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IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION
Action No. HBC 0227 of 1996

No. 21/2007

BETWEEN: **FRED WEHRENBERG** of Nananu-I-Ra Island

First Plaintiff

WALBURGA WEHRENBERG of Nananu-I –Ra

Second Plaintiff

AND: **AMINIASI TUVURA** DC179, Police Officer, Rakiraki

First Defendant

TOMASI NAKATARAU SGT 430, Police Officer, Valelevu.

Second Defendant

SUNIL DUTT GOSAI DC 1454, Police Officer, Rakiraki.

Third Defendant

COMMISSIONER OF POLICE, Suva

Fourth Defendant

THE ATTORNEY GENERAL & MINISTER FOR JUSTICE

Fifth Defendant

Plaintiffs in Person
Mr S D Turaga and Mr S. Tuwaqa for the Defendants

Dates of Hearing: 16 to 19 January and 22 to 24 January 2007
Date of Oral Submissions: 26 January 2007
Date of Judgment: 9 February 2007

JUDGMENT OF FINNIGAN J

[1] The Plaintiffs seek damages for certain actions and inactions of police officers. In a Statement of Claim filed on 3 July 1996, amended on 17 April 2000 they claim that the First and Second Defendant tortured the First Plaintiff physically and mentally at the Rakiraki Police Station on 20 July 1993 in order to obtain a confession and signatures from him for offences, which he did not commit. In a second cause of action they claim that on 18 June 1994 the Second and Third Defendants did the same.

[2] In a third cause of action they claim negligence by the police generally, being negligence in breach of their statutory duty between November **1990** and January **1996**.

[3] In a fourth cause of action added in the Amended Statement of Claim they claim a similar breach of statutory duty between October **1998** and November **1999**.

[4] The third and fourth causes of action are pleaded against the Fourth Defendant both in his capacity as Commissioner and as representative of other police officers.

Introduction:

[5] The background to these claims is best summarized from the

closing submissions of the First Plaintiff, and some recourse to the evidence. He and his wife are German Nationals and New Zealand Citizens. Before coming to Fiji they had lived and worked in three other countries where he earned his living as an Electrical Engineer designing components and systems for petro-chemical plants, universities, schools etc. He says he was very successful and in New Zealand the last country where they lived he worked hard and did well so that they were then able to afford to retire to Fiji.

[6] They bought residential land on Nananu-I-Ra Island and devoted themselves to horticulture which was the hobby. They renovated the house and developed a large garden which contained many plants. This began in 1988.

[7] For about a year the Plaintiffs adjusted to their new environment and lived in harmony with their neighbours.

[8] However after that year differences began to arise. Disharmony and arguments began to grow. These developed into violence. Except for a period of peace between the third cause of action and the fourth cause of action (February 1996 – September 1998) the disharmony and violence continued to escalate.

[9] This all began in about 1991. Fundamentally, one must observe that there are not only two sides to an argument but also at least two different accounts of it. I did hear some of the other side, from two civilian witnesses called by the Defendants. Bearing that in mind, the discord appears to have surfaced in the early months of 1992. It is said that a neighbouring couple Louise Anthony and her husband were illegally using their residence as a guesthouse.

For a time the Second Plaintiff helped this couple with their financial and tax records. She began to become more aware of the circumstances and sought advice about what she was doing in the Planning Section of the Ministry for Housing, Urban Development and Environment. There she was informed that the tasks she had been asked to perform were illegal. She said this to the neighbours and told them she could no longer help them. The neighbours were long-time residents of the island and took offence.

[10] They did not let matters rest there. Neither it seems did the Plaintiffs. There were several families that had lived on the island for a long time. It seemed to the Plaintiffs, on the basis of what they had been told in the Ministry of Housing, that several of those were illegally operating guesthouses for tourists in what the planning authorities had intended should be an isolated residential locality.

[11] They had bought their land in order to live in an isolated island environment and were unable to avoid pointing out what they saw as an intrusion into that environment by blatant illegality. One at least of the neighbours advertised on the Internet as a resort, offering packages and charging rather high prices in US dollars. Others advertised in brochures and in magazines including, I was told, that of Air Pacific.

[12] As time passed, the Plaintiffs brought all this to the attention of the authorities, particularly the Minister of Housing, the Ra Rural Local Authority and the Police. Among them all they were the enforcement authority. As early as 7 October 1993 the Minister of Housing himself wrote to the Attorney General and Minister for

Justice (before much of what followed had occurred) urging him to look into the situation and deal with it (Exh. P2).

[13] That was because by October 1993 the original antagonism of one neighbour had become the antagonism of several neighbours and the antagonism had escalated to violence. This expressed itself in stone- throwing. Three months previously in July 1993 the Second Plaintiff had gone to Suva to have the situation recorded by the Daily Post which on 22 July 1993 published her account of four stone-throwing incidents in which rocks had been thrown through the windows of their house. By then the Plaintiffs had made 34 written statements to the police of offences which they alleged had been committed against them, being assaults, arson, thefts, threats, damages to property and attempted murder. The Plaintiffs at this stage were making no public complaints about the police. At least two people had already been charged and had appeared in the Rakiraki Magistrates Court. The Second Plaintiff's account to the newspaper is Exh. P5. None of the facts so far are disputed.

[14] However by the end of the period at issue, November 1999, the number of incident reports filed by the Plaintiffs with the Police had risen to 182. Some of the reports alleged more than one offence committed by other persons and the number of alleged offences against them was over 200. The Plaintiffs kept a record of these things and a long detailed schedule of offences they said were committed against them was Exh. M1.

[15] In the course of all this, not only the Plaintiffs were laying complaints with the police. Their complaints were investigated (to what degree is disputed) and in the course of those investigations

the Police received complaints by the alleged offenders who themselves alleged offences committed against them by the Plaintiffs. These other complaints also were investigated and from two of them in particular, charges were laid against the First Plaintiff. Pursuant to those two charges the police on two separate occasions arrested the First Plaintiff and it is from those two arrests that the two claims of torture arise. These are the first and second causes of action.

[16] By contrast, the 182 incidents reported by the Plaintiffs resulted in no more than about 30 charges laid against the neighbours who throughout the hearing were called by the First Plaintiff the gang of criminal intimidators. Not one of these resulted in a conviction. On one occasion 22 of them were set down for hearing as defended charges in a single day before a single magistrate and it seems all were dismissed, apparently for non appearance by the complainants (the Plaintiffs). All the police witnesses and the Plaintiffs described these as acquittals. It is from the apparent failure by the police to bring to justice even a single one of the alleged perpetrators of over 200 alleged criminal offences against the Plaintiffs and their property that the third and fourth causes of action arise.

[17] The venue for the offences which the Plaintiffs alleged against their neighbours was generally on or close to their own land. They made the point in evidence that they never offered violence to their neighbours even by way of defending themselves. This of course is disputed and it was the police acceptance of the neighbours' claim of offences against them that gave rise ultimately to the first and second causes of action.

[18] It seems that the Plaintiffs did not normally stray far from their own property and the neighbours brought the battle to them. There seems little dispute that what occurred always occurred in the vicinity of their house or garden. There seems little dispute and the photographs tendered by the Plaintiffs (mostly in photocopy form, the originals having been lost by the Court), show damage to windows in particular and to trees and shrubs which are consistent with violence. They show property damage consistent with perhaps a windstorm or deliberate destruction. The evidence proves beyond doubt that some persons entered on to the Plaintiff's property from time to time and damaged the house and some of the foliage in the garden.

[19] Interwoven with this was another dispute entirely. The seaward boundary of the Registered Title to their land was the mean high water mark. They actually were entitled to part of the beach in front of their house. The people with whom they were in dispute claimed a right to walk on that part of the beach. From the evidence of the two Plaintiffs and of the two residents called as witnesses by the police this battle for rights was bitterly fought. On one occasion at least it seems to have been fought physically on the disputed part of the beach because the police laid charges of affray against 6 or 7 people including the first Plaintiff. He is very disappointed and bitter, and says that he was arrested and subjected to torture as a result of the charge against him while the charges against all the others were "acquitted". Even the charge against him was ultimately abandoned by *nolle prosequi.*

[20] The Plaintiffs took every step they could to clarify and enforce their claim of right. By 11 October 1995 they had built a rock wall and had applied to the Director of Town and Country Planning for

relaxation of Foreshore and Access Reserve on their two Certificates of Title. This had initially been refused but their appeal (7 August 1995) to the Minister for Lands, Mineral Resources, Energy, Local Government and Environment had been partially allowed in that a foreshore and access reserve over the property was relaxed up to the stone walls. No easement had ever been registered on the titles however and argument over their rights was carried on by lawyers in the police department and the office of the Director of Public Prosecution. So far as I can see the battle continued until the Plaintiffs sold their property and moved away in 2004.

[21] The significance of this for present purposes is that in 1995 government surveyors came on to the Plaintiffs' property. A witness who was a member of the surveying party on each occasion gave evidence but I have no idea (apparently nor did he) of precisely what the surveyors came to survey, nor what authority they had to do so other than their rights under the Surveyors Act Cap 260. A police witness DW10 Ilaisa Vulaono said it was he who got the surveyors to assist with complaints of trespass onto the Plaintiffs' land. The First Plaintiff was charged with an offence for allegedly obstructing these surveyors and thereby arises a cause of action in another matter, which I am also deciding today.

[22] That other case was to all intents and purposes consolidated with the present case and heard immediately after it. The submissions made by the parties were made at the end of the second case and covered both. That other case (HBC229/1997L) makes other claims arising out of these same facts within the period 1992 until March 1997 when all charges against the First Plaintiff were abandoned by *nolle prosequi*. I mention this because in

submissions and in evidence both parties addressed me on events right up to 2004, when the Plaintiffs left the island. This is understandable because to tell the whole story from either party's point of view one must cover that 15 year period. To decide the present case however I can take account of no events after November 1999.

[23] It is necessary to say all this because the First Plaintiff in final submissions asked me to take account of 14 years (2000 to 2004) of police mistreatment, which he claims, has ruined his life and his wife's life and damaged his health by constant stress. I shall have to go into this claim more a little later but he described it as a life of being intimidated, having rocks thrown through his windows and of living in fear because of a failure or refusal by the police to stop the attacks upon him by his intimidators. He said that stress meant not sleeping, or waking when a coconut fell, wondering whether yet again there were trespasses on his property. He spoke of his feelings upon seeing police for whom in other countries he said he had great respect. By the time his experience of the police was well advanced he said that seeing a policeman on the island caused him to wonder whether they were coming yet again to blame him for things that he had not done.

[24] All of this he said became his full time occupation, taking all his mental capacity and physical resource. The plethora of fine detail, recorded over many years, which he presented in evidence and with which he showed absolute familiarity in memory leaves me in no doubt about that particular claim. He said it resulted in a loss of faith in justice and loss of his own reputation. He said he and his wife became a laughing stock not only on the island but to the community at large, in the Rakiraki district.

[25] He was particularly concerned throughout his submissions with one item which what he said was the prime focus of the Defendants' case. This he said was their attempt to continue to destroy his character. He asked me to see the evidence of the police and civilian witnesses as being once again the police "pounding at me, ruining my character".

[26] He submitted that the Court had seen the police machinery at work. He referred to an occasion on 13 October 1992 when the Police Divisional Commander Western came to the island to address a meeting of the residents. Already by that time the disharmony, discord and physical violence had already reached the level where a police officer of that rank had come to investigate the problems. It was being said frequently at high level that the solution to the island's problems lay with the residents themselves, (one example only is Annexure 727 in HBC 229/1997). He said that all those who had reported against the Plaintiff were at the meeting, shouting at them and accusing them of things they had not done, to which they could hardly make reply. He said what was noticeable was that the police officers present were amused by this, they liked it and were laughing, making himself and his wife look like clowns and a spectacle.

[27] He then said that the court had seen how these same officers reacted because it had happened in court when one of the island residents was giving evidence. He said that what occurred was typical and the police have always done that.

[28] That was indeed a matter I had taken seriously. It developed like this. On day three of the hearing, Thursday 18 January 2007, I directed the first police witness Acting Sergeant Aminiasi Tuvura at the conclusion of his evidence to remain in the courtroom while the other police witnesses were called. The next day, Friday, he was not in the courtroom and after the lunch adjournment a complaint was made by the second Plaintiff that she had come across him during the lunch adjournment that day sitting and laughing with the other police witnesses who had not yet given evidence. She gave evidence of what she said she overheard. This witness was recalled and questioned by the court. His answers are recorded. He denied discussing the case in breach of a warning. He was not convincing. He was again directed to remain in the courtroom. On day five of the hearing, 22 January 2007, at the lunch adjournment I directed Mr Turaga leading Counsel for the Defendants to let the police officers who had given evidence go back to their duties. Upon resumption at 2.15pm it seems they were all still there. The witness giving evidence at that time was Inspector Sunil Dutt Gosai. When he finished his evidence at 3.00pm I directed him to leave the courthouse. Shortly after that, at 3.15pm the first of the two residents of the island who were called for the defence (DW 7 Hoffman) was giving evidence about a particular time when he said three senior police officers came from Suva and one of them came to the island. At one of his remarks about the first Plaintiff the three or four police officers at the back of the court broke out in laughter. I reminded Mr Turaga that I had already directed that they go away from the courthouse and ejected them from the courtroom. This little series of events undermined what faith I may have had by that time in the impartiality of the police witnesses towards the claims that I am

yet to decide. My assessment of the credibility of each had already been formed by that stage but cannot be unaffected by this incident.

Credibility of the Witnesses:

[29] This case marked the 30th anniversary of my first sitting as a judge. At that time, influenced directly by an eminent barrister who since became a judge of the Fiji Court of Appeal, I had become a (cautious) disciple of the Irish Barrister Serjeant Sullivan. One of his teachings was about deciding credibility when conflicting evidence is given by a police officer and a civilian witness. If the decision were not made by other factors, one should, he taught, favour the evidence of the police officer because it is not in the interests of the state that the security of the citizenry should be disturbed by a finding adverse to a policeman's credibility.

[30] Some may find the proposition outrageous, but for a judge of independent mind it may well stir a decision against the evidence of a police witness in the facts of a particular case. Sometimes the facts may dictate a judgment contrary to a police officer's evidence. In that event a decision to reject that evidence is the only decision which is in the interests of the state. Far from disturbing the citizenry it should enhance faith in the courts, which are superior to and independent of the law enforcement agencies. This is the point made several times by the first Plaintiff in his closing submission. Over the years one has heard many times, not just in the criminal courts that a defence is harder to make out than a prosecutor's allegations. Hence the criminal standard for defendants, raise only a reasonable doubt. In his closing submissions the first Plaintiff said, "in a police station surrounded

by police officers they can do anything to you, hit and assault you then they can all close ranks and deny and back each other up. This can happen in any country, not just Fiji. But wherever it may happen witnesses are hard to come by. I however have sworn my affidavits and I rely on these and those of my witnesses and upon cross-examination". He himself made no direct submissions about credibility of the police witnesses.

[31] Taking the witnesses for the Plaintiff first, there were four. Each of the Plaintiffs swore two affidavits and the other witnesses one affidavit each. The two witnesses swore theirs in March and April 1995 and the two Plaintiffs swore theirs in June and July 1997. They swore a joint supplementary affidavit for the fourth cause of action (added in 2000) in January 2001. All four of these deponents were made available and were cross-examined. This procedure was accepted without comment by Counsel for the Defendants. It had the advantage that the evidence was sworn at a time reasonably near the events recounted and in extensive cross-examination none of the deponents changed one word of their evidence.

[32] The Plaintiffs have kept detailed daily records over many years and made detailed calculations of categories of incident and of alleged offence and totals of both. They have taken many photographs and kept copies of correspondence both to and from themselves and to and from a multitude of persons private and public unincorporated and corporate. They also have obtained copies of letters written between various public bodies and other persons. All these documents, mostly in photocopy form, were tendered in evidence. There are certainly over 300 letters and documents in evidence along with three folders of documents which were

tendered together and which are said to contain 250 letters particularly relevant to the present case. The First Plaintiff in particular demonstrated a detail in record keeping which is unprecedented in my experience and showed a grasp of the complex and interwoven facts, which he put before the court that could not be shaken. In his lengthy opening address and in cross-examination as well as in his final submissions he stated readily the relevant dates and names for the subject in hand or else knew precisely where to look for the one relevant document which contained the information he required. Much of the questioning related to the years 1993 to 1996 and every relevant fact which he stated was as sworn in his affidavits in July 1997. The second Plaintiff was tested to a lesser extent but she also was consistent throughout with her affidavits sworn in June 1997. The two witnesses swore their affidavits in 1995 and their recall of the events stated therein was total. These were not professional witnesses, one was an official in the Department of Women and Culture (PW3 Saukalou), the other was and is a taxi driver (PW4 Rauf).

[33] Evidence presented and tested in such a way is prima facie strong evidence. One must await the evidence of the other party in order to decide whether it is credible. At this point if an assessment must be made, it has to be that the evidence is by and large correct, the Plaintiffs have accurate and objective recall and so do the two other witnesses who have on the evidence become involved only incidentally. The only alternative is to find that the two Plaintiffs are subjective obsessed and delusional (or, as suggested by several police witnesses and by Counsel in submissions, simply telling lies but for no reason which the defence was able to suggest or prove). The only alternative for the two witnesses is to find some

reason why each is still able to withstand strong cross-examination on their accounts of events which they said they observed only incidentally 12 and 13 years ago, and to which they swore affidavits over 11 years ago. These witnesses were Sereana Saukalou and Abdul Rauf.

[34] By contrast the two civilian witnesses called by the defence were both long-term residents of the island and were both deeply personally involved in the disputes in question, and both were still prepared to carry them on vocally and subjectively with the first Plaintiff while he cross-examined them. DW7 Carl Hoffman in particular made no secret of his dislike for the Plaintiffs and of his relief at their departure from the island. He did not disguise the fact that this may have been related to his purchase of their property as first and only bidder at an undisguised under-value on a forced sale. He began cross-examination by admitting that he had been convicted of assaulting the first Plaintiff ("in the first case no, in the second case yes"). My notes show that very soon the cross-examination developed into a "high decibel ding-dong between two heavyweights, but interference is not warranted". After that was over his next noted answer was 'I <u>am</u> a hostile witness, I didn't want to come, I thought I had seen the last of you". His next reply after that was "I am not a hostile witness, Town and Country Planning declared it an illegal wall.....".

[35] In many ways this witness I thought was salt of the earth. However his view of the argument can be considered objectively only after one accepts that he is irrevocably espoused to only one side of it.

[36] The topic of illegal guesthouses came up during cross-examination. This witness agreed that he had been charged by the police with the offence of running an illegal guesthouse. The investigating officer for that case DW12 Saimone Ratu, had given evidence that he had been unable to obtain the vital evidence he needed for the charge, namely proof that money had changed hands between houseowner and guest. The account of this witness was that "it was all thrown out". Referred to a letter from Ra Rural Local Authority (Exh. P10) about this, he then claimed that the author of that had been dismissed for corruption which may or may not have had little to do with whether he had been running an illegal guesthouse. His last answer to the first Plaintiff in cross-examination was itself a question; "how did it affect you so that you had to put your spoke in the wheel? ". Though entertaining and entirely believable as to his beliefs in the matter I found this witness has little credibility about the matters of fact which the Defendants wanted him to prove.

[37] The other civilian witness was DW8 Sera Anthony. After some initial uncertainty during which a Fijian interpreter was sought and brought, this witness showed that she speaks, reads and argues fluently in English. It was with members of her family, Mrs Louise Anthony and her husband, that the very first discord over tax etc returns (above) had arisen. The burden of her evidence she stated early in her evidence in chief:

[38] *In 1989 everything was okay until Fred and Buggi came.*

Everybody was friendly. Then I went to court. Now when they moved from the island everybody is happy. Fred says he owns that place which he does not own and I go to court. [witness repeats the

first sentence above in answer to the next question then continues] there was a big party at the beach when they left. There were 20 something people there, because Fred was leaving.....".

[39] Among the criminal complaints lodged by the Plaintiffs was one for theft of a signboard, which they had erected for the purpose of enforcing their right to ownership of the beachfront. This board had been (inter alia) stolen at one time. The witness went on "*I took your signboard: that case was thrown out. .....it is not your property I only take things which I know. It is not your property*".

[40] Subsequently in cross-examination by the Second Plaintiff this witness was asked was she convicted of any offence. She replied, "maybe once ....." Pressed further she replied "I can't say yes or no". Pressed further on whether she had been convicted of assault on the first Plaintiff with Carl Hoffman, she replied " not Carl, only me". At this point I noted that she was a prevaricatious witness.

[41] I did not find this witness helpful. She did say that right now she would like to be friends with the Plaintiffs because they no longer live on the island but that while they were there "nobody was allowed to walk there". She proved to me and I accept that while the Plaintiffs lived on the island they were at loggerheads with people like her, feelings ran high, feelings still run high, and would again be expressed in discord if the Plaintiffs were to return. Her evidence did not go beyond that.

[42] Two court officials gave evidence for the Defendants about the events in the Rakiraki Courthouse Registry on 20 July 1993. They were consistent with each other and with the police officers. They gave evidence that the police officers forcibly removed the First

Plaintiff from the Registry while he forcefully resisted. These were DW1 T. Kumar and DW13 O. Ravukivuki. They did not observe, nor were they required by Defence Counsel to recount, any events other than that. The credibility of DW4 however was dented somewhat by his readiness to say "it's all lies", and "it's a lie" to the First Plaintiff's propositions before he had heard them even during evidence –in-chief. My impression from his account in particular was that he had participated in a collective refreshment of memory with the police officers.

First Cause of Action: Torture on 20 July 1993

[43] The evidence about this is in the affidavits and cross-examination of the First Plaintiff, the Second Plaintiff and DW3 Sereana Saukalou, and of DW1 T. Kumar, DW13 O.Ravukivuki, DW2 A/Sgt Tuvura and DW3 Insp. Sukula.

[44] There was an event on Nananu –I -Ra island on 20 February 1993. Arising from that the First Plaintiff lodged a complaint of assault on him by a "gang". The police went to the island and after interviewing persons involved, alleged to the First Plaintiff that he had assaulted one of them, Matilda McCreadie. By 13 May 1993 he had not been charged and he wrote to the Director of Public Prosecutions in Suva asking that official to instruct the police officers to charge her, not him (Annexure A1).

[45] On 16 July 1993 the First Plaintiff met the Commissioner of Police (Arnfield) in Suva and complained that the police officers at Rakiraki were not conducting investigations properly. The Commissioner said he would send two Lautoka police officers to the island to investigate which did happen. Before it did however,

on 20 July 1993 the First Plaintiff was in the Rakiraki Courthouse and was arrested by Tuvura and Sekula and brought to the police station for interview on a proposed charge about the alleged assault on 20 February, 5 months before.

[46] Detailed affidavits by the First Plaintiff the Second Plaintiff and DW3 make allegations about the conduct of Sekula, Tuvura and Nakatalau in the Rakiraki police station. The four witnesses for the Defendants however about that tell a different story. It is out of that conflict of evidence that I must construct an account on the balance of probabilities of what then occurred, and whether it amounted to torture. There is however a prior conflict to be resolved. This concerns the arrest itself.

[47] From the evidence of the four police witnesses and the station diary (Exh. D1) the First Plaintiff came to the police station at 8.30am and was arrested on a Bench Warrant issued by a Magistrate in respect of some other matter. He was held in a cell and was taken to the courthouse after 10 minutes at 8.40am. There in chambers he was bailed by the Magistrate. He signed his bail bond in the Registry and then Tuvura and Sekula apprehended him in the courthouse and brought him to the station.

[48] All four defence witnesses (the two court clerks and the two police officers) say that he protested strongly and resisted being arrested shouting "at the top of his voice" and holding tight to a window bar. The bar was bent during police efforts to pull him away.

[49] The decision to apprehend him was Sgt. Tuvura's. He was investigating officer in the Matilda McCreadie assault allegation. He said his intention was to bring him into the station for questioning, i.e. to interview him for a statement about the allegation of assault against him. As it happens he now cannot remember whether during what followed be obtained a statement or not.

[50] About what followed the witnesses give two consistent but different accounts and it is there that the first cause of action arises. However the events that followed could not have occurred unless this arrest had taken place. Was the arrest lawful? Its purpose was to bring a suspect to the station. He had not been interviewed about the allegation against him, nor had he been charged. What power did the police officers have to arrest him in that circumstance?

Was the 20 July 1993 arrest lawful?

[51] Counsel for the Defendants in submissions said the power was given in the Police Act Cap 85. He referred me to Ss. 3, 5, 7, 8, 17(1), and in particular Ss. 5 and 17(1). He then invited me to consider Ss. 18, 24, 31 and 47. I have done so but none of these provisions helped me. He then referred me the Criminal Procedure Code Cap 21, S. 21, parts of which are as follows:

> **21.** Any Police officer may, without an order from a Magistrate and without a warrant, arrest –
>
> *(a) Any person whom he suspects upon reasonable grounds of having committed a cognizable offence;*

(b) *Any person who commits any offence in his presence;*

(c) *Any person who obstructs a police officer while in the execution of his duty, or who has escaped or attempts to escape from lawful custody;*

.....

[52] Counsel's submission thereupon was that a complaint of assault had been made, the police officers could not find the alleged offender, opportunity to interview him arose in front of their eyes, and their motive was only to carry out their duty. To illustrate that they had correctly exercised the authority given to them by S. 21 he referred me to **DPP –v- Singh** [1987] FJCA 4; [1987] SPLR 113 (FCA), judgment 13 March 1987. He supplied a copy of the judgment taken from the Internet. I have read it and did not find it helpful. It is on a different point. It would apply if the two police officers had arrested the First Plaintiff for some offence he seemed to be then committing (S. 21 (b)), but they did not. They took him into custody by force and against his will as a suspect for interview.

[53] Counsel then referred me to Ss. 22, 26 and 31. He urged me also to read Ss. 51 –53, 57 and 58. I did so and with the exception of 26 (the power to release on bail) I read them without much profit.

[54] One case in point that I have found is **Deo –v- The State and Chand –v- The State** [2003] FJCA 20; AAU0015 and 16 of 2000S (FCA) judgment 16 May 2003. The police officers could not have been acting under S. 21(b) or under (c). If they had power at all it must have arisen from suspicion upon reasonable grounds that the First Plaintiff had committed an assault offence (not by that

time specified, but in any event cognizable). In this latter case the Court of Appeal stated (at page 4 of the Internet Report);

[55] *In that the law requires suspicion on reasonable grounds, an objective assessment by the arresting officer is required; see the discussion of this power to arrest in* ***Blundell –v- Attorney-General*** *(1968) NZLR 341, C.A.*

[56] In **Blundell** , Turner J said (at p. 356 line 41:

Detention while making "inquiries" cannot in my opinion be justified under the law of this country.

[57] McCarthy J said (at p.357, l. 18):

Many might think that what the Police officers did was not unreasonable in the circumstance, which faced them, but the principle involved in such an episode is of much greater importance than a casual look at it might reveal, and I think it necessary to state once again the unmistakable essence of that principle.

One fundamental rule of the common law which we have inherited as part of the British system of justice is that any restraint upon the liberty of a citizen against his will not warranted by law is a false imprisonment....."

[58] In my opinion the arrest of the First Plaintiff was in breach of his fundamental rights and was unlawful. As did the Court of Appeal in **Blundell** I think that everything following it occurred while the First Plaintiff was unlawfully detained. He has however made no claim at all about that and this must be recognized. It does not

affect the decision of fact whether or not he was tortured. It would go only to quantum of damages.

The events in the Police Station on 20 July 1993:

[59] About that claim of torture, economy now dictates that I set out the conflicting accounts only in outline. The First Plaintiff, Second Plaintiff and PW3 all say they experienced saw and/or heard an incident in which the three police officers played a part. They say the First Plaintiff was manhandled and shouted at in a degrading manner. He was lying on the floor holding his stomach. He was kicked in the wrist. He begged the police officers to get him a doctor. PW1 (Saukalou) says it was she who insisted that the police get the First Plaintiff to the hospital. No connection between this witness and the Plaintiffs was demonstrated, indeed cross-examination showed only that she had little connection with them.

[60] The two police officers DW2 and DW3 say that the First Plaintiff fell to the floor spontaneously and Tuvura thought that he was having a fit. He was shaking and shouting "at the top of his voice". Tuvura tried to sit him a chair but he held tight to the table leg, moving the table.

[61] After 10 minutes of this his wife came in and they conversed in a foreign language. The police witnesses say he demanded to be interviewed in German. After a few hours and some conversation with his superior officers Tuvura says he was able to interview him. He says the First Plaintiff then denied assaulting Matilda McCreadie and was taken straight for a medical examination.

[62] About the medical examination there are widely –even wildly- conflicting accounts. The First Plaintiff says he was given oxygen and an injection and was put on a drip and admitted to the men's ward. He said an x-ray was taken of his stomach. He says that after two hours the policemen had succeeded through misinformation and lies in convincing the medical officer to let them take him away. He said he was forced from his bed and taken back to the station. There he said he was pressured to sign forms and that Tuvura pushed a pen into his hand forcing his hand, arms and shoulder to make him sign. He said he signed some forms and gave fingerprints in order to escape the ill treatment and left the station at about 3.30pm.

[63] The police officers deny that any of this happened. They rely on the station diary (Exh. D1). They say he was taken to hospital because of the distress that he was causing to himself and that after a short time he was released by the hospital authorities and they took him back to the station. The diary states they left at 1502 and returned at 1530hrs. They point to the medical report of the incident, which was written by Dr. K.S Uluitoga the Acting Sub-divisional Medical officer Ra, which the Plaintiffs had produced as annexure A3. The report states:

[64] *The attending Medical Assistant assessed that the clinical presentation was suggestive of Malingering and Depression. A second medical officer assessed the patient to be suffering from Hysteria.*

[65] This is actually selective reading of the medical report. The First Plaintiff claimed that the person who wrote it did not examine him and the report bears that out. It also confirms that an x-ray was made, though of his chest. It stated that he was "*ambulatory, shouting, sweating and was in obvious pain. Blood pressure, pulse and respiration were noted to be normal. Physical examination proved to be normal except for tenderness over the left hypochondrium without any outward signs of physical injuries.....*". *It finishes with the words "he was sedated and subsequently discharged after two hours of observation at hospital".*

[66] The report also sets out that the First Plaintiff "*presented with a history alleging that policemen at Rakiraki Police Station punched him in the abdomen, causing severe epigastric pain and difficulty breathing. He also alleges that he was booted by the same officer. The accompanying police officer, explained that the above mentioned was arrested and completely calm until he was required to give his fingerprints, at which time he became hysterical".*

[67] The hypochondrium is in the stomach region, or epigastric region.

[68] On the balance of probabilities this report clearly favours the account of the First Plaintiff. It contradicts the evidence of Tuvura that he fell spontaneously to the floor as soon as the interview started. It contains an immediate contemporary record of the complaints of assault which subsequently have been made in this court. It states that the First Plaintiff was detained in the hospital for observation for two hours. This appears to be in addition to any time spent in examination assessment and x-ray. This

conflicts with the station diary which records a total absence of 28 minutes for this hospital visit.

Decision about the events in the Police Station on 20 July 1993:

[69] In assessing the credibility of the witnesses I note that the defence witnesses showed good recall, as did those for the Plaintiffs. However this was restricted largely to their similar accounts of what they say were the main events and in cross-examination they were not impressive as to recall of supporting detail. The factors which in my opinion favour the Plaintiffs' account are:

1. The credibility factor in the witnesses themselves;
2. The long period which the First Plaintiff spent in the police station. I accept that both he and the diary are correct in stating his final departure time as 3.30pm, but find that his time at the hospital was over 2 hours (say 2 ½ hours). This reduces the period of detention in the station from 5 hours to about 3 hours. On balance in my opinion even that reduced period favours his account of what occurred there rather than that of the two police officers.
3. The statements in the medical report, annexure A3.
4. The fact that PW3 Saukalou was an unconnected and disinterested witness.

[70] The factors in favour of the Defendants' account are:

1. The station diary;
2. The medical report annexure A3;

3. The consistency of all 4 defence witnesses accounts as to the claimed arrest in the Registry and of the two police accounts as to the events in the station.

[71] However, I think the station diary is to a degree discredited by the medical report and the medical report itself supports more of the Plaintiffs' account than it does of the Defendants'. As for witness consistency, my faith in their credibility was undermined by frequent claims of being unable to recall details and frequent claims made, when asked by Counsel, that the Plaintiffs' accounts were lies, without any supporting reasons. Therefore on balance I accept the Plaintiffs' account of what occurred, as being the more reliable..

[72] The next question is, does what occurred amount to "torture"? Counsel for the Defendants made a one-sentence reference to a definition of the word but unfortunately neither party addressed me on what it should mean. Among the several authorities cited and supplied to me by Counsel for the Defendants, none is on this topic. In the time available to me I have been unable to locate any Fijian or British legal authority that may define the term for present purposes. The Shorter Oxford English dictionary indicates that initially one essential element of torture was "excruciating pain". The terms seems quickly to have widened its scope to mean infliction of severe pain or suffering, or grievous distress. Whatever view one takes it seems to me that the word is meant to be at the extreme end of the range of suffering. The decision has to be mine, and it must in every case be subjective. My opinion is that the treatment given to the First Plaintiff by the three police officers who were present was abusive and a grave dereliction of their duty. It was well outside what was lawfully permitted to them

in dealing with a citizen, but I have decided similar cases in the last two years where the conduct of the police officers went beyond what was done in the present case and further towards the extreme. Even those cases however what occurred did not appear to any of the parties or to the court to be torture.

[73] I shall now move to the second cause of action and will complete their decision jointly.

The Second Cause of Action: Torture on 18 June 1994:

[74] I shall continue to try to be economical and to avoid unnecessary detail. On 29 December 1993 an event took place on the Plaintiffs' property. Arising from that event the police decided to lay charges against more than one person for the offence known as Affray. It was on 27 May 1994 that the First Plaintiff became aware that the police intended to lay charges against himself and his wife. He wrote that day to the Commissioner of Police urging him to "charge the culprits for trespassing, assault and damaging of property and not us the victims". (Annex 942).

[75] On 18 June 1994 at about 11.30am the First Plaintiff was at the shops in Rakiraki and apparently agreed to accompany two policemen namely Basant Deo and Sitiveni Waqa to the police station. He claims to have been arrested but takes no issue with that. At the station the police officer Deo told him that he and his wife would be charged with the offence of Affray for the events on 29 December 1993. He argued with the officer and another (who gave evidence) Sunil Dutt Gosai. The details are in his affidavit. His arguments were brushed aside and he was told he was to be charged.

[76] The police account is that once in the station he was told he was to be interviewed. All parties agree that he resisted and the details of the First Plaintiff's account are in his affidavit. The only witness to this incident for the Defendants was DW6 Gosai who said he was involved as an observer. He had been asked by the investigating officer for this particular offence, officer Deo, to formally charge the First Plaintiff with the offence of Affray. He said he set up the charge sheet and began the process but the First Plaintiff was not listening, folded his arms, swayed left and right and eventually dropped to the floor by himself hitting his head and there he started shouting, screaming and struggling by himself on the floor and hitting his body on the floor. He says the First Plaintiff was eventually formally charged by Basant Deo after some time and then refused to give his fingerprints and particulars. At his request he tried to locate solicitors for him eventually finding one in Lautoka whom he named. After the First Plaintiff spoke with that lawyer he gave his particulars and fingerprints and was bailed. In general, he denied that any of the detailed events set out in the affidavit of the Plaintiffs' PW4 (Rauf) had occurred.

[77] This witness impressed me as having a good memory of the events which he recounted. It seemed to me however that he may not have any memory of his own, independent of police records of events of that day. When his memory was tested he replied that he was concerned only with charging the First Plaintiff. He said he did not remember the circumstances of the event, adding that the register from the Rakiraki Police Station had been brought to court. My impression was that he had refreshed his memory where he could and was unable to give any direct evidence about

the events in the First Plaintiff's affidavit, other than to claim that they did not happen.

Decision about the events of 18 June 1994:

[78] The state of the evidence clearly tends towards a decision on the balance of probabilities in favour of the Plaintiffs' account of what happened in the police station. Briefly, this is that he wanted a lawyer, that DW6 Gosai got angry pulled his shirt and forced him down so that he hit the floor. Officer **Nakatarau** manhandled him and pushed against the wall repeatedly shouting words that are in the affidavit, hit him on the head and repeatedly pushed him through the room to make him sign documents. Several others including officer Gosai were also verbally abusing him. He was locked in the cell by Nakatarau and released at approximately 2.00pm, whereupon he decided to sign whatever the police wanted him to sign so he could get away and prevent further injury. His wife said also that she saw him vomit into a hand basin during these events.

[79] On the balance of probabilities I uphold these claims by the Plaintiff and his wife which are supported to some degree by PW4 Abdul Rauf. They cannot however in my opinion amount to torture by any definition of that term.

First and Second Causes of Action: Damages Awards

[80] In my opinion, the evidence does not establish that what the police officers did amounted in the legal sense to torture. In my limited experience of cases of this nature, i.e. in Fiji and in Tonga only, it is not usual to plead that what occurred was torture. Is it fatal to

the Plaintiff's claim that he used this word for what occurred? The usual rule is that the parties are bound by their pleadings.

[81] I take account of three factors. First is the pleadings of the Defence. The allegations of torture were merely denied and the Plaintiffs' were put to proof. Second in cross-examination of the Plaintiff's witnesses this defence was maintained, and the defence witnesses also maintained an outright denial that any of the claimed events occurred. Third, in his submissions counsel for the Defendants merely referred to the torture allegation and submitted the evidence did not prove it. In other words, by any name it was denied. He did not define torture nor attempt to distinguish it on the facts.

[82] The rule that parties are bound by their pleadings is not absolute and may be relaxed in the circumstances of any case. The situation in England and in Australia, at any rate, is well set out by Millhouse J. in **State Govt Insurance Commission –v- Sharpe** (1996) 126 FLR 341 at 344 (S.C. of N.S.W., Full Court):

[83] *"Pleadings in an action are to define the issues between the parties. Sometimes ... the pleadings may not do so at all or only imperfectly. As a rule, though, depending on the course of the hearing, that may not matter because the issues become quite plain as the hearing proceeds and no party is put at a disadvantage... The day has well passed when decisions are based on the state of the pleadings, irrespective of the facts or justice."*

[84] This was the view of the High Court of Australia as early as 1916, see **Gould v Mount Oxide Mines Ltd** (1916) 22 CLR 490 at 517 (H.C. of Australia, judgment of Isaacs and Rich JJ:

[85] *"... pleadings are only a means to an end, and if the parties ... choose to restrict them, or to enlarge them, or to disregard them and meet each other on issues fairly fought out, it is impossible for them to hark back to the pleadings and treat them as governing the area of contest..."*

[86] In the case before me the issue was not the intensity or degree or the description of what may have occurred. It was only whether it had occurred or not. That is the issue I have decided and in my view, damages to the First Plaintiff flow from that finding. It may be measured against other cases I have heard, e.g. **Yogendran v Chand & Others** – HBC 403 of 2001, judgment 12 April 2005 (an incident in the Tavua police station in 2000); **Yasir Khan v Commissioner of Police & Anor** – HBC 075 of 2004L, judgment 13 April 2005 (an arrest without authority in Lautoka and incarceration for 24 hours without assault); **Kumar v Commissioner of Police & Anor** – HBC 145 of 2003L:, judgment 7 October 2005 (assault while in custody for interview at Nadi police station) and **Mohammed v Commissioner of Police & Anor** – HBC 407 of 2002L, Judgment No. 60/2006, 31 March 2006 (arrest and assault at Tavua police station). In these judgments, judgments of other Judges are cited and relied upon.

[87] I pause to note that in some previous cases of this kind, there have been awards additional to general and special damages, i.e. aggravated and/or exemplary (punitive) damages. The Plaintiffs in

the present case have not claimed these additional damages. The flexibility of the pleading rule does not extend to the remedies pleadings. See, e.g. the judgment of the High Court of Australia in **Dare v Pulham** (1982) 148 CLR 658 at 664:

[88] *"Apart from cases where the parties choose to disregard the pleadings and to fight the case on issues chosen at the trial, the relief which may be granted to a party must be founded on the pleadings."*

[89] The Plaintiffs may be awarded no more than what they seek. Each of the two incidents must be assessed separately as an independent cause of action. There is little connection between them.

[90] In the first incident on 20 July 1993, the First Plaintiff was punched in the stomach so that he fell to the floor and was kicked, one kick in particular on the wrist. I accept that he called in German to his wife who was outside the building under an open window, describing those events to her, and that this calling was heard by PW-3 Saukalou. I accept that the two officers Tuvura and Sekaia Sekula and one named Nakatarau shouted abusive remarks as set out in his affidavit. I am satisfied he was taken to hospital and that he was as described in the medical report which I earlier discussed. The events in the police station took place over a period of about three hours. After returning from the hospital he was again physically and verbally pressured, and signed a document and gave his fingerprints.

[91] I take account of all that, and of the additional factor that the detention was unlawful *per se*. I compare this with the facts, the particular individual circumstances and the awards in the above cases. I take account also of the reasoning and the awards in the cases cited therein. I am seeking consistency. Noting that this award is in general damages only, I assess quantum at $50,000.00.

[92] In the second incident, on 18 June 1994, there was no element of unlawful arrest. The First Plaintiff was forcefully pulled by the shirt and fell to the floor. He vomitted. He was shouted at by police officers Gosai, Nakatarau and others. He was pushed at a wall, hit on the head and pushed around the room by Nakatarau. He agreed after that to sign documents and give fingerprints. He sought medical treatment at CWM Hospital in Suva.

[93] I have tried to make my assessment consistent with all I have said above. In my assessment there is no element of punitive damages since they are not sought. Nonetheless, as I stated in **Yasir Khan** (above), in cases of police bullying, it seems to me that damages must be assessed on at least the same scale as awards for personal injury and disablement with a tendency to a higher scale. This is because the injury suffered is compounded and is indeed injury done to the whole community. Further, the injury is done by officials in the State who are vested formally with special authority to protect lawful residents from exactly this kind of behaviour. They are meant to be as they say themselves, "*Salus Populi*".

[94] The physical injury in this incident was a lesser feature but the humiliation and degradation were major. As well, I am satisfied that the acute depressive illness pleaded by the Plaintiffs at statement of claim B-6(c) is proved and is attributable in part to this incident. I assess general damages at $40,000.00.

[95] I turn now to the claims in special damages. They are pleaded in detail, statement of claim A-7 and B-7. These claims are for $300.00 and $108.00 respectively. They were not challenged in any way by Counsel for the Defendants. From evidence in other cases, I accept these amounts as necessary and reasonable, without documentary proof. They were incurred a long time ago. They are almost all travel fares for which receipts are hard to get. I award $408.00.

[96] Interest has not been claimed. The power to award interest however is not given by the pleadings. It is bestowed on the High Court by section 3 of the **Law Reform (Miscellaneous Provisions) (Death and Interest) Act, Cap. 27**. I shall allow interest because of the time lapse between the causes of action and judgment. On the general damages I fix the rate at 6% per annum simple, and on the special damages at 4%. The period is from filing the writ (3 July 1996) till judgment. That period is 10 years 7 months, longer than is desirable. Such periods are now becoming rare, under the current case-management system in this Registry.

Summary of Damages Awards:

(a) On the first two causes of action general damages totaling $90,000;
(b) Interest thereon at 6% p.a. for 10 years 11 months $57,150.00
(c) Special damages totaling $408.00
(d) Interest thereon at 4% p.a. $172.82
(e) Total award $147,730.82

Third cause of action: Neglect of Police Duty

[97] This claim was defended first on the facts. There was no dispute that the tort claimed is breach of statutory duty. The most economical approach is to set out parts of the Statement of Claim.

[98] C-3 *In the period between November 1990 and January 1996 the Plaintiffs suffered intense criminal intimidation by a group of people which grew from 5 in 1990 to approx. 25 in 1996. This group committed 128 offences against the Plaintiffs, including 4 attempts on their lives and caused more than $20,000.00 damage. All incidence* (sic) *were duly reported to the Rakiraki Police by the Plaintiffs.*

[99] *C-4 As no charges were laid against the offenders and the criminal intimidation increased, the Plaintiffs wrote many letters and made numerous visits and phone calls during the period between 1991 and 1996 to the following Police Officers, asking them to*

enforce law and order on Nananu-I-Ra island and to order the gang to stop their criminal attacks.

[100] [There follows a list of seven police officers starting with the station officer Rakiraki and ending with the Commissioner of Police Suva.]

[101] *All efforts made by the Plaintiffs were in vain as the Police Force refused to order the intimidators to stop.*

[102] C-5 To the contrary, the 4th Defendant and some of his staff turned against the Plaintiffs and were involved in the following wrong doings:

(a) Fraternizing with the intimidators and supporting their views and ridiculous demands

(b) Declaring that the criminal attacks against the Plaintiffs were self inflicted

(c) Declaring the Plaintiffs as unwanted trouble makers, liars and lunatics in the presence of the Plaintiffs intimidators.

(d) .....

(e) .....

(f) .....

[103] C-6 THAT as a consequence of the above said negligence and deliberate wrong doings by the Police Force the intimidators grew in number and the criminal attacks against the Plaintiffs increased dramatically and became life threatening. The Plaintiffs were left in a desperate position and sought the help of other departments and organizations.

[104] The following government departments and organizations have also tried to persuade the 4th Defendant and some of his staff between 1991 and 1996 to come to the Plaintiffs aid and to stop the criminal intimidation without success:

(a) District Officer Ra in Oct, 1991, Feb and April 1993
(b) Ombudsmans Office in Sept – Dec 1993 and Feb 1996
(c) Office of the Prime Minister in Nov. 1993 and June 1994
(d) Office of the President in Sept. 1995 to Jan. 1996
(e) Hon. Joeli Kalou, Minister for Housing in Jan – Oct 1993
(f) Fiji Trade and Investment Board in Nov. 1993
(g) Ministry of Commerce, Industry and Tourism in July 1994
(h) United Nations Centre for Human Rights Geneva in Dec. 1993 to August 1995
(i) New Zealand Embassy in July 1992 and July 1995
(j) Fiji Womens Right Movement in July 1993

[105] Finally in October 1995 the Plaintiffs were forced to vacate their freehold property because the number of intimidators had risen to more than 25 people, the number of attacks to 118 (one hundred and eighteen) and the attacks were extremely dangerous.

[106] In para. C7 the Plaintiff pleads that the Prime Minister's office and President's office asked the Commissioner Western in December 1995 to conduct his own investigations and to stop the criminal intimidation.

[107] I shall now set out para. C9

C-9 *The Plaintiffs charge and the fact is that the 4th Defendant and some of his staff were guilty of the following acts of negligence:*

PARTICULARS OF NEGLIGENCE:

(a) Failing to enforce law and order

(b) *Failing to prevent offences*

(c) *Failing to warn the intimidators and re-offenders of the consequences of their action*

(d) Failing to order the intimidators and re-offenders to refrain from further criminal attacks

(e) Failing to help the Plaintiffs who were in desperate need of assistance but proclaiming that the attacks were self-inflicted.

(f) Failing to detect and apprehend offenders.....

(g) Failing to recognize the findings and recommendations made by other departments and organizations.....

(h) Failing to be impartial and showing strong favouritism towards the intimidators and offenders.....

[108] The period of that claim is November 1990 until January 1996. A similar claim for the period October 1998 until November 1999 is pleaded in similar detail in the Amended Statement of Claim.

Plaintiffs' Submissions and Evidence:

[109] In a coherent closing submission the First Plaintiff acknowledged that the claim must end at 1999. He relies first upon the oral evidence and second upon the documentation which had been tendered in evidence, which he listed. These are:

The affidavits of the Plaintiffs
A list of 1,767 incidents between 1990 and 2004 (Exh. M1)
The "list of costs to repair damages to Wehrenbergs property".
[This document was filed before the trial with Exh.M1].
Two large folders of correspondence
Two sets of photocopies of photographs
Twenty coloured photographs (Exh. P15)
Folder of phone accounts and receipts
Bundle of receipts in two envelopes for hotel accommodation
The "list of trips to see officials for help" filed with Exh. M1
Exh. P1 – P17.

[110] The First Plaintiff then made what is for him a pivotal submission. He had made this point more than once during the hearing. He stated that after one visit by the Commissioner Western in January 1996 and a subsequent meeting called by the District Officer Ra on 18 January 1996, the attacks upon the persons and property of the Plaintiffs and all the criminal intimidation caused for two years until 1998. No complaints were laid with the police, no police needed to come to the island because there were no attacks upon them and no allegations against them. So, he asked, "why could not the mighty Police Force achieve the same?"

[111] This shows in Exh M1 the list of incident reports which he filed with the police. The 128th was filed on 4 April 1996 and the 129th on 20 October 1998. He referred to the evidence that in about September 1998 another resident came to the Plaintiffs and asked them to make a written statement in support of another attempt by that other person to have the illegal guesthouse operators prosecuted. The Second Plaintiff had flatly refused to have anything to do with this, but the First Plaintiff after some

hesitation, obliged and supplied a written statement. Almost immediately what he calls the campaign of criminal intimidation started again.

[112] He referred to annexures 2024 to 2027 in the Plaintiffs' supplementary affidavit, 2025 being the statement which he wrote on 13 October 1998. He appears to have had a supply of blank police interview forms. Annex 2026 and 2027 are two other police statements he made that same day (13 October 1998). All are typed statements and extremely detailed. If accurate and proved in evidence they appear to go a long way towards proving his allegations that Carl Hoffman and others were at that time operating guesthouses without licences. With the statement he sent in copies of professionally produced tourist brochures, one purporting to have the sponsorship of Air Pacific.

[113] The statements and brochures were said to have been delivered to the station officer Rakiraki on 14 October 1998 at 8.45am. Within a week, on 20 October 1998 the Plaintiffs lodged with the same officer a complaint of criminal trespass (Exh.M1-Incident Report 129), their first since April1996. The next one was five days later and this continued until by the end of November 1999 the number of incident reports filed by the Plaintiffs was a further 55, the total 183.

[114] Exhibit M1 shows that the rest of their incident reports (1,548 after November 1999) were filed outside the period of this claim, while the claim was awaiting hearing.

[115] As it happens, people other than the Plaintiffs and the police had been willing to urge the police to prosecute illegal guesthouse operators on the island during 1998. The Plaintiffs submitted in that respect Annexures 2103 to 2114. The Solicitor General, the Attorney General, the Ombudsman, apparently even the Official Secretary to the President, the Permanent Secretary for Tourism, Transport and Civil Aviation, the Secretary of the Central Board of Health and the Ra Rural Authority all became involved, and by December 1998 when the Solicitor General wrote to the Commissioner of Police a Memorandum headed "Illegal guesthouses – Nananu I-Ra island" (Annexure 2105), a great deal had been said but little or nothing had been done. By 24 March 1999 the Ombudsman's office was writing to the Commissioner of Police requesting him to treat the matter as urgent (Annexure 2108). One licensed resort operator on the island had during 1998 lodged its own complaint and by 4 August 1999 the Secretary of the Hotel Licensing Board was writing to the Commissioner of Police advising him that the Board record showed certain premises were not licensed and asking him to take the necessary action on that other operator's complaint (Annexure 2111).

[116] On 16 September 1999 the First Plaintiff wrote to the Director of Public Prosecutions (Annexure 2112). He set out the situation in detail and asked for a rather investigation into all that had/had not occurred. He stated the Plaintiffs needed urgent help as they were "suffering immensely and .....fearing for our safety" (Annexure 2112).

[117] They were many other documents also to which the Plaintiffs drew my attention. One for example was annexure 1102 to their initial affidavit sworn on 31 July 1997. As early as April 1993 the District Officer Ra wrote to the Senior Police Officer Tavua/Ra about the situation on the island, stating he found it difficult to understand why there had never been any solution found to the problem, stating that his office was committed to finding a solution and looking forward to seeing urgent attention paid to the matter by the Police.

Defendants' Submissions and Evidence:

[118] To all of this, the Defendants offered very little by way of defence. Their lack of effort in the guest house situation is deplorable. In the present case nine police officers gave evidence. In the related case HBC229/97, two of those gave evidence and two more police officers were called. Of these eleven officers, only one gave direct evidence about the complaint of police inaction over the illegal guesthouse operations. This was DW12 Saimone Ratu. His evidence-in-chief was brief. He said he made five trips to Nananu-I-Ra and interviewed almost all the people on the island, about 200, including tourists. He said the Local Authority Health Inspector used to accompany him and other officers to the island. Asked to state what he found about the illegal guesthouse operations he replied:

[119] *"It was not true. There were no transactions, no documents found in any of the houses – they were private houses. We did not arrest or charge anybody ....."*.

[120] Asked to comment on the Plaintiffs' claim that the police had failed to do their duty he replied that all complaints were attended to and action was taken accordingly. He said:

[121] *"We charged people if the evidence was there, if there was not we forwarded the file for further direction (and) legal advice from DPP. "*

[122] In cross-examination he said that he attended no reports other than about illegal guesthouses. When referred to an annexure 2101, in which the Permanent Secretary for Toursim and Transport wrote to the District Officer Ra that the Plaintiffs had "a valid case for the relevant government authority to pursue and investigate", and that "by producing brochures and flyers that were distributed also to Airlines as indicative of the profound intention and motive of private residential owners (sic)", this witness replied:

[123] *We did our investigation and no illegal operations were going on on the island ...I did the investigations to the best of my knowledge.....every complaint made we must attend on a daily basis. We have to account for every complaint.....*

[124] By and large, the other ten police witnesses when referred to this topic were asked by Defence Counsel whether they had failed to do their duty. They replied in various ways but to the effect that they had not.

[125] No more substantial was the defence raised in certain police documents. These were produced in the related case HBC227/96 as Exh. D2 to D5.

[126] Exhibit D2 was a thoughtful report written on 10 March 2003 by a police officer who did not give evidence, a Station Officer Ra. It concluded that police records showed a total 292 complaints received from the Plaintiffs between 1994 and 2002 inclusive, of which only two involved illegal guesthouse operations. This is hard to believe, in the face of the many independent urgings that the police take action.

[127] Exh. D3 is an internal police memorandum written by DW9 in the other case Sgt. Kumar. It was written on 22 May 2003 and was a report to the Divisional Police Commander Western of the total man hours, total stationery costs, costs of transportation and costs of police deployment in following up matters involving the First Plaintiff.

[128] Exh. D4 is a typed document headed "Complaint of Mr Fred Wehrenberg", undated and unsigned, authorship and factual basis undeclared. It lists the years 1991 to 1999 and in each year states what it says were the complaints lodged by the First Plaintiff. I counted the number of files said to have been opened and there are 45. The list ends by stating "apart from the above 45 complaints of Mr Fred Wehrenberg were classified as TRIVIAL, CIVIAL or No case in Law (sic)". The document then lists three "cases in which Fred Wehrenberg was charged", in 1993, 1996 and 1999.

[129] Exh D5 is headed Summary. It contains a "formula" to calculate the hours "wasted" on attending complaints lodged by the First Plaintiff. In the document there is a "summary of total man-hours lost by police", and a "summary of total cost of investigations". The

total man-hours "lost" apparently in dealing with matters raised by and about the First Plaintiff is said to be 5120. The total cost of investigating reports filed by the First Plaintiff is said to be $59,626.79. This statistical exercise is related to no particular data, and makes no reference to any investigation of the guest-house situation.

[130] Counsel for the Defendants also made coherent submissions. In respect of the illegal guesthouse operations he referred to the evidence of DW12 Ratu and submitted that the problem was proof of payment. Nonetheless the First Plaintiff, not satisfied, continued to persist and waste valuable resources of himself and others. He submitted that the hinge of all the First Plaintiff's claims is his own character. He submitted there was a problem of human relationships on the island and he addressed the evidence of his two civilian witnesses that these problems came to an end when the Plaintiffs left. The police evidence was the same. He pointed to other police evidence that there were several meetings arranged by the police for the residents, that a special team went to the island on more than one occasion and that special protection overnight and perhaps longer had been provided for the Plaintiffs. This he said was a special service offered to them, not usual police practice. He submitted that the police had engaged in consultations with other government agencies such as the Commissioner Western and the District Officer Rakiraki. They had prosecuted some of the residents.

[131] He submitted that the police were simply not able to satisfy the demands of the Plaintiffs. He submitted the evidence showed that the police had committed more than the usual resources to the complaints lodged by the Plaintiffs. Each police witness had given

evidence that he followed procedures laid down for him and that all complaints were investigated. If evidence was found then charges were laid. However, the First Plaintiff, according to the police witnesses, demanded, dictated and persisted. He even intervened in the work of the office of the Director of Public Prosecutions and of the Commissioner of Police. He submitted that the First Plaintiff wanted the entire Public Service to see things from his point of view. For the police officers however he said police work is a straight forward matter, first a complaint, then investigation and gathering of evidence then further opinion of the DPP if necessary and then a charge. This is a process which in each case takes many days. The police have to deal with every minor complaint and with every major accident and crime case in the same way. He pointed to the numbers in Exh D5 and submitted that it cannot be said that the police failed in their duty.

[132] In my opinion that submission of fact cannot, on the evidence, be accepted. It evades, as did the police officers concerned, the by now obvious fact, that dealing with the guest-house operators according to law should have brought the island discord to a manageable end.

[133] Counsel then turned to the law, which till then had not been mentioned in the pleadings or during the hearing. He referred me to several judgments in the High Court, Court of Appeal and Supreme Court. On the law of negligence and police duty he relied on **Wartaj Seafood Products Ltd –v- Ministry of Home Affairs** [2000] FJHC 99; HBC 129j/2000S judgment 8 September 2000, Fatiaki J. This is the case of the Levuka Shipwreck. The facts do not match the present case but it is a notable judgment. It gathers

together several authorities on the duty that police officers owe to the general public to enforce the law.

[134] Next he cited **Bachu –v- Commissioner** of Police [2004] FJCA 53; ABU0020 of 2004S, judgment 11 November 2004, FCA. The facts in that case by contrast were strikingly similar to the facts before me. The claim also is the same.

[135] Counsel cited also the judgments of the Court of Appeal and of the Supreme Court **Kumar –v- Commissioner of Police** [2005] FJCA 35; ABU0059 of 2004S, judgment 29 July 2005 (FCA) and [2006] FJSC 13; CBV0003U of 2006S, judgment 19 October 2006 (FSC). The facts of this case were again different but the discussion of the authorities is useful. This case demonstrates that the legal principles to be applied to the Plaintiffs' claim of breach of duty are well established, consistent, and fatal to the claim.

[136] What I have set out above is intended to show the depth of the disappointment in the police which is felt by the Plaintiffs. I have also indicated the police response. The matter however is not to be decided by the intensity of the grievance, or by the ineffectiveness of the police. The principle was stated clearly in **Hill –v- Chief Constable of West Yorkshire** [1988] 2All ER 238; [1989] AC 53. In all three of the above cases (except for **Kumar** in the Court of Appeal) this case of **Hill** is relied on as the primary authority. Rather than cite from it at length I cite from the judgment of the Court of Appeal **Bachu;**

[137] ***Hill*** *(etc).....is settled authority for the proposition that while there is a general duty imposed on the police to enforce the criminal law, an action for damages is not an appropriate vehicle for investigating*

the efficiency of the police force. Furthermore, as a matter of public policy the police are ordinarily immune from actions for negligence in respect of their activities in the investigation and suppression of crime.

[138] That is not to say that in exceptional circumstance a police officer may not be held by reason of a sufficient relationship of proximity to owe the complainant a duty of care .....(authorities cited).....however the High Court found that on the facts of the present case as emerging and as emerged from the affidavit evidence the Appellants had not established such a relationship. We agree".

Decision of Neglect of Duty Claim:

[139] The facts of that case are different from those before me only in degree. I am bound by the principle in **Hill**, and particularly the judgment in **Bachu** to conclude that the Plaintiffs cannot sustain this cause of action. It has to be dismissed.

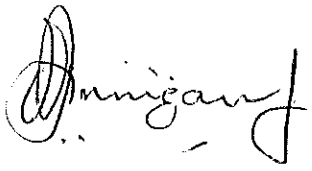
Conclusion:

[140] The one principle allowing that parties need not be bound by their pleadings has applied to the benefit of both parties here. I have found for the Plaintiffs on their first two causes of action and awarded damages. On the third and fourth causes of action I have found for the Defendants.

Costs:

[141] Costs normally follow the event, **HCR O.62 r.3 (3)**. Where they have succeeded, the Plaintiffs are entitled to costs. They appeared in person, so r.18 applies. Pursuant to r.18(1) their costs may be the same as would have been allowed if they had appeared by a solicitor. Allowances may be included for witnesses.

[142] The Defendants also are entitled to costs where their defence succeeded, but these would be reduced because the defence that succeeded had not been disclosed in advance. Rather than make two awards I shall make a reduced award to the Plaintiffs, whose award would have been greater. Since taxation of a bill of costs is out of the question I shall assess quantum summarily. I assess reduced costs for the Plaintiffs (7-day hearing) at $3,500.00.



D.D. Finnigan

JUDGE

At Lautoka

9 February 2007