This is a powerful argument. Counsel for the respondent relies upon the evidence from his witnesses, particularly the Chief Armourer, that they were completely shocked and surprised that their own comrades could behave towards them in the way they did. The argument is set out by Lord Kinkel in Hill v Chief Constable of Yorkshire [1988] 2 ALL ER 238. This was the case of the alleged negligent failure by police officers to catch a serial murderer sooner than they did, which resulted in the death of the last victim. At page 243G, Lord Kinkel stated,

> "That in my opinion there is another reason why an action for damages in negligence should not lay against the police in circumstances such as those of the present case, and that is public policy... Potential existence of such liability (refered to earlier) may in many instances be in the general public interest, as tending towards the observance of a higher standard of care in the carrying on of various different types of activity. I do not , however, consider that this can be said of police activities. The general sense of public duty which motivates police forces is unlikely to be appreciably reinforced

by the imposition of such liability so far as concerns their functions in investigation and suppression of crime. From time to time they make mistakes in the exercise of that function, but it is not be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of the function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. ..."

[78] Lord Kinkel then went on to set out specific reasons in relation to the police why it would, in fact be counter productive, for public policy to find liability. In this regard again I have reconsidered the dicta in Kumar v Commissioner of Police and Others.

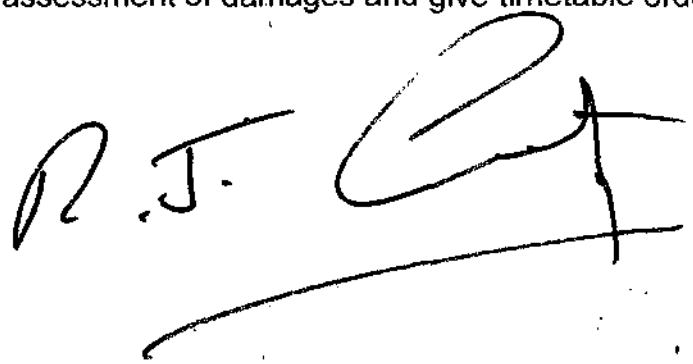
[79] In this case I am of course considering Military Forces as opposed to the Police or any other Constitutional or statutory body. I am specifically considering the circumstances of Fiji. Further, the ambit of the duties of care I am considering in this case are far narrower in their practical inception than the general duty imposed upon a police force to prevent and detect crime.

[80] I do find that within the setting of Republic of Fiji and its history before, during and after the events of November 2000 there are strong public policy reasons in favour of fixing the Fiji Military Forces with liability should they fail to keep their guns, ammunition and weaponry under their control and from falling into the hands of anyone who will misuse them. There is liability should they fail to maintain and ensure discipline amongst their officers. If they do not do this then legal actions for compensation can be brought against them.

[81] The defence have urged that Mr. Pillay was contributorily negligent in that he was outside his house when these events were taking place,

especially as radio messages and common sense would dictate that he stayed inside. I do not accept this argument. First, his house was a long way from the barracks and there is nothing to show he knew or should have known that he was in danger given that distance. Further, the evidence does not show that in the time before he left his house it was obvious that bullets were flying in the vicinity thereof.

[82] Accordingly, I find the defendants are liable in negligence to the plaintiff. I will set a date for the assessment of damages and give timetable orders to that hearing.



(R.J. Coventry)

JUDGE