

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Action No. HBC 377 of 2005

BETWEEN:

SENITIKI NAQA

Plaintiff

AND:

THE COMMANDER, REPUBLIC OF FIJI MILITARY FORCES

First Defendant

THE COMMISSIONER, REPUBLIC OF FIJI POLICE FORCES

Second Defendant

THE ATTORNEY GENERAL OF FIJI

Third Defendant

Coram: Hickie, J

Counsel: Mr S. Valenitabua for the Plaintiff
Mr J. Boseiwaqa and Mr J. Faktaufon First Defendant
Mr S. Raramasi for the Second and Third Defendants

Dates of Hearing: 4 and 5 August 2008

Submissions Ordered: 19 August 2008 (Plaintiff) – filed 17 September 2008
2 September 2008 (1st Defendant) – filed 12 September 2008
2 September 2008 (2nd & 3rd Defendants) – filed 3 September 2008
9 September 2008 (Plaintiff in Reply) – not exercised

Date of Decision: 11 March 2009

JUDGMENT

A. BACKGROUND

1. Previous proceedings

- [1] The Plaintiff had previously filed an application in the High Court on 11 September 2003 seeking Constitutional Redress arising out of alleged assaults upon him on 24 and 25 August 2000 by members of the Republic of Fiji Military Forces and Fiji Police Force as well as his detention until 8 September 2000 by members of the Republic of Fiji Military Force.
- [2] The application seeking Constitutional Redress was dismissed by Singh J on 24 March 2004 due to it being filed some three years after the alleged incidents took place whereas under the Constitutional Redress Rules such applications are to be commenced within 30 days of the alleged breach. In addition, Singh J noted that the cause of action was clearly in tort and not appropriate to be dealt with by way of Constitutional redress where “*the qualifying word is constitutional not any redress*”: see ***Naga v Commander, Republic of Fiji Military Forces*** (Unreported, High Court of Fiji at Suva, Civil Action No.HBM 63 of 2003, 23 March 2004, Singh J) Paclii: [2004] FJHC 1, <http://www.paclii.org/fj/cases/FJHC/2004/1.html>).

2. The present application

- [3] Over a year after the decision by Singh J dismissing the Plaintiff’s Constitutional Redress application, the Plaintiff then filed on 25 July 2005 in the High Court at Suva a Writ of Summons and Statement of Claim seeking damages for both personal injuries and trespass to the person as well as a breach of his constitutional rights arising out of the said alleged assaults upon him on 25 and 26 August 2000 as well as his said alleged detention until 8 September 2000.
- [4] The claim specified that the Plaintiff was seeking in terms of damages:
- (a) “*Special damages for the Plaintiff’s out-of-pocket expenses*”;
 - (b) “*General damages for assaults, beatings, torture and brutalities being trespasses to the Plaintiff’s personal*”;
 - (c) “*General damages for the breach of the Plaintiff’s constitutional rights aforesaid*”;
 - (d) “*General damages for the Plaintiff’s personal injuries*”;

(e) *“Exemplary damages for the Defendants’ respective breach of the Plaintiff’s constitutional rights and for the assaults, beatings, torture and brutalities on the Plaintiff”.*

3. The agreed facts

[5] The agreed facts are, in summary, as follows:

- (a) That the Plaintiff is self-employed and resides at a settlement in the district of NABOBUCO in NAITASIRI, called SAVUSAVU;
- (b) That on 24 August 2000, the Plaintiff appeared with other persons from villages in the MONASAVU area before a Magistrate in the Magistrates’ Court in Tavua on charges in relation to the take-over of the dam at the hydroelectric scheme at MONASAVU;
- (c) That the Plaintiff was granted bail at the Tavua Magistrates’ Court on 24 August 2000;
- (d) That the Plaintiff was then re-arrested by a member of the Police Force at approximately 11.00 am on 25 August 2000 and escorted to Tavua Police Station;
- (e) That the Plaintiff was then held in a cell at the Tavua Police Station until about 8.00pm when he was released by a member of the Police Force and handed over to members of the Republic of Fiji Military Forces;
- (f) That the Plaintiff was then placed by members of the Military Forces in a Military Forces’ vehicle;
- (g) That from September 2000, the Plaintiff was then further detained at Central Police Station in Suva until 8 September 2000 when he was released.

B. THE PLAINTIFF’S CASE

1. The Plaintiff’s case in summary

[6] The “gaps” in the agreed facts, if they can be so termed, essentially form the Plaintiff’s case, they being:

- (a) That after the plaintiff was placed by members of the Military Forces in the back of a twin cab motor vehicle, he was driven to Wainavau Camp;
- (b) That on the way to Wainavau Camp on 25 August 2000, the Plaintiff was assaulted;
- (c) That on 26 August 2000, whilst at Wainavau Camp, the Plaintiff was again assaulted;

- (d) That the Plaintiff was later taken to three hospitals and then back to Wainavau Camp;
- (e) That on or about 30 or 31 August 2000, the Plaintiff was transferred from the Wainavau Camp to Central Police Station where he was detained until 8 September 2000 when he was released;
- (f) That on 18 September 2008, the Plaintiff was examined by **Dr S. VEITOGAVI** who prepared a report (**Doc. “1” in Exh 1 – Agreed Bundle of Documents**) stating:

“TO WHOM IT MAY CONCERN
SENITIKI N. NAOA

The above person was alleged to have been bitterly assaulted by the Army on 25/08/00 with resultant injuries to his face, head, eyes, chest and other body parts. He was not able to chew his food for nine (9) days with intractable headaches, throbbing pain of jaws, eyes and other parts of the body. There were contusions with bruise on the side of his chest and face.

His left arm was also injured with resultant. [sic] Oblique fracture displacement at distal end of left ulnar. His chest x-ray on 27/08/00 also showed the following:

- a) heart is slightly enlarged – CXR 15/27*
- b) inflammatory changes both lower zone of his lungs*

At the moment he is still unable to lie on his sides because of pressure pain to his chest. He cannot and may not be able to plant or engage in a reasonable work to earn money or produce food or resources for his family and himself.

The above conditions are only due to rough and severe blows, adverse conditions of exposure and treatments could undoubtedly contribute to what Senitiki is experiencing now and other complications he will later experience in life.

[S. Veitogavi] Dr”

2. The Plaintiff’s evidence

[7] The Plaintiff’s evidence-in-chief as to the various assaults upon him as well as his detention was, in summary, as follows:

- (a) That after being bailed and waiting for transport to return home, a Police Officer “asked me if I can get off from the transport Sir and if I can go with him so I can give them another statement” in relation to the matter for which he had been charged and for

which he had *“already given a statement to them”*;

(b) That he then accompanied the Police Officer to Tavua Police Station where he was taken and put in a cell, though he was not told why he was being *“locked up”* in the cell other than *“I have to wait in the cell for the other officers”*;

(c) That he was *“detained in the cell till the afternoon when army officers arrived at the Station ... round about after 7-8 o’clock”* in the evening;

(d) That he only saw one army officer who *“came to take me with them”* and he was then *“handcuffed”* by a Police Officer who then *“released me to the army officer”*;

(e) That the Army Officer then took the Plaintiff out of the Police Station and had him board a vehicle *“that was brought by the army officer”* though by then he *“realised there was another one with me so there was two of them”* and they made him *“lie down in the transport”* which was a *“twin cab”* with one officer driving *“and two of them at the back with me”*;

(f) That the Plaintiff was not told by the soldiers the reasons they were taking him, why he was handcuffed or why he was made to lie down, though the Plaintiff did in his evidence later correct himself saying that *“the first army officer – who released me from the Police Station – he told me that I’m going to Wainavau”*;

(g) That while driving on the way to Wainavau, *“the two officers sitting with me at the back start to beat me and assault me”*, kicking him and *“and beat me with something hard – I can’t make it up whether a rifle or a stick”* and the assaults and beatings continued from Tavua on to Wainavau;

(h) That prior to this the Plaintiff did not know that Wainavau existed, nor that it was a Military Camp;

(i) That the Plaintiff could not recall at what time they reached Wainavau as he was unconscious and then he got off the vehicle and was directed where to sleep noticing *“that there were some other army officers there, vehicles and some police offices too”*;

(j) That the following morning on 26 August 2000 a Police Officer *“came and called me he beat me with a stick – beat my hands and my back”* which resulted in a broken left hand and then was operated upon at Vunidawa Hospital (and for which a lump remains on his left wrist today);

(k) That after the beating on 26 August 2000 he was then told to crawl to a nearby creek where he then sat and was given by a Police Officer a piece of cloth to wear as his clothes were covered in blood;

(l) That his wife came and visited him on 26 August 2000 at the camp and remained with him until the afternoon when she left and he slept there overnight;

(m) That on 27 August 2000, he was placed in the back of a twin cab with two dogs and driven to Vunidawa Hospital – a name *“I notice when we reached there”*;

(n) That at the Vunidawa Health Centre, he was examined by a doctor, given pills and his left hand *“was plastered by the Doctor”*, after which he was taken back by Army Officers to an Army Camp in Nabua, known as *“the Queen Elizabeth Barracks”* where he was also seen by a doctor and *“given a drip”* and then taken to the CWM Hospital in Suva where he was again examined and given medication after which he was taken back to the Army Camp at QEB Nabua and from there back to Wainavau Camp, the same Military Camp from where he was assaulted and beaten and stayed there from 27 August 2000 for some three to four days during which time he was not medically treated;

(o) That after the detention at Wainavau Camp he was then brought to the CPS Police Station at Suva where he stayed for a week during which time he received no visitors, was not told of the reasons for his detention, nor was he charged with any offence.

[8] The Plaintiff’s evidence under cross-examination by Counsel for the First Defendant as to the various assaults upon him was, in summary, as follows:

(a) That he conceded that he was charged in relation to *“the takeover of the Monasavu Dam”*;

(b) That when he was picked up on 25 of August 2000 from Tavua Police Station by a soldier, the soldier *“was wearing army uniform”* and he had been *“told by police officer that army officer will be there to take me”*;

(c) That the soldier took him *“to board the transport and told me to lie down”*;

(d) That he *“can’t remember the colour of the cab because it was dark, only I knew it was a twin cab”*, nor did he recognise any soldiers that were in the twin cab;

(d) That he did not report the soldiers to their superior officer or anybody in command about the assault that he alleges took place on the way from Tavua to Wainamau Camp nor has he ever lodged a complaint with the Republic of Fiji Military Forces for that

assault that took place;

(e) That when he said he was “unconscious” when he arrived at Wainavau Camp, he clarified that to “*I was in a shock and I can’t remember the things that happened to me*” and agreed that because of the state he was in that he “*didn’t recognise any of the people there*”;

(f) That he knows the road from Tavua up to Nadarivatu well having travelled on it weekly “*to come and to sell the yaqona*” and agreed that the road is “*not tar sealed*” but as he was “*lying in the tray*” of the transport “*it was just travelling smoothly*”;

(g) That although both hands were beaten “*only my left hand injured*”.

[9] The Plaintiff’s evidence under cross-examination by Counsel for the Second and Third Defendants as to the various assaults upon him was, in summary, as follows:

(a) That he was arrested by Police on 24 August 2000 for his involvement in the taking over of Monasavu Dam and was charged with wrongful confinement, forceful entry and in unlawful possession of arms and ammunition as well as for damaging and unlawful use of a motor vehicle and he was produced at Tavua Magistrates Court where he was then bailed and he agreed that he was “*treated fairly by the Police at this time*”;

(b) That he conceded that he was then told at Tavua Police Station that the army required for him to be interviewed in relation to missing firearms from Monasavu at the time of the takeover;

(c) That on 26 August 2000 according to his examination in chief he was beaten by the Police at Wainavau, which he confirmed but said that it was just one Police Officer named “Wara” and that he knew that he was a Police officer “*because he dress up like one of the Police Officer uniform*”;

(d) That he confirmed that he was beaten with a stick on the way to Wainavau Army Camp;

(e) That he conceded that he was detained at Central Police Station due to the pending investigation conducted by the military and the police into missing firearms and that he was “properly released from the station after the investigation”;

(f) That he although he claims to have been mistreated at Wainavau, he did not report or make a complaint to Senior Police officers as “*I wasn’t given any chance to do that*”;

(g) That he never consulted the Fiji Human Rights Commission on this issue “because I

have no idea how to report and I don't how to go about it";

(h) That he agreed that he was never admitted to any hospital during that time for treatment but "*went to the hospital Sir, I was examined and went back and I was not admitted in the hospital*".

[10] The Plaintiff's evidence in re-examination as to the various assaults upon him as well as his detention was, in summary, as follows:

(a) That although he did not make complaints to the Military, Police and Human Rights Commission, that he did complain to his lawyer "*about these assaults and beatings*";

(b) That the soldiers did ask him about the missing firearms but "*they done that before I appeared in Court*" and that the soldiers who took him from Tavua did not ask about the missing firearms;

(c) That he agreed that he was charged "*with all of the offences that the learned Counsel for the second and third Defendants say that you were charged with*" and that "*this is why I have to appear in the Tavua Magistrates Court*" where he was tried and convicted for which he served time in prison after he "was sentenced in 2004" coming out of prison on 4 August 2004.

3. The evidence of Taitusi Bulisuva

[11] The evidence-in-chief of **Mr TAITUSI BULISUVA**, a prison officer of 13 years, as to the various assaults upon the Plaintiff which he witnessed was, in summary, as follows:

(a) That around 24-26 of August 2000, he "*was up in the interior of Naitasiri ... with some of my fellow prison officers ... to search for escaped prisoner Alifereti Nimacere*" whereupon they ended up at the Wainavau Military camp on 25 August 2000;

(b) That at the Wainavau Military camp, he saw other prison officers, soldiers in uniform carrying weapons or guns, military vehicles, police officers in uniforms, police vehicles with cage and dogs;

(c) That on the morning of the 26 August 2000, he was at the Wainavau Military camp, having slept there overnight, and there was roughly about 30 people present consisting of soldiers, police, prison officers;

(d) That on the morning of 26 August 2000, *“just before we left searching for the escaped prisoner Alifereti Nimacere, as we about to board our vehicle we were standing from the distance a man was beaten by army officers and police officers”* who *“one of my fellow officers told me the identity of”* which was the Plaintiff, Senitiki Naqa;

(e) That he had met Senitiki prior to this incident as he is related to him;

(f) That Senitiki Naqa was sitting in a creek beside the camp and *“some of the soldiers surrounding him and some started beating him ... using the sticks, guns and stones”*;

(g) That **Mr BULISUVA** then *“left to go and search for the escaped prisoners”* and when he returned to the Muainavau camp he went and met the Plaintiff and saw the following injuries on him – *“swollen face, swollen leg and bruises on the face and swollen hands”* and *“his face was swollen, face and eyes and bruises all over the face”* in *“a deep black”* colour;

(h) That the Plaintiff recognised him but *“he could hardly speak”* and was not properly dressed so **Mr BULISUVA** gave the Plaintiff *“one of my cardigans on that night”* as *“there was no clothes and he was really cold”*;

(i) That he knows the Plaintiff’s wife and is related to her too and he also met her at the Wainavau camp that day on 26 August 2000 after he returned from their search and *“that same afternoon we took her in our vehicle to drop a nearby village to sleep”* as she was not allowed to sleep in the military camp.

[12] The evidence of the prison officer, **Mr TAITUSI BULISUVA**, under cross-examination by Counsel for the First Defendant as to the various assaults upon the Plaintiff which he witnessed was, in summary, as follows:

(a) That on 25 August 2000 he was searching for an escaped prisoner Alifereti Nimacere and he was in Wainavau camp for three days;

(b) That while at the camp he spoke to soldiers and police officers there and was told by the army officers *“that they were doing an operation”* but that *“I don’t know what operation they were doing”*;

(c) That on the morning of 26 August before he left with the patrol to search for escaped prisoner Nimacere, he was standing some 20 metres from where the Plaintiff was being assaulted and the weather that morning *“was fine”*;

(d) That he did not ask why the Plaintiff was being beaten;

(e) That he did not know that the Plaintiff was involved in some activities that resulted in his being charged in Tavua Magistrates Court, nor whether the soldiers were searching for escaped prisoner Mr Nimacere as well, but agreed that the Police were also searching for Mr Nimacere too;

(f) That when he met the Plaintiff at the camp *“we just say hello to each other, that’s all”* and he did not ask him why he was there no did the Plaintiff tell him was he was there.

[13] The evidence of the prison officer, **Mr TAITUSI BULISUVA**, under cross-examination by Counsel for the Second Defendant as to the various assaults upon the Plaintiff which he witnessed was, in summary, as follows:

(a) That he agreed that there was a state of emergency in place in August 2000;

(b) That he agreed that he knows the Plaintiff;

(c) That he agreed that he is from Naitasiri, Udu village, near Monasavu;

(d) That he knows about the taking over of Monasavu but he does not know that the Plaintiff was one of those involved in the taking over of Monasavu;

(e) That he disagreed with the proposition *“is it correct at that time the Prison and the Police were under the Military rule”*;

(e) That he disagreed with the proposition *“that was the reason you went up to Monasavu to assist in the taking, the arrest of the people responsible in taking over the dam”* and replied that *“My duty is to recapture escaped prisoner, nothing else my lord”*;

(f) That he agreed with the proposition *“is it true at the same time the escapee the late Nimacere was also at Monasavu”* but said that he had *“no idea”* as to Nimacere was armed;

(g) That he disagreed with the proposition *“you agree with me that the Plaintiff was taken into custody because of the investigation by police regarding unlawful possession of firearms”*;

(h) That he agreed that he did not make any attempt to stop *“the Plaintiff being assaulted by the army and the police”* as *“there were plenty of them and they were armed with sticks and guns and stones”*;

(i) That although *“there were only two police officers there assaulting”*, *“they were surrounded by soldiers”*.

(j) That he agreed with the proposition that *“there was a combined operation on that day between police and military and the Prison Department in relation to the capture of Nimacere”* but he had no that at that time there was a state of emergency where the police and prisons were directly under Military Forces;

(k) That the police officer who assaulted the Plaintiff he knows as “Wara” but that he did not lodge a complaint against this police officer as *“I think I got nothing to do about that to be assisting the Plaintiff - it’s none of my business there my lord”*, nor did he ever assist the Plaintiff in complaining about the senior Military Officers.

[14] The evidence of **Mr TAITUSI BULISUVA** in re-examination as to the various assaults upon the Plaintiff which he witnessed was, in summary, as follows:

(a) That he received his briefings or orders *“from the Prison Department, Commissioner of Prisons”* through a delegate of power *“at Wainavau”* where *“one of our senior officers”* gave briefings;

(b) That he did not receive any brief to the extent that he was subject to the army or the police under the emergency regulations;

(c) That his *“briefing was solely to recapture the prisoner Alifereti Nimacere”* which they did in joint operations with the police who had their own vehicles;

(d) That he never saw *“soldiers using police vehicles or police using soldiers’ vehicles”*;

(e) That in the briefings it was mentioned that the escaped prisoner, Nimacere, was armed;

(f) That he did not receive orders to capture anyone else apart from Nimacere.

4. The evidence of Luisa Tanumi

[15] The evidence-in-chief of **Mrs LUISA TANUMI**, the Plaintiff’s wife, as to the various injuries upon the Plaintiff which she witnessed was, in summary, as follows:

(a) That on 24 August 2000, she was at Naelewai in her village and her husband was going to Tavua to attend Court for his case but she expected him to return on that day particularly as she had heard that *“he attend Court, that he being bailed”* but she then heard on 25 August when the carrier reached the village when she asked where was her husband people were saying *“that he was taken away ... by soldiers from the carrier”*;

(b) That she then asked her parents if they could look after her children so she could go

and look for her husband which she did on 25 or 26 August waking up early in the morning around 4.30am to get the Naqelewai bus leaving to come up to Suva run by the Tacirua bus company;

(c) That she did not know officially where her husband had been taken to by the soldiers, though she had heard the previous afternoon he went to Wainavau, a place she did not know of but she went down the road in the Tacirua bus, and there was a lady sitting beside her in the bus as well as the driver who she asked and when the bus reached Wainavau the bus stopped and the driver told her that she had reached Wainavau and she got off the bus;

(d) That she was allowed into the military camp and the first man she met was a soldier who she asked if she could see her husband who she saw *“sitting near a creek”* and she went to him: *“... I was thankful nobody stopped me but when I saw him it draws my heart to go to him the condition that he was in, but something was wrong with his eyes and he didn't know that it was me”*;

(e) That her husband was wearing *“a cloth ... tied around his waist and he was without the clothes that he had on when he left the village”*;

(f) That as to her husband's injuries these were described by her as follows –

“my husband he was sitting on the gravel near the creek ... but he doesn't know that it was me ... When I saw him ... the colour of body is different like it was different - his face was all black, his face was swollen and his hand was just hanging Sir ... There were marks on his legs ... His back – there were black marks on his back. Swollen face Sir ... When I tried to kiss him Sir he was in pain – when I tried to pull his head towards me ... His leg - something was wrong with his leg and he was feeling the pain”;

(g) That she had brought with her that morning from Naqelewai Village for her husband *“some dalo to eat and some clothes for his change, his tooth brush and colgate”* as well as some *“oil for his body”* but *“when I reached him Sir, and gave him the dalo he can't eat it because something was wrong with his mouth”*, she also *“used a face towel to clean his body and apply ointment too”* as *“he had small stones Sir sticking on his body”* and *“on his face, in his hands at the back, black marks”* and that *“after cleaning him I make him wear these clothes, ones that I bring with me”*;

(h) That she asked an Army Officer if she could take her husband to hospital but *“they told me I was not allowed to take him to hospital so I was just sitting there till dark”* after

which she stayed the night with people she knew at Nadovu and was taken there by transport driven by an Army Officer with two others and that she returned the next morning by bus to Wainavau camp but when she entered about 7.30 am was told that by a “boy” in a green army uniform her husband had been already taken to hospital “*but they didn’t tell me which hospital or where he was taken to*” but because of the injuries she had seen previously on her husband “*my feeling was that Senitiki would be brought straight to CWM Hospital*” and came back and asked the bus driver to take her to Suva;

(i) That after leaving the camp at Wainavau, she was travelling in the bus to Suva “*when I came to a roundabout I saw that Senitiki was in another vehicle sitting at the back ... a dog was on left hand side and right hand side and ... he was in the middle ... That was the last time I saw him*”;

(j) That after seeing her husband she came to the Suva Bus Station arriving at 10am and went straight to the CWM Hospital asking for her husband and was advised by a nurse that “*he was not there*” and also spoke with a doctor who advised “*he had no idea*”. She then left the CWM Hospital and went to Qauia to spend the night there where “*I heard that he’s been taken to Central Police Station*”;

(k) That the following morning she went back to her village where her children were being looked after by her parents and then later came down to try and see her husband at CPS but she was not allowed to visit him and although she had brought a parcel of food to give him, she was advised by “*a Policeman that was inside the station*” that her husband was not eating;

(l) That she then returned home to her village and after eight days her husband was released from CPS, she came back to Suva, and on the same day her husband was released from CPS and she met him in Qauia on his way home;

(m) That she did not know that on the day she went to CWM Hospital that her husband was taken to Vunidawa Hospital, nor that after he was treated at the Vunidawa Hospital he was taken to the Military Camp, nor that from the Military Camp he was then taken to CWM Hospital, nor that after he was observed and treated and given medication at the CWM he was taken back to the QEB camp, that from QEB he was then further detained at the Muainavau Military Camp, nor that he was then taken from the Muainavau Camp to CPS;

(n) That at the Wainavau Military Camp she saw Taitusi Bulisuva to whom she is related “wearing long pants” which she thought was a “*police officer uniform*”, they did not talk, but he was one of the officers that took her in a vehicle to Nadovu Village to spend the night there, after she had visited her husband.

[16] There was no cross-examination of **Mrs LUISA TANUMI**, the Plaintiff’s wife, by Counsel for the First Defendant.

[17] The evidence of **Mrs LUISA TANUMI**, under cross-examination by Counsel for the Second and Third Defendants as to the various injuries upon the Plaintiff which she witnessed was, in summary, as follows:

(a) That she agreed with the propositions “*that your husband was involved in the taking over of the Monasavu dam*” and “*that was the reason he went to Court that day at Tavua Court House*”;

(b) That she further agreed that she was not present when her husband was allegedly beaten by the army and the police and that she just saw the Plaintiff with those injuries

(c) That she agreed with the propositions that “*at Wainavau, you were given freedom to enter the camp*” and “*you were not stopped from seeing your husband*”;

(d) That at the Central Police Station she was stopped by a Police Officer she does not know from seeing her husband and did not lodge a complaint for refusing such access.

[18] There was no re-examination of **Mrs LUISA TANUMI**, by Counsel for the Plaintiff.

[19] The Plaintiff’s case was then closed.

C. THE DEFENDANTS’ RESPECTIVE CASES

1. The First Defendant

[20] There was no opening made by Counsel for the First Defendant and no witnesses were called. That was the case for the First Defendant.

2. The Second and Third Defendants

[21] There was no opening made by Counsel for the Second and Third Defendants and no witnesses were called. An unsworn copy of an “Affidavit in Reply” of **SAIMONI**

RATU, Acting Inspector, Fiji Police Force from the previous Application for Constitutional Redress, Civil Acton No. HBM 63 of 2003, dismissed before Singh J, was tendered as **Exh “2”**. That was the case for the Second and Third Defendants.

E. RESOLVING THE COMPETING CASES

1. The written submissions

[22] At the close of the hearing, the Court ordered a timetable for the filing and serving of serve written submissions by Counsel on behalf of their respective clients.

Unfortunately, as this was not complied with by the Plaintiff’s Counsel in terms of both the order and date of the submissions, it meant that the Defendants filed their respective submissions before those of the Plaintiff resulting in a number of issues not being “joined” and thus not commented upon.

2. What is missing from the Plaintiff’s case

[23] Copies of the following would have assisted the Plaintiff’s case:

- (a) A warrant for the Plaintiff’s arrest;
- (b) A copy of the statement allegedly made by the Plaintiff during his previous detention for six days at the Wailoa Power Station, Suva Central Police Station and Lautoka Police Station;
- (c) A statement from the Plaintiff lodged with Police at Tuvua and/or Central Police Station in Suva to complain as to what he said allegedly had happened to him from 25 August until 8 September 2000 (as to why this did not occur soon after he saw a lawyer on 18 September 2000 has been left unexplained);
- (d) A copy of the Police Books at Tuvua and/or Central Police Station in Suva for the period 25 August until 8 September 2000 or a copy of a subpoena requesting such to be produced to show the Plaintiff’s detention and what Officers were on duty during that period;
- (e) Reports from the three hospitals he is alleged to have visited on 26/27 August 2000;
- (f) Recent medical reports as to the Plaintiff’s long term injuries, if any;
- (g) A “Schedule of Damages”;
- (h) Supporting documentation for the claim for special damages.

[24] Despite the absence of the above documents, the Court has used its best endeavours to make appropriate findings as set out below.

3. The arrest and initial detention of the Plaintiff on 25 August 2000

[25] As noted above from the “Agreed Facts”, the Plaintiff appeared in the Magistrates’ Court in Tavua on 24 August 2000 on charges in relation to the take-over of the Monasavu Dam whereupon he was granted bail. He was then re-arrested by a member of the Police Force at approximately 11.00 am on 25 August 2000 and escorted to Tavua Police Station. This is set out in the Plaintiff’s Statement of Claim and the Second and Third Defendant’s Statement of Defence (as well as in the “Agreed Chronology of Events”) and they also both agree that the Plaintiff was advised by the arresting Police that the reason for his re-arrest was that soldiers of the First Defendant wanted to take a statement from the Plaintiff.

[26] At the hearing, no person was called on behalf of the Second and Third Defendants to give evidence that they had lawfully arrested the Plaintiff on 25 August 2000, upon either the basis of a reasonable suspicion, or a warrant. In the alternative, no copy of a warrant for the Plaintiff’s arrest was produced on behalf of the Second and Third Defendants. It should be remembered that the Plaintiff had the previous day been granted bail by the Tavua Magistrates Court presumably on the same matters. As to what was the legality of the Police powers in effect “revoking” bail (which had been granted by the Court presumably on the same matters) for the period from 25 August 2008 until 8 September 2008, this was not addressed by Counsel for the Plaintiff in his written submissions.

[27] In addition, although the Plaintiff at paragraph 7 in his Statement of Claim questioned why he was being rearrested (as he stated that he had allegedly already provided a statement to the Police during his previous detention for six days at the Wailoa Power Station, Suva Central Police Station and Lautoka Police Station), no copy of this statement was tendered to the Court in the present proceedings.

- [28] Further, no reference was made by the Plaintiff's Counsel in his written closing submissions to the relevant sections of the *Criminal Procedure Code* (Cap.21) in relation to the "arrest" being:
- (a) Arrest – Section 13;
 - (b) Arrest by police officer without warrant – Section 21;
 - (c) Disposal of persons arrested by police officer – Section 23; and
 - (d) Detention of persons arrested without warrant – Section 26.
- [29] The Plaintiff's Counsel in his written closing submissions has referred, however, to the relevant sections of the *Constitution (Amendment) Act 1997* in relation to "arrest" being:
- (a) Section 23 - Personal liberty; and
 - (b) Section 27 – Rights of arrested or detained persons.
- [30] The Plaintiff's Counsel has also referred to the fact that the Republic of Fiji Police Force was directly under the command of the First Defendant during this period in 2000 pursuant to Section 6 of the *Police Act* as an Emergency Decree (Regulation 22 of the Public Emergency Regulations) was then in force. The respective counsel for the Defendants have also referred to this fact.
- [31] Neither Counsel for the Plaintiff nor Counsel for the respective Defendants has made submissions as to the effect of the Emergency Decree (Regulation 22 of the Public Emergency Regulations) which was in force in August and September 2000. Indeed, they did not refer to either the judgment of the Fiji Court of Appeal in **Republic of Fiji Islands v Prasad** (Civil Appeal No. ABU 78 of 2000, 1 March 2001, Casey, Barker, Kapi, Ward and ahndley JJA); Paclii: [2001] FJCA 2, <http://www.paclii.org/fj/cases/FJCA/2001/2.html>) or the High Court of Fiji in **Nagera v The State** (Civil Action No. HAA 56J of 2001S, 5 October 2001, Shameem J; Paclii: [2001] FJHC 75, <http://www.paclii.org/fj/cases/FJHC/2001/75.html>).
- [32] In **Prasad**, the the Fiji Court of Appeal made the following declaration (amongst others) that: "*The 1997 Constitution remains the supreme law of the Republic of The Fiji Islands and has not been abrogated.*" In **Nagera**, Shameem J held:

*“In respect of the Emergency Decree, it is clear that the extraordinary measures (including the involvement of the armed forces in maintaining law and order) were passed to meet an extraordinary situation. Indeed the measures were introduced to deal with persons responsible for the removal of democracy, and those who might take advantage of the situation which arises when democratic institutions are destroyed, or fail to operate. **The freedom of movement provision in the Constitution is undoubtedly important in a free and democratic society, but even more important is the protection of democracy itself.** Further, the emergency powers procedures laid down in the Constitution, were frustrated because of the inability of the Cabinet to function. **In these circumstances insofar as the Emergency Decree was in breach of Section 34 of the Constitution, it was reasonably justifiable in a free and democratic society when it was passed by Commodore Bainimarama on 2nd June 2000. Whether it continues to be justifiable, is a matter which the State must prove to the satisfaction of the courts, on each occasion it seeks to rely upon its provisions.**”*

- [33] Apart from the Plaintiff’s bare oral evidence, there was no further evidence of any documents subpoenaed by the Plaintiff (or attempts at subpoena) from the Police to support the Plaintiff’s claim that he was illegally arrested and detained on 25 August 2000. Indeed, neither his Statement of Claim nor his Counsel’s written submissions address the question of the effect of the Emergency Decree. Similarly, there was no oral evidence given and/or any documents tendered on behalf of the Second and Third Defendants to refute the Plaintiff’s bare claim as to the illegality of his arrest and detention.
- [34] Whether the Plaintiff’s bare oral evidence is sufficient to have satisfied the evidential burden upon him as to the legality of his arrest and initial detention was, in the Court’s view, not properly addressed in the written closing submissions of the respective Counsel. As noted above, the Plaintiff under cross-examination by Counsel for the Second and Third Defendants conceded that he was “*treated fairly by the Police*” on 24 August 2008 and that when he was arrested the following day and taken to Tavua Police Station, he was told that the Army required for him to be interviewed in relation to **missing firearms** from Monasavu at the time of the takeover.
- [35] On one view it could be argued that this was a different matter to the charges for which the Plaintiff had been granted bail the previous day (which he agreed in cross-

examination was for wrongful confinement, forceful entry and in unlawful possession of arms and ammunition as well as for damaging and unlawful use of a motor vehicle) NOT for missing firearms. Whether they were one and the same offence needed further clarification particularly in relation to the case against the Second and Third Defendants. This did not occur.

[36] **Thus, the first finding of the Court is that the Plaintiff was re-arrested by a member of the Republic of Fiji Police Forces at approximately 11.00 am on 25 August 2000 and escorted to Tavua Police Station where he was detained. Due to an insufficiency of pleadings, evidence and argument, however, the Court makes no findings as to the lawfulness of otherwise of that re-arrest and initial detention by Police Officers of the Second Defendant.**

4. The transfer in detention of the Plaintiff from the Police to the Military

[37] Although not appearing in the “Agreed Facts”, it is set out in the “Agreed Chronology of Events” that at 8.00p.m. on 25 August 2000 *“the Plaintiff was released from Tavua Police Station cell by an officer of the 2nd Defendant and handed over to the officers of the 1st Defendant”*. This is also set out in the Plaintiff’s Statement of Claim and the Second and Third Defendant’s Statement of Defence. It is denied, however, in the First Defendant’s Statement of Defence.

[38] At the hearing, there was no evidence of any documents either subpoenaed by the Plaintiff from the Police or tendered on behalf of the Second and Third Defendants such as “Station Diary Entries” for Tavua Police Station on 25 August 2000 to support the claim as to the Plaintiff’s transfer in custody from officers of the Second Defendant to officers of the First Defendant.

[39] In re-examination, the Plaintiff gave evidence that the soldiers of the First Defendant had previously asked him about the missing firearms but *“they done that before I appeared in Court”* (presumably on 24 August 2000) and that the soldiers who took him from Tavua Police Station on 25 August 2000 did not ask about the missing firearms.

- [40] In addition, I note that no person from the Military Forces was called on behalf of the First Defendant to refute the claim as to the transfer in custody of the Plaintiff from officers of the Second Defendant to officers of the First Defendant. Thus, the Court is entitled to assume that any evidence such person or persons could have given on behalf of the First Defendant concerning the alleged transfer of the Plaintiff and his release from a holding cell in Police custody at Tavua Police Station to Military custody on 25 August 2000 (allegedly for questioning about missing firearms), would not have assisted the First Defendant's case: *Jones v Dunkel* (1959) 101 CLR 298.
- [41] As noted above, the Plaintiff's Counsel has referred to the fact that the Republic of Fiji Police Forces were directly under the command of the First Defendant during this period in 2000 pursuant to Section 6 of the *Police Act* as an Emergency Decree (Regulation 22 of the Public Emergency Regulations) was then in force. Both Counsel for the Defendants also refer to this fact.
- [42] **In light of the above, the second finding of the Court is that the Plaintiff was transferred from Police custody on 25 August 2000 to Military custody, that is, by the Plaintiff being released by a person or persons unknown from a holding cell in Police custody at Tavua Police Station to Military custody and the Plaintiff then departed the said Police Station in that Military custody.**
- [43] **As to the lawfulness of that transfer in custody from the Police at Tavua Police Station to Military custody, the Court makes no findings against the Police as it would appear from the limited evidence that they were acting directly under the command of the First Defendant.**
- [44] If the lawfulness of that transfer into Military custody was based upon the request that the officers of the First Defendant allegedly wished to question the Plaintiff about missing firearms (and that this was not the basis for the Plaintiff being in Military custody evidenced by the Plaintiff's claim that such questioning did not take place), then the legal basis of the Military request for the transfer in custody must be questionable.

[45] The problem for the Court is that Plaintiff did not plead in his Statement of Claim nor was it argue in his Counsel's closing submissions as to the legal effect and relevance, if any, of the Emergency Decree promulgated on 2 June 2000 by the First Defendant and which was in force during August and September 2000 when the causes of action arose in relation to the present case.

[46] **It must follow, therefore, that the third finding of the Court is that for Officers of the First Defendant to both request that the Plaintiff be transferred on 25 August 2000 from Police custody to their custody and then to accept the said transfer of the Plaintiff on that date is legally questionable. Due to an insufficiency of pleadings, evidence and argument, however, the Court makes no findings as to the lawfulness of otherwise of that transfer of the Plaintiff from Police to Military custody.**

5. The assault travelling from Tavua to Wainavau

[47] In the "agreed facts" it is stated that after being handed over to members of the Republic of Fiji Military Forces at Tavua Police Station, the Plaintiff was then placed by members of the Military Forces in a Military Forces' vehicle.

[48] According to the Plaintiff, he was handcuffed at the time of his transfer in custody from the Police to the Military at the Police Station where he was then escorted by a Military officer from the Police Station who told him that he was going to Wainavau (a place he did not know existed, nor that it was a Military camp). The Plaintiff has alleged that he was then placed in the back of a twin cab motor vehicle where he was made to lie down and that during the road trip from Tavua to Wainavau he was repeatedly assaulted by two Military officers sitting in the back of the twin cab with him and, in particular, they kicked him and "*beat me with something hard – I can't make it up whether a rifle or a stick*".

[49] Under cross-examination, he conceded that he did not report the soldiers to their superior officer or anybody in command about the assault nor has he ever lodged a complaint with the Republic of Fiji Military Forces. He also conceded that he knows the road

well from Tavua , that it is “not tar sealed“ and although he was “lying in the tray” of the transport “it was just travelling smoothly”. Further he clarified that when he said he was “unconscious” when he arrived at Wainavau Camp, he meant that “*I was in a shock and I can’t remember the things that happened to me*”. He maintained, however, that he was beaten with a stick on the way to Wainavau Army Camp.

[50] As noted above, a medical report was tendered at the hearing on behalf of the Plaintiff prepared by a **Dr S. VEITOGAVI** on 18 September 2000 (see Doc. “1” in Exh 1 – Agreed Bundle of Documents.) Unfortunately, the report does not state the date when the Plaintiff was actually examined nor what injuries, if any, were attributable to the alleged assaults which occurred whilst the Plaintiff was being driven from Tavua to Wainavau Army Camp. It is clear, however, according to Dr VEITOGAVI, that the Plaintiff had injuries as at 18 September 2000 “*due to rough and severe blows*”.

[51] The Court was advised from the Bar Table by Counsel for the Plaintiff that:

“This doctor has passed away. He was not working in the CWM Hospital or in any of the medical institutions that my client was taken into as will come up in the evidence ... We do not have a record of his date of death. We were informed of his passing at CWM Hospital while searching for the folder of the Plaintiff.”

[52] No other medical evidence was tendered or called by any of the parties.

[53] In addition, I note that no person from the Military Forces was called on behalf of the First Defendant to refute the claims of the Plaintiff as to the alleged assaults which took place as he was being driven from Tavua to Wainavua. Thus, the Court is entitled to assume that any evidence such person or persons could have given on behalf of the First Defendant concerning the said alleged assaults during that time would not have assisted the First Defendant’s case: ***Jones v Dunkel*** (1959) 101 CLR 298.

[54] **In light of the above, the fourth finding of the Court is that on 25 August 2000 the Plaintiff was unlawfully assaulted by two unnamed persons whilst travelling in a vehicle being driven under Military custody from Tavua to Wainavua.**

6. The assault at Wainavau

- [55] The Plaintiff alleges that on the morning on 26 August 2000 a Police Officer named “Wara” came and *“beat me with a stick – beat my hands and my back”* which resulted in him sustaining a broken left hand. The Plaintiff claims that he knew that “Wara” was a Police officer *“because he dress up like one of the Police Officer uniform”*.
- [56] After the beating, the Plaintiff claims that he was then told to crawl to a nearby creek where he then sat with his clothes covered in blood and was then given by another Police Officer a piece of cloth to wear. Later, his wife came and visited him and sat with him until the afternoon.
- [57] In addition, **Mr TAITUSI BULISUVA**, a prison officer of 13 years, gave evidence that on 26 August 2000 whilst waiting for the prison transport to depart Wainavua during a search for an escaped prisoner, he was standing about 20 metres away from a man he later came to recognise as the Plaintiff who *“was beaten by army officers and police officers”*. He stated that the Plaintiff was sitting in a creek beside the camp with *“some of the soldiers surrounding him and some started beating him ... using the sticks, guns and stones”*. He then clarified this to say that the assaults he witnessed upon the Plaintiff that morning at Wainavua, involved only two Police Officers *“surrounded by soldiers”*, one of whom he knows as “Wara”.
- [58] After this, according to Mr BULISUVA, he then left to go and search for an escaped prisoner. Later when he returned, he claimed that he went to the Plaintiff who recognised him but *“could hardly speak”* and that he noted the following injuries on the Plaintiff - *“swollen face, swollen leg and bruises on the face and swollen hands”* and that the bruises were *“a deep black”* colour. In addition, as the Plaintiff was apparently bereft of most of his clothes and very cold Mr BULISUVA gave him a cardigan to put on.
- [59] The Court notes the discrepancies between the Plaintiff’s evidence (wherein he claims that he was beaten by a solitary Police Officer and then after the beating was told to crawl to a nearby creek where he then sat with his clothes covered in blood), compared with the evidence of Mr BULISUVA that he witnessed the Plaintiff being beaten by TWO Police

Officers as he sat in a creek. None of this has been addressed by any of the Counsel in their respective submissions.

- [60] In addition, no explanation was provided to the Court by Counsel for the Plaintiff as to:
- (a) Why Police Officer “Wara” was not subpoenaed by the Plaintiff?
 - (b) Why was the official Police Notebook of Police Officer “Wara” was not required to be produced to the Court by the Plaintiff?
 - (c) Why were the Prison Officers who were allegedly with Mr BULISUVA on 26 August 2000 not named by him and subpoenaed by the Plaintiff?
- [61] In any event, as noted above, a medical report was tendered at the hearing on behalf of the Plaintiff prepared by a **Dr S. VEITOGAVI** on 18 September 2000 (Doc. “1”, Exh 1.) As also noted above, the report does not state the date when the Plaintiff was actually examined nor what injuries, if any, were attributable to the alleged assaults which occurred whilst the Plaintiff at Wainavau Army Camp. It claims the injuries arose from assault which took place on 25 August 2000. It does not mention the assault of 26 August 2000. As further noted above, Dr VEITOGAVI had apparently passed away prior to the hearing. No other medical evidence was tendered or called despite the fact that the Plaintiff claims that the assaults upon him of 26 August 2000 resulted in a broken left hand which was then operated upon at Vunidawa Hospital (and for which a lump remains on his left wrist today).
- [62] According to the tendered report of 18 September 2000 of **Dr S. VEITOGAVI**, what he actually noted (presumably from an undated examination of the Plaintiff) was
- (a) That there were “*contusions with bruise on the side of his chest and face*”;
 - (b) That there was on his left arm an “*oblique fracture displacement at distal end of left ulnar*”;
 - (c) That a chest x-ray taken on 27 August 2000 showed a “*slightly enlarged*” heart and “*inflammatory changes both lower zone of his lungs*”;
 - (d) That “*at the moment he is still unable to lie on his sides because of pressure pain to his chest*”; and
 - (e) That “*the above conditions are only due to rough and severe blows*”.

[63] The other parts of Dr Veitogavi’s report are just a “hearsay” history provided by the Plaintiff as to his “*alleged to have been bitterly assaulted **by the Army** on 25/08/00 with resultant injuries to his face, head, eyes, chest and other body parts*”, and that “*he was not able to chew his food for nine (9) days with intractable headaches, throbbing pain of jaws, eyes and other parts of the body*”.

[64] Counsel for the First Defendant has submitted that the Court should attribute “no weight” to the report **Dr S. VEITOGAVI** of 18 September 2000 for the following reasons:

(a) That it is a business record and pursuant to Section 11 of the *Civil Evidence Act* 2002 for it to be part accepted as part “of the records of a business or public authority” which “may be received in evidence in civil proceedings without further proof”, there needed to be attached with the Report “a certificate” to the effect that it was indeed a business record “signed by an officer of the business or authority to which the records belong”. It was submitted that this was not done, “*the Plaintiff had sufficient time to obtain such certificate and his caught the defendants by surprise*”;

(b) That the medical report is missing the following details –

- (i) The doctor’s appointment or department he worked in;
- (ii) The Plaintiff’s number or hospital folder;
- (iii) The actual Hospital he worked in (such as CWM in Suva) as one would expect rather than on Ministry of Health letterhead;
- (iv) The doctor’s qualifications.

[65] In addition, Counsel for the First Defendant has submitted that:

“The Plaintiff in his evidence stated that he was taken to three medical centers [sic], Vunidawa ... the George Mate ... at Queen Elizabeth Barracks and the CWM Hospital in Suva ... he could have obtained medical reports from these three centers [sic] by way of discovery but did not.”

[66] Counsel for the Second and Third Defendants has concentrated in his submissions to the as to the “*severity of the injuries suffered by the Plaintiff*” and has not addressed the issue of “weight” to the report **Dr S. VEITOGAVI** of 18 September 2000.

[67] Similarly, Counsel for the Plaintiff has also not addressed in his submissions the issue of “weight” to the report **Dr S. VEITOGAVI** of 18 September 2000. To be fair though, he did submit to the Court at the hearing that “*under 11(6) your Lordship has a discretion to waive all the requirements depending on the circumstances*”.

[68] Section 11(6) of the *Civil Evidence Act* 2002 states:

“(6) The court may, having regard to the circumstances of the case, direct that all any of the above provisions of this section do not apply in relation to a particular document, or record, or class or description of documents or records.”

[69] Exacerbating the problems with the report **Dr S. VEITOGAVI** of 18 September 2000 is the fact that NO evidence was led of the Plaintiff in his evidence-in-chief as to:

(a) How did the Plaintiff happen to come and see Dr VEITOGAVI?

(b) Upon what basis was the report of 18 September 2000 report prepared? Was there a bodily examination?

(c) How did the Plaintiff come to provide the chest x-ray of 27 August 2000 to Dr VEITOGAVI when no similar report was tendered to the Court or presumably ever supplied to the lawyers for the Defendants?

(d) From which hospital did the chest x-ray of 27 August 2000 originate and when did the Plaintiff obtain them as, in his evidence, he said that he was detained in custody until 8 September 2000?

[70] In addition, there are many questions left unanswered such as:

(a) Why was the Plaintiff not examined again by another general medical practitioner or specialist between the time of Dr S. VEITOGAVI’s report of 18 September 2000 and the date of the hearing on 4 August 2008 – a gap of nearly eight years?

(b) Indeed, why was the issue of paltry medical evidence not rectified, particularly after it had been raised in the judgment of Singh J when dismissing the Plaintiff’s previous Application for Constitutional Redress in 2004 in **Naga v Commander, Republic of Fiji Military Forces** (supra) when he noted:

“The applicant alleges that he was brutalised and ill-treated by soldiers and police on 24th and 25th August 2000. He also says he was detained by soldiers until 8th September 2000. He first saw a solicitor about the alleged brutality and detention on 18th September 2000 and he was referred to a doctor. No medical

certificate has been produced.”

(c) If the Applicant first saw a Solicitor on 18 September 2000 and “*was referred to a doctor*”, then both he and his lawyer must have been aware at that time (which was only 10 days after his release from detention) as to the importance of medical evidence to his case. That is, it was crucial in such a case that reports be obtained –

- (i) as to the alleged medical examinations and/or treatment of the Plaintiff which allegedly took place at various hospitals in the period from 25 August-8 September 2000;
- (ii) that such reports be supplemented by medical examinations of the Plaintiff soon after his release by independent general practitioners and/or experts; and
- (iii) that “follow up” interim medical reports be obtained over the following years as to any long term affects resulting from the injuries allegedly sustained by the Plaintiff as a result of his allegedly being assaulted whilst in custody from 25 August to 8 September 2000.

[71] It is also of concern to this Court that in Singh J’s judgment in *Naga v Commander, Republic of Fiji Military Forces* (supra) he stated that: “*The applicant alleges that he was brutalised and ill-treated by soldiers and police on 24th and 25th August 2000.*” By contrast, Dr S. VEITOGAVI’s report of 18 September 2000 states that “*the above person was alleged to have been bitterly assaulted by the Army on 25/08/00 ...*” which was presumably written on the basis of the case history as provided to Dr VEITOGAVI by the Plaintiff. In the present proceedings, the Plaintiff is claiming that he was detained on 25 August 2000 and initially assaulted that evening by two military officers whilst travelling in the back of a twin cab vehicle being driven from Tavua to Wainavau Army Camp. He then claims that he was then further assaulted the following morning, 26 August 2000, by a solitary Police officer named “Wara”.

[72] Thus Dr VEITOGAVI’s report prepared on 18 September 2000 (following some form of interview and examination with the Plaintiff) is different to the evidence given by the Plaintiff in his recollections some three years later when he filed the Application for Constructional Redress on 11 September 2003 when he claimed it was “*soldiers and police on 24th and 25th August 2000*”. It is also different again to the present application

which was filed just under five years later on 25 July 2005 and for which he then gave evidence just on eight years later on 4 August 2008 claiming the assaults occurred on 25 August 2000 by Army officers and then on 26 August 2000 by a solitary Police Officer named “Wara”. How could Dr VEITOGAVI’s report prepared on 18 September 2000 get such crucial details wrong unless, of course, the Plaintiff has changed his story from what he told Dr VEITOGAVI in September 2000, to what he put before Singh J in 2003/2004 and changed yet again to what he has put before this Court?

- [73] It is also of concern that it would appear that Dr VEITOGAVI’s report prepared on 18 September 2000 was not before Singh J in the Plaintiff’s previous Application for Constitutional Redress when he noted that although the Applicant after first consulting a Solicitor on 18 September 2000 “*he was referred to a doctor*” but that “*no medical certificate has been produced*”: *Naga v Commander, Republic of Fiji Military Forces* (supra).
- [74] Complicating the issue is the evidence of **Mrs LUISA TANUMI**, the Plaintiff’s wife, as to the various injuries upon the Plaintiff which she witnessed on what would appear to be 26 August 2000 when he was at Wainavau Camp. She stated in her evidence-in-chief that she saw the Plaintiff “sitting near a creek” and she went to him and saw that “*something was wrong with his eyes and he didn’t know that it was me*”, that he was wearing “*a cloth ... tied around his waist and he was without the clothes that he had on when he left the village*”, and that “*his face was all black, his face was swollen and his hand was just hanging ... There were marks on his legs ... there were black marks on his back ... something was wrong with his mouth*”, and “*he had small stones ... sticking on his body*” .
- [75] There was no cross-examination of **Mrs LUISA TANUMI** by Counsel for the First Defendant and the cross-examination by Counsel for the Second and Third Defendants as to the various injuries upon the Plaintiff which she witnessed was having her agree that she was not present when her husband was allegedly beaten by the army and the police and that she just saw the Plaintiff with those injuries and further that she was given freedom to enter the camp and was not stopped from seeing the Plaintiff.

[76] The Court notes that Mrs TANUMI in her evidence stated that she when night fell on 26 August 2000 she was told that she had to leave the camp and was taken to Nadovu to stay over night with friends she knew there. She stated that the transport was driven from Wainavau Camp to Nadovu by an Army Officer with two others one of whom she confirmed was Mr BULISUVA who was “*wearing long pants*” which she thought was a “*police officer uniform*”. Mr BULISUVA in his evidence stated that he had met Mrs TANUMI at the Wainavau camp on 26 August 2000 after he returned with prison officers from their search for an escaped prisoner and “*that same afternoon we took her in our vehicle to drop a nearby village to sleep*” as she was not allowed to sleep in the military camp. That is, according to Mr BULISUVA, Mrs TANUMI was taken by PRISON OFFICERS in their vehicle, not by Army officers. The Plaintiff did not mention in his evidence (nor was he ever asked by his Counsel) as to his having met Mr BULISUVA on 26 August 2000 at the Wainavau camp. Indeed, Mr BULISUVA claimed to have given a cardigan to the Plaintiff because he was really cold. By contrast, Mrs TANUMI stated that when she saw the Plaintiff on 26 August 2000 at the Wainavau camp, he was sitting by a creek with “*a cloth ... tied around his waist and he was without the clothes that he had on when he left the village*”. None of this has been addressed by any of the Counsel in their respective submissions.

[77] In addition, I note that no person from the Military Forces was called on behalf of the First Defendant to refute the claims in Dr VEITOGAVI’s report prepared on 18 September 2000 as to the alleged assaults which took place of the Plaintiff “by the Army” on 25 August 2000. Thus, the Court is entitled to assume that any evidence such person or persons could have given on behalf of the First Defendant concerning the said alleged assaults on 26 August 2000 would not have assisted the First Defendant’s case: ***Jones v Dunkel*** (supra).

[78] The position of the Police, however, is arguably somewhat different. Although, I note that no person from the Police Force was called on behalf of the Second and Third Defendants to refute the claims of both the Plaintiff and Mr BULISUVA as to the alleged assaults which took place of the Plaintiff on 26 August 2000 at Wainavau camp by

Police, for the Police to have to meet this evidence there first has to be an evidential burden established by the Plaintiff. As noted above, there are major differences between the Plaintiff and Mr BULISUVA as to how many people assaulted the Plaintiff and when. According to the Plaintiff, the assault was solely by Police Officer “Wara” before he then made the Plaintiff to crawl to a nearby creek, and according to Mr BULISUVA, the assault was by Police Officer “Wara” and one other as the Plaintiff was sitting at a nearby creek. Into this mix, is the evidence of the Plaintiff’s wife, who claimed it was Army officers (with Mr BULISUVA) who drove her that night to stay at Nadovu whereas Mr BULISUVA said it was him and fellow Prison Officers who drove her. Also the Plaintiff’s evidence as to how he came to know the person who assaulted him was “Wara” and that he was a Police Officer was unclear:

Q: How many Police Officers were involved?

A: One Police Officer Sir.

Q: Do you know the name of that Police Officer?

A: I don’t know his name Sir, but I came to know his name is “Wara”.

Q: How did you know that he was a Police officer?

A: I know because he dress up like one of the Police Officer uniform.”

[79] Apart from this leaving unclear as to HOW the Plaintiff came to know that the name of the person who assaulted him was “Wara”, he was also not asked what “*the Police Officer uniform*” looked like and how this differed from Army and Prison Officer uniforms he may have witnessed at that time.

[80] Taking into account all of the above, the Court accepts the evidence of the Plaintiff that he was beaten on the morning of 26 August 2000 at Wainavua Camp. It further accepts the evidence of his wife, Mrs LUISA TANUMI, that when she attended Wainavua Camp on 26 August 2000 and found the Plaintiff sitting by a creek with “*a cloth ... tied around his waist and he was without the clothes that he had on when he left the village*”, and that his body evidenced injuries consistent with his having been severely beaten.

[81] The Court, however, does not accept the evidence of Mr TAITUSI BULISUVA that he actually witnessed the Plaintiff being assaulted. The Court also notes the objection raised by Counsel for the First Defendant as to the reception into evidence of the report of Dr S. VEITOGAVI of 18 September 2000 without a “certificate” as to authenticity of it being a business record of the Ministry of Health as required under Section 11 of the *Civil Evidence Act 2002*. Balanced against this, the Court notes the submission of Counsel for the Plaintiff that the Court has a discretion pursuant to section 11(6) to admit such a report without a “certificate” “*having regard to the circumstances of the case*”. Further, the Court notes the inconsistencies in the report Dr S. VEITOGAVI of 18 September 2000 as to the date of the assault and perpetrator which must have based upon the oral history given to him by the Plaintiff. The Court is prepared to exercise its discretion to admit the report of Dr S. VEITOGAVI of 18 September 2000, however, for the reasons outlined above, the weight that shall be attributed to it shall be limited to observations of Dr VEITOGAVI that “*there were contusions with bruises on the side*” of the Plaintiff’s “*chest and face*” and that he also observed that the Plaintiff’s “*left arm was also injured*” and that he had an “*oblique fracture displacement at distal end of left ulnar*” and that he concluded that “*the above conditions are only due to rough and severe blows*”.

[82] **Having considered all of the above evidence on this issue, therefore, the fifth finding of the Court is that on 26 August 2000 the Plaintiff was unlawfully assaulted by an unknown person whilst under Military custody at Wainavua Camp.**

7. The detention of the Plaintiff from 25 August until 30/31 August 2000

[83] According to the Plaintiff’s evidence, after he was assaulted at Wainavua Camp on 26 August 2000, he then slept there overnight and the following day, 27 August 2000, he was taken to three different hospitals, after which he returned that same day to Wainavua Camp where he then stayed for some three to four days after which he was then brought to the Central Police Station at Suva.

[84] The Plaintiff was not cross-examined by either Counsel for the Defendants on his alleged ongoing detention at Wainavua Camp from 25 August 2000. Thus, the Plaintiff’s

evidence was that he was detained at Wainavua Camp from 25 August 2000 until 30/31 August 2000 remains unchallenged.

[85] In addition, the Court notes that no person from the Military Forces was called on behalf of the First Defendant to refute the claims of the Plaintiff as to his alleged detention at Wainavua Camp from 25 August 2000 until 30/31 August 2000. Thus, the Court is entitled to assume that any evidence such a person could have given on behalf of the First Defendant concerning the said alleged detention at Wainavua Camp from 25 August 2000 until 30/31 August 2000 would not have assisted the First Defendant's case: *Jones v Dunkel* (supra).

[86] As noted in relation to a number of other findings above, the Plaintiff did not plead in his Statement of Claim nor was it argued in his Counsel's closing submissions as to the legal effect and relevance, if any, of the Emergency Decree promulgated on 2 June 2000 by the First Defendant and which was in force during August and September 2000 when the causes of action arose in relation to the present case.

[87] **Thus the sixth finding of the Court is that the Plaintiff was detained by a person or persons unknown whilst under Military custody at Wainavua Camp from 25 August until 30 or 31 August 2000. Due to an insufficiency of pleadings, evidence and argument, however, the Court makes no findings, as to the lawfulness of otherwise of that detention.**

8. The detention from at Central Police from 30/31 August until 8 September 2000

[88] The Plaintiff claims that after three to four days at Wainavua Camp from 27 August 2000, he was then brought to the Central Police Station at Suva where he was detained for a week during which time he received no visitors, was not told of the reasons for his detention, nor was he charged with any offence.

[89] In cross-examination by Counsel for the Second and Third Defendants, the Plaintiff conceded that he was detained at Central Police Station due to the pending investigation conducted by the military and the police into missing firearms and that he was "properly

released from the station after the investigation”.

[90] No witnesses were called on behalf of the Second and Third Defendants. As noted above, an unsworn copy of an “Affidavit in Reply” of **SAIMONI RATU**, Acting Inspector, Fiji Police Force from the previous Application for Constitutional Redress, dismissed before Singh J, was tendered as **Exh “2”**. It concentrated solely on the initial arrest on 25 August 2000 and in it there is no mention of a warrant. No mention was also made as to the Plaintiff’s subsequent detention for approximately a week at CPS Suva until 8 September 2000.

[91] Further, as with the Plaintiff’s initial arrest on 25 August, no reference was made by the Plaintiff’s Counsel in his written closing submissions to the relevant sections of the *Criminal Procedure Code* (Cap.21) in relation to the Plaintiff’s detention for a week at CPS Suva, in particular Section 26 and the detention of persons arrested without warrant which states:

“Detention of persons arrested without warrant

*26. When any person has been taken into custody without a warrant for an offence other than murder or treason, the officer of or above the rank of corporal to whom such person shall have been brought may in any case and shall, if it does not appear practicable to bring such person before an appropriate magistrates' court within twenty-four hours after he has been so taken into custody, inquire into the case, and, unless the offence appears to the officer to be of a serious nature, release the person on his entering into a recognizance, with or without sureties, for a reasonable amount to appear before a magistrates' court at a time and place to be named in the recognizance, **but where any person is retained in custody he shall be brought before a magistrates' court as soon as practicable:***

Provided that an officer of or above the rank of sergeant may release a person arrested on suspicion on a charge of committing any offence, when, after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with the charge.”

[92] It is not in dispute that during the period from the end of August when the Plaintiff was handed by the Military back to the Police where he was subsequently held for a week at CPS Suva until 8 September 2000, that the Plaintiff was never “*brought before a magistrates' court as soon as practicable*”.

[93] In addition, the Plaintiff's Counsel in his written closing submissions has referred to the relevant sections of the *Constitution (Amendment) Act 1997* in relation to "arrest" being:

- (a) Section 23 - Personal liberty; and
- (b) Section 27 – Rights of arrested or detained persons.

[94] Section 23 states:

“Personal liberty

23.-(1) *A person must not be deprived of personal liberty except: ...
(e) if the person is reasonably suspected of having committed an offence ...*

...

(3) *If a person (**detainee**) is detained pursuant to a measure authorised under a state of emergency:*

- (a) the detainee must, as soon as is reasonably practicable and in any event **within 7 days** after the start of the detention, **be given a statement in writing**, in a language that the detainee understands, **specifying the grounds of the detention;***
- (b) **notice of the detention must be published in the Gazette within 14 days after the start of the detention**, giving particulars of the law under which the detention is authorised;*
- (c) the detainee must be given the opportunity to communicate with, and to be visited by:*
 - (i) his or her spouse, partner or next-of-kin; and*
 - (ii) a religious counsellor or social worker;*
 - (d) the detainee must be given reasonable facilities to consult with a legal practitioner of his or her choice” [My emphasis]*

[95] Section 27 states:

“Arrested or detained persons

27.-(1) *Every person who is arrested or detained has the right:*

- (a) to be informed promptly in a language that he or she understands of the reason for his or her arrest or detention and of the nature of any charge that may be brought;*
- (b) to be promptly released if not charged;*
- (c) to consult with a legal practitioner of his or her choice in private in the place where he or she is detained, to be informed of that right promptly and, if he or she does not have sufficient means to engage a legal practitioner and the interests of*

justice require legal representation to be available, to be given the services of a legal practitioner under a scheme for legal aid;

(d) to be given the opportunity to communicate with, and to be visited by:

(i) his or her spouse, partner or next-of-kin; and

(ii) a religious counsellor or social worker;

(e) to challenge the lawfulness of his or her detention before a court of law and to be released if the detention is unlawful; and

(f) to be treated with humanity and with respect for his or her inherent dignity.

(2) The authorities holding a person who has been arrested or detained must promptly take all reasonable steps to inform his or her spouse, partner or next-of-kin of his or her arrest or detention.

(3) Every person who is arrested for a suspected offence has the right:

(a) to be informed promptly in a language that he or she understands that he or she has the right to refrain from making a statement;

(b) to be brought before a court no later than 48 hours after the time of arrest or, if that is not reasonably possible, as soon as possible thereafter; and

(c) to be released from detention on reasonable terms and conditions pending trial, unless the interests of justice otherwise require.”

[96] Clearly, both of these sections were flouted. As at 31 August 2000, the Plaintiff had then been held for some seven (7) days. Another eight days at CPS Suva, meant that he had been detained by 8 September 2000 for 15 days without charge.

[97] The Plaintiff’s wife gave evidence that she came down from her village to try and see her husband at CPS Suva but that she was not allowed to visit him and even though she had brought a parcel of food to give him, was advised by “*a Policeman that was inside the station*” that her husband was not eating.

[98] As noted above in relation to the Plaintiff’s initial arrest on 25 August 2000, the Plaintiff’s Counsel has referred to the fact that the Republic of Fiji Police Forces were directly under the command of the First Defendant during this period pursuant to Section 6 of the *Police Act* as an Emergency Decree (Regulation 22 of the Public Emergency Regulations) was then in force. Both Counsel for the Defendants have also referred to

this fact.

- [99] Unfortunately, none of the three Counsel have made submissions as to the effect of the Emergency Decree (Regulation 22 of the Public Emergency Regulations) which was in force in August and September 2000 (when the causes of action for the present matter arose) and what effect, if any, was the attempted abrogation of the *Constitution (Amendment) Act 1997* during that period. As also noted above, the judgment of the Fiji Court of Appeal in *Prasad* (supra) declared that: “*The 1997 Constitution remains the supreme law of the Republic of The Fiji Islands and has not been abrogated.*” It would follow, therefore, that the Plaintiff’s rights under the Constitution were not suspended during that time.
- [100] It is part of the “agreed facts” that in September 2000, “*the Plaintiff was then further detained at the Central Police Station in Suva, until 8 September, 2000 when the Plaintiff was released*”.
- [101] Unfortunately, this aspect of the case has not been addressed by Counsel for the Second and Third Defendants in his written submissions. It has been noted briefly by Counsel for the Plaintiff in his submissions in relation to the evidence of the Plaintiff that he received no visitors during this period, as well as the evidence of his wife that she was not allowed to visit him, clearly in breach of Section 27 (1)(d) of the *Constitution*.
- [102] No documents were tendered by the Plaintiff (which presumably they would have tried to obtain under subpoena) to support the Plaintiff’s claim that he was illegally detained for a week until 8 September 2000 at CPS Suva (such as “Station Diary Entries” and/or a “Meal Register” would normally include details as to why the Plaintiff was being held). Similarly, there was no oral evidence given and/or any documents tendered on behalf of the Second and Third Defendants to refute the Plaintiff and his wife’s claims as to the illegality of his detention.
- [103] the Court notes that no person from the Police Force was called on behalf of the Second and Third Defendants to refute the claims of the Plaintiff as to his alleged illegal

detention at CPS Suva 30/31 August 2000 until 8 September 2000. Thus, the Court is entitled to assume that any evidence such a person could have given would not have assisted the case of the Second and Third Defendants: *Jones v Dunkel* (supra).

[104] As noted above, the problem for the Court is that Plaintiff did not plead in his Statement of Claim nor has it been argued in his Counsel's closing submissions as to the legal effect and relevance, if any, of the Emergency Decree promulgated on 2 June 2000 by the First Defendant and which was in force during August and September 2000 when the causes of action arose in relation to the present case.

[105] **Thus the seventh finding of the Court is that the Plaintiff was detained by a person or persons unknown at Central Police Station, Suva, from approximately 30 or 31 August 2000 until 8 September 2000. Due to an insufficiency of pleadings, evidence and argument, the Court makes no findings, however, as to the lawfulness of otherwise of that detention.**

F. LIABILITY

1. Whether any or all of the claims are statute barred?

[106] In his written closing submissions, Counsel for the Plaintiff is now claiming:

- (a) General damages for battery and assault of \$40,000 against both the First and Second Defendants;
- (b) Special damages for out of pocket expenses of \$18,000 against the First and Second Defendants;
- (c) Exemplary damages of \$30,000 against the First and Second Defendants;
- (d) Compensatory damages for Constitutional breaches of \$40,000 i.e. \$20,000 against the First and Second Defendants respectively;
- (e) Interest to be computed at 6 per cent;
- (f) Costs to be summarily fixed at \$5,000 against the First and Second Defendants respectively.

[107] On 30 July 2008, just before the commencement of this matter, the First defendant filed a Summons seeking leave to amend the First Defendant's Statement of Defence arguing:

(a) That the Plaintiff has filed his Statement of Claim five years after he was injured which is well outside the time allowed by section 4(d)(i) of the *Limitation Act* [Cap.35]; and

(b) That the Plaintiff is also well outside the limitation period for filing his writ under the High Court Constitutional Redress Rules 1998 which was previously dismissed by Singh J on 23 March 2004.

[108] The Plaintiff's Affidavit in Response which was sworn and filed on 31 July 2008 clarified that he had been advised that his "*claim in these proceedings is not and never was a claim for damages for personal injuries only*" and indeed "*that the sub-paragraph (d) of paragraph 24*" of his original claim "*can be withdrawn and be ignored by the Court in deciding the quantum of damages payable to the Plaintiff*" and the cause of action is based on the tort of "*trespasses to the person from the assaults and brutalities*" which the Plaintiff alleges occurred.

[109] Counsel for the Applicant First Defendant and Counsel for the Respondent Plaintiff appeared before me in relation to the Summons on Friday, 1 August 2008, prior to the commencement of the defended hearing of the substantive application on the following Monday, 4 August 2008. Counsel for the Applicant First Defendant withdrew the Application conceding that pursuant to section 4(1)(a) of the *Limitation Act*, the statutory limitation period to issue a claim for an intentional tort as pleaded in the present case (that is, assault) is six years, whereas pursuant to section 4(d)(i) of the *Limitation Act* "*actions for claims for damages for negligence*" have a statutory limitation period of three years. In short, the Plaintiff was not statute barred when he filed his claim on 25 July 2005 as only just under five years had passed since the cause of action arose.

2. The claim for Constitutional breaches

[110] In relation to the Constitutional Redress matter, this has not been dealt in the respective submissions of the Defendants but is an issue raised by the Plaintiff.

[111] Counsel for the Plaintiff has submitted that the Plaintiff is entitled to compensatory damages for Constitutional breaches as well as for his claim for his assault and battery.

He cites the judgment of Singh J in *Navualaba v Commander of Fiji Military Forces* (Unreported, High Court of Fiji at Suva, Civil Action No. HBC355 of 2003, 8 August 2008; Paclii: [2008] FJHC 168, <http://www.paclii.org/fj/cases/FJHC/2008/168.html>) but submits that the “*position by His Lordship is incorrect and we pray that Your Lordship dissents from the same*” and that “*the Plaintiff should be allowed to claim, compensatory damages for constitutional breaches apart from special and general damages in tort.*”

[112] What Singh J held in *Navualaba* (supra) at paragraph 36 was:

*“Mr. Valenitabua further in his final submission is seeking compensatory damages for constitutional breaches. He relies on the authority of Proceedings Commissioner, Fiji Human Rights v. The Commissioner of Police and the Attorney General – ABU 2003 of 2006 to make these submissions. That was a claim purely brought for damages for breaches of certain sections of the bill or rights, provisions in the Constitution. The present proceedings are a claim in tort. There is no reference to breaches of the Constitution in the statement of claim or the amended statement of claim. **Even if there were such claim, the court would not grant damages twice for the same wrong – one for tort and one for breach of constitutional right. That would be against the whole object of compensatory damages. Hence I cannot grant him any compensatory damages under this head.**”*
[My emphasis]

[113] In addition, in the present case, as noted above, on 24 March 2004 Singh J dismissed the Plaintiff’s previous Application for Constitutional Redress noting that it was not only some three years out of time but that the cause of action was clearly in tort and not appropriate to be dealt with by way of Constitutional Redress: *Naga v Commander, Republic of Fiji Military Forces* (supra).

[114] I note that the Plaintiff did not appeal Singh J’s decision to the Court of Appeal and instead commenced the present action in the High Court at Suva on 25 July 2005. Not only would it be inappropriate for me to entertain a further Application for Constitutional Redress which has been previously refused by the High Court (even if it is “dressed up” in another form) as it is out of time and should have been taken on appeal, but I also fully endorse the earlier finding of Singh J in *Naga* (supra) that is: “***Even if there were such claim, the court would not grant damages twice for the same wrong – one for tort and one for breach of constitutional right. That would be against the whole object of compensatory damages.***”

[115] I further note from paragraph 23 of the Plaintiff's Statement of Claim that he has claimed for breach of his constitutional rights in the form of "*assault, beatings, torture and brutalities*" and "*detention*". Then at paragraph 24, the plaintiff has particularised the damages suffered as:

- (a) "*Special damages for the Plaintiff's out-of-pocket expenses*";
- (b) "*General for the assaults, beatings, torture and brutalities being trespasses to the Plaintiff's personal*";
- (c) "*General damages for the Plaintiff's constitutional rights aforesaid*";
- (d) "*General damages for the Plaintiff's personal injuries*";
- (e) "*Exemplary Damages for the Defendants' respective breaches of the Plaintiff's constitutional rights and for the assaults, beatings, torture and brutalities on the Plaintiff*".

[116] As noted above, the Plaintiff in his Affidavit sworn and filed on 31 July 2008 stated "*that the sub-paragraph (d) of paragraph 24*" of his original claim for personal injuries "*can be withdrawn and be ignored by the Court in deciding the quantum of damages payable to the Plaintiff*".

[117] As for the detention, the Court has found that the Plaintiff was unlawfully detained by a person or persons unknown whilst under Military custody at Wainavua Camp from 25 August until 30 or 31 August 2000. It has further found that the Plaintiff was unlawfully detained by a person or persons unknown at Central Police Station, Suva, from approximately 30 or 31 August 2000 until 8 September 2000.

[118] Section 26 of the *Criminal Procedure Code* (Cap.21) requires that a person be brought before a court **within twenty-four hours** or released and Section 27 (3)(a) of the 1997 *Constitution* which requires that a person be brought before a court **not later than 48 hours**, unless it is under a *state of emergency* where a person can be held for **up to seven days**. Therefore, by 31 August 2000 the Plaintiff had been held in detention for some seven (7) days. The approximate further eight days he was held in detention at CPS Suva, meant that by 8 September 2000, he had been held for 15 days without charge, in

breach of section 23(3)(a) of the *Constitution* for his having been held longer than seven days and also arguably in breach of section 23(3)(b) as “*notice of the detention must be published in the Gazette within 14 days after the start of the detention*”.

- [119] As noted a number of times throughout this judgment, the problem for the Court is that Plaintiff did not plead in his Statement of Claim nor has it been argued in his Counsel’s closing submissions as to the legal effect and relevance, if any, of the Emergency Decree promulgated on 2 June 2000 by the First Defendant and which was in force during August and September 2000 when the causes of action arose in relation to the present case. In addition, there has been no reference to the relevance or otherwise of the judgment of Court of Appeal in *Prasad* (supra) and/or the High Court in *Nagera* (supra).
- [120] Counsel for the Plaintiff in his closing written submissions has stated that he is seeking “*general damages for battery and assault*” and “*compensatory damages for Constitutional breaches*”. It is clear from both the Plaintiff’s Statement of Claim as well as his Counsel’s final submissions that the only claim made for trespass to the person is in the form of the tort of assault and battery. There is no separate claim for the tort of false imprisonment. Counsel should have amended his claim to plead false imprisonment. He did not. The Court cannot allow a claim for a tortious act where it has not been pleaded. In addition, for the reasons outlined above, this Court cannot now allow a “back door” claim for Constitutional Redress. Therefore, even though the Court has found that the Plaintiff was unlawfully detained from 25 August until 8 September 2008, this aspect of the claim must fail.

3. Vicarious liability of the First Defendant

- [121] There is one other aspect of the case one which the submissions of the First Defendants has addressed and that is whether they should be held vicariously liable for the actions of their employees?
- [122] According to the First Defendant “*the purported tort committed on the plaintiff by servants of the defendants is too remote from their duties of securing the Monasavu Dam*”. In support, the First Defendant cites the judgment of Singh J *Wati v Buliruarua*

(Unreported, High Court of Fiji at Suva, Civil Action No. HBC 70 of 2004, 8 June 2005; Paclii: [2008] FJHC 128, <http://www.paclii.org/fj/cases/FJHC/2005/128.html>) where he held:

*“Therefore one has to look at the closeness of the connection between the duties which, in broad terms, the employee was engaged to perform and his wrongdoing. In other words the question to be answered is: **was the assault so closely connected with what the second defendant authorised or expected from the first defendant in the performance of his duties as a forklift driver that it would be fair; just and reasonable to conclude that the second defendant is to be held vicariously liable for the assault and resulting damages.**”* [My emphasis]

Whilst in Singh J found in *Wati* that the employer was not vicariously liable for the wrongdoing of his employee, he also noted: *“It therefore appears that a master is liable for acts of his servant in the course of employment even if the act is a criminal act or a tortious wrongdoing.”*

[123] In coming to a decision on vicarious liability, it is perhaps best to restate very briefly the Court’s two findings in this matter in relation to personnel of the First Defendant:

1. That on 25 August 2000 the Plaintiff was unlawfully assaulted by two unnamed persons whilst travelling in a vehicle being driven under Military custody from Tavua to Wainavua;
2. That on 26 August 2000 the Plaintiff was unlawfully assaulted by an unknown person whilst under Military custody at Wainavua Camp.

[124] In reviewing the above findings, it is clear that what was done by the employees of the First Defendant to the Plaintiff were acts for which their employer must be held liable as they were clearly done *in the course of their employment*. Counsel for the First Defendant has submitted that *“the military chain of command had no knowledge of the activity of these soldiers”* and that *“the security operations were limited to Monasavu dam area”* such that *“there is no close connection between the operations in Monasavu and the assault of the plaintiff”*. Therefore, Counsel has submitted that the Court should differentiate the present case from *Navualaba* (supra) where Singh J *“found that a duty was owed to the plaintiff by the defendants in circumstances similar to the present matter”* but where *“members of the security forces went looking for the plaintiff in his*

village which is close to the Monasavu dam” compared with the present case where “their area of operations was limited to Monsavu [sic] and it did not include Tavua”.

[125] By concentrating on this aspect of his submissions as the remoteness of Tavua (where the Plaintiff was initially “picked up”) to Monasavu dam, Counsel for the First Defendant, with all due respect, has missed an important point - the Plaintiff was then driven from Tavua to Wainavua Camp on 25 August 2000 a date which the First Defendant must accept was previously found by Singh J in Navualaba (supra) to be when the camp was found to exist and controlled by the Military.

[126] Even accepting for a moment that these were “rogue” soldiers, one only need ask, who provided such items as the vehicles, tents, food and weapons needed to maintain such a facility even on a temporary basis? Surely those in the military chain of command would have noticed both personnel as well as the equipment and supplies missing for such an extended period of time as we know it was operating from at least 24 August until at least 30/31 August 2000?

[127] The evidence of **Mr TAITUSI BULISUVA**, a prison officer, however, confirmed that this was a mainstream Military camp. Under cross-examination by Counsel for the First Defendant, Mr BULISUVA gave evidence that on 25 August 2000 he was searching for an escaped prisoner Alifereti Nimacere, he was in Wainavau camp for three days and that while at the camp he spoke to soldiers and police officers there and **was told by the army officers “that they were doing an operation”** but he was not told and did not know the exact nature of the operation. Indeed, the judgment of Singh J in Navualaba (supra) **found that some members of the Military were doing things on 24-25 August 2000** other than searching for an escaped prisoner Alifereti Nimacere, as he held at paragraphs 11-12:

*“The plaintiff’s evidence is confined to assaults at Wainavau camp which was a **military camp** ... I accept the plaintiff’s version of events in that **he was assaulted at Wainavau military camp** by being punched and kicked, hit with iron rod, of him having hot water poured over him and being hit with rifle butt. I accept that he was forced to eat horse manure ...*

And then again at paragraph 35 :

*“The plaintiff had surrendered himself to the army camp. If he was a suspect he should have been handed over to police to investigate the allegations against him according to law. **The plaintiff was alone among soldiers.** Far from protecting him, they assaulted him. They subjected him to totally unwarranted indignities ... The conduct of the soldiers in this case was extraordinarily undignified having no respect for the defendants’ right ... ”* [My emphasis]

- [128] Thus the camp seemed to be used as a base for coordinating a number of activities including the search for escaped prisoner Alifereti Nimacere.
- [129] Finally, the Court notes that no person was called on behalf of the First Defendant to say:
- (a) That what occurred on 25 and 26 August 2000 to the Plaintiff was by “rogue” soldiers and/or that their activities were not within the scope of their employment or orders; or
 - (b) That the activities of the “rogue” soldiers have been investigated and dealt with through disciplinary proceedings; or
 - (c) That the Military camp at Wainavau did not exist from 24 August until 30/31 August 2000 or, if it did exist, was not known to exist by the Military chain of command.
- [130] Thus, the Court is entitled to assume that any evidence such person or persons could have given on behalf of the First Defendant from the Military chain of command on the issue of vicarious liability would not have assisted the First Defendant’s case: **Jones v Dunkel** (supra).
- [131] **Therefore, the finding of the Court is that the First Defendant is vicariously liable for the actions of unknown soldiers in relation to:**
- (a) the assault of the Plaintiff on 25 August 2000 whilst travelling in a vehicle from Tavua to Wainavua Military Camp; and**
 - (b) the assault of the Plaintiff on the 26 August 2000 whilst being detained in the Wainavua Military Camp.**

G. DAMAGES

1. General damages

[132] In his Statement of Claim, the Plaintiff sought three sets of general damages:

- (a) General damages for trespass to the person;
- (b) General damages for personal injuries;
- (c) General damages for the breach of Constitutional rights.

[133] As has already been noted above, the Plaintiff in his Affidavit sworn and filed on 31 July 2008, just prior to the commencement of the hearing, confirmed in paragraph 4(b) “*that the sub-paragraph (d) of paragraph 24*” of his original claim, that is, for the Plaintiff’s “**personal injuries**” “*can be withdrawn and be ignored by the Court in deciding the quantum of damages payable to the Plaintiff*” and at paragraph 4(c) that he has six years “*within which to institute proceedings where the cause of action is based on Tort ... and that assaults and brutalities are trespasses to the Plaintiff’s person and are therefore torts*”.

[134] This has been further clarified in written closing submissions, where Counsel for the Plaintiff is now claiming on behalf of the Plaintiff “*general damages for battery and assault i.e. \$40,000 against the 1st and 2nd Defendants respectively*”. **There is no specific claim for the tort of false imprisonment and no finding by the Court as such.**

[135] In addition, as for the general damages claimed for breach of Constitutional rights, for the reasons already outlined above, this Court fully endorses the earlier finding of Singh J in *Naga* (supra) that is, that “*the court would not grant damages twice for the same wrong – one for tort and one for breach of constitutional right. That would be against the whole object of compensatory damages.*”

[136] Therefore, the Plaintiff’s only remaining claim in relation to general damages is for trespass to the person for the tort of assault and battery. In this regard, the Court has made two findings against personnel of the First Defendant:

- (a) That on 25 August 2000 the Plaintiff was unlawfully assaulted by two persons unknown whilst travelling in a vehicle being driven under Military custody from Tavua to Wainavua;
- (b) That on 26 August 2000 the Plaintiff was unlawfully assaulted by an unknown person

whilst under Military custody at Wainavua Camp.

[137] In addition, the Court has found that the First Defendant is vicariously liable for the actions of unknown soldiers in relation to the assault of the Plaintiff on 25 August 2000 whilst travelling in a vehicle from Tavua to Wainavua Military Camp and then again on the 26 August 2000 whilst being detained in the Wainavua Military Camp.

[138] The Judicial Studies Board of the United Kingdom, *Civil Bench Book*, on civil jury trials, (see http://www.jsboard.co.uk/civil_law/cbb/mf_16.htm) makes the following point in relation to actions for trespass to the person:

“Assault, battery and false imprisonment are forms of trespass to the person, so that once the plaintiff proves on a balance of probability that he has been beaten or detained, the legal onus of establishing some lawful justification falls upon the defendant.”

[139] In the present case, I am satisfied that the Plaintiff has proved on the balance of probabilities that he was assaulted on two different occasions by personnel of the First Defendant. The First Defendant has decided, for whatever reason, not to adduce evidence to establish “some lawful justification” for the actions of his personnel. As such, the First Defendant must pay to the Plaintiff appropriate damages as a result of being vicariously liable for the actions of his personnel in assaulting the Plaintiff on 25 and 26 August 2000.

[140] In *Navualaba* (supra), Singh J accepted that the Plaintiff “received some injuries” following a beating involving “*being punched and kicked, hit with iron rod, of him having hot water poured over him and being hit with rifle butt*” and “*forced to eat horse manure*”. He did not accept “*that such beatings continued for hours ... otherwise he would be in the form of a pulp*”. Nor did he believe that the Plaintiff “*was made to dive into a dry river bed ... or in a very shallow water*” as he “*would have expected serious injuries in his face and head if this had occurred*”. Further, the Court did “*not accept*” that the Plaintiff “*suffered a fractured left ankle*”. As for his specific injuries, however, Singh J found:

“He was beaten so he would have body pains with tenderness on back and both

chest walls. He received fracture to the middle phalanx of his left finger. I also accept that he suffered fracture of left forearm which had to be put on a back slab. The beatings also resulted in the plaintiff not being able to move and had difficulty to even sit in bed. Given that the plaintiff was punched and beaten, I do believe his wife that his face was swollen and he had black eyes and his arms and legs were swollen.”

[141] Singh J also found that the Plaintiff was suffering “*from post traumatic stress disorder, insomnia and irritability*” and awarded damages of \$45,000 for pain and suffering “*being \$40,000.00 for past pain*”.

[142] In the present case, the Court has found that the Plaintiff suffered two beatings, the first in the back of a vehicle whilst travelling from Tavua to Wainavua Camp and the second at Wainavua Camp.

[143] As to the level of injuries, the Court has accepted into evidence the report of Dr S. VEITOGAVI of 18 September 2000, however, the weight attributed to it shall be limited to observations of Dr VEITOGAVI that “*there were contusions with bruises on the side*” of the Plaintiff’s “*chest and face*” and that he also observed that the Plaintiff’s “*left arm was also injured*”, had an “*oblique fracture displacement at distal end of left ulnar*” and concluded that “*the above conditions are only due to rough and severe blows*”. The Court has also accepted the evidence of the Plaintiff that he was beaten whilst being driven from Tavua to on the way morning of 26 August 2000 at Wainavua Camp. It has further accepted the evidence of his wife, Mrs LUISA TANUMI, that when she attended Wainavua Camp on 26 August 2000 she found the Plaintiff sitting by a creek and that his body evidenced injuries consistent with his having been severely beaten.

[144] In relation to the amount of general damages to be awarded, Counsel for the Defendants in their respective submissions have each cited **Rokobutabutaki v Rokodovu** (Unreported, Fiji Court of Appeal, Civil Appeal No. ABU0088U of 1998S, 11 February 2000, Casey, Eichelbaum and Barker) Paclii: [2000] FJCA 9, <http://www.paclii.org/fj/cases/FJCA/2000/9.html>) which in turn cited **Attorney-General v. Jainendra Prasad Singh** (Unreported, Fiji Court of Appeal, Civil Appeal No. ABU0001U of 1998S, 21 May 1999, Tikaram P and Casey JA); Paclii: [1999] FJCA 35

<http://www.pacii.org/fj/cases/FJCA/1999/35.html>) wherein the Court noted that the judge's task "*was to fix damages at a proper figure in current Fiji dollars, referring to other awards as no more than broad guidelines to ensure that he was on the right track*". They have, however, not cited any other awards from Fiji or elsewhere to assist as "broad guidelines". Similarly, Counsel for the Plaintiff has not addressed in his submissions on this point.

- [145] The Court notes that in *Navualaba* (supra), Singh J cited *Sashi Prakash v. Commissioner of Police and Attorney General* (Unreported, High Court of Fiji at Lautoka, Civil Action No.HBC 237 of 2001) where:

"the High Court awarded a sum of \$42,000.00 for pain and suffering both post and future where a suspect was held in police custody from 7.30 p.m. to 1.30 a.m. and suffered seven fractured ribs, four on the right and three in the left. He also had a swollen mouth and broken dentures and other lesser injuries. There was no evidence of any post traumatic stress disorders."

- [146] In *Singh v Ponijasi and Ors* (Unreported, High Court of Fiji at Suva, Civil Action No.HBC371 of 1993, 4 September 2007) Coventry J awarded \$75,000.00 for general damages where the Plaintiff "*was kidnapped by serving soldiers*", taken to a remote spot, "*questioned and tortured*" including having "*a hood ... placed over his head and tied tightly around his neck*", "*his hands and feet ... tied*", then his body was "*tied to a tree*" and beaten, with "*a vehicle tyre ... set on fire close to him and ... told 'we will roast you alive'*" and then followed further beatings including "*his hands placed over the roots of a tree*" and "*then beaten with a metal pipe*". After "*11 to 12 hours*" he was eventually set free. Coventry J found post traumatic stress disorder "*was very strong after these events but gradually faded over the ensuing twelve to twenty-four months*". He did not cite any comparable case law.

- [147] Thus there have been three known cases in Fiji in recent years of vicious assaults whilst being unlawfully detained: *Prakash* (supra) of 2001 where \$42,000 was awarded for past and future pain and suffering where the Plaintiff suffered seven fractured ribs; *Singh* (supra) where in 2007 Coventry J awarded \$75,000.00 for general damages; and *Navualaba* (supra) of 2008 where Singh J awarded \$45,000 for past and future pain and

suffering (\$40,000 for the former) where the Plaintiff was in hospital for 47 days.

[148] In my view, the scale of the pain and suffering past and future is based on very limited medical evidence as well as the lay evidence of the Plaintiff and his wife. In addition, I note that there is no evidence of the Plaintiff having suffered post traumatic stress disorder. The Court accepts that the Plaintiff suffered two suffered two vicious assaults within the space of 24 hours which resulted in a broken left hand and required visits to three hospitals. Doing the best I can on the limited evidence available and noting that the assaults occurred just on eight years ago as at the time of the hearing, **the Plaintiff is awarded the sum of \$30,000 as general damages for his pain and suffering both past and future.**

2. Aggravated damages

[149] This was a case where aggravated damages for the aggravating features of the pain and suffering, perhaps should have been pleaded. They were not. In addition, no claim has been made for such damages in the written submissions of Counsel for the Plaintiff. As such, no claim for aggravated damages has been considered.

3. Special damages

[150] The Plaintiff is seeking special damages for out-of-pocket expenses of \$18,000 against the First and Second Defendants for labourers wages he alleges he has had to pay four times a year at \$500 each time ($4 \times \$500 = \$2,000 \times 8 \text{ years} = \$18,000.00$).

[151] The problem with this aspect of the Plaintiff's claim is that there was not a shred of documentary evidence tendered to support his claim. Instead, the Plaintiff simply relied upon his oral evidence and that of his wife.

[152] Even if documents have been "lost" over the past eight years, one would have thought that once the Plaintiff had first obtained legal advice on 18 September 2000, he would have been advised to document such items as:

- (a) Income and expenditure for his farm from 1999 before the assaults and then for 2000-2007 after the assaults;

- (b) Payments made to those who have been assisting in clearing the land and harvesting allegedly at \$500 a time at four times a year from 2000-2007;
- (c) Income tax returns from 1999-2007.

[153] In addition, the Plaintiff could have called as witnesses some of the labourers he has allegedly employed on a casual or contract basis. Thus, the Court is entitled to assume that any evidence such person or persons could have given on behalf of the Plaintiff, would not have assisted the Plaintiff's case on special damages: ***Jones v Dunkel*** (supra).

[154] This aspect of the Plaintiff's claim has some similarities in part to the special damages dismissed by Singh J in ***Navualaba*** (supra) when he concluded:

“Loss of Income:

[18] The only relevant detail in the statement of claim relevant to special damages is that the plaintiff was a villager. There is nothing mentioned about his occupation or the level of his remuneration be it weekly or some other term. There is no mention of him having a farm producing crops for sale ...

[20] In the year 2000 he stated that he began to plant yaqona and dalo which he sold. He stated that he sold these twice a week, that is, two bundles of yaqona worth \$600.00 and carrier full of dalo. After beating he stated that he could not farm a lot because of injuries. The wife farms now ...

[22] If the plaintiff is to be believed, he sold weekly yaqona valued at \$600.00 and a carrier full of dalo. He did not tell the court what was the size of the carrier he transported the dalo in. He produced no names or places where he sold such significant amount of farm produce. If he was using someone else's vehicle to transport produce, that person could have been called as witness.

[23] I do not believe the plaintiff that he was selling dalo and yaqona to the extent he makes out. He may have done some small scale farming but not the amount he is trying to make out

*[24] The law is clear. Plaintiffs who claim substantial damages must show both the fact that he/she suffered damages and the extent of those damages. Difficulty of proof does not dispense with necessity for proof. If precise evidence is available or obtainable, then the court expects a plaintiff to produce it. It is not enough for plaintiff to simply write down figures or make assertions and throw them at the court and expect the court to grant those damages: ***Bonham Carter v. Hyde Park Hotel*** – (1938) 6 TLR 177; ***Ratcliffe v. Evans*** – (1982) 2 Q.B. 524, 532. In the latter case Bowen L.J. recommended that*

‘As much certainty and particularity must be insisted on, both in pleading and proof or damage, as is reasonable, having regard to the circumstances and to the nature of the facts themselves by which the damage is done. To insist upon less would be to relax old and intelligent principles. To insist upon more would be the vainest pedantry.’

[25] All the plaintiff has done is making assertions of his loss with no supporting evidence. I cannot in the circumstances grant him any damages for loss of income ... Besides there was nothing to stop the plaintiff from employing someone on part time basis so his crops could be tendered. This employee would assist his wife in the tilling of the crops. Mitigation of damages is not an idle concept.

[26] His claim for loss of income is therefore dismissed.” [My emphasis]

[155] This Court can only concur with much of what Singh J said in Navualaba in relation to special damages, **There is no basis for the Court to award such damages in the present case. This aspect of the Plaintiff’s claim is dismissed.**

4. Exemplary damages

[156] In the Plaintiff’s Statement of Claim it is stated that he has suffered various damages including:

“Exemplary damages for the Defendants’ respective breaches of the Plaintiff’s constitutional rights and for the assaults, beatings, torture and brutalities on the Plaintiff.”

[157] In his written submissions, Counsel for the Plaintiff is seeking exemplary damages of \$30,000 against the First and Second Defendants. The Court has, however, only found the First Defendant liable for the assault and battery on 25 and 26 August 2000.

[158] According to Order 18, rule 7(3) of the High Court Rules:

“A claim for exemplary damages must be specifically pleaded together with the facts on which the party pleading relies.”

[159] To cite *Clerk & Lindsell on Torts*, 19th edn, Sweet & Maxwell, London, 2006, at paragraph 29-139, page 1883:

“Lord Devlin in ***Rookes v Barnard*** [1964] AC 1129 laid down that exemplary damages, as distinct from aggravated damages, should only be awarded in two specific categories... unless ... expressly authorised by statute ... first, **cases of ‘oppressive, arbitrary or unconstitutional action by the servants of the government’** and ... cases in which ‘the defendant’s conduct has been calculated ... to make a profit ... which may well exceed the compensation payable to the [claimant].”

[160] Perhaps one the best summations of the law in this area was by Brennan J from the High Court of Australia (who was later a member of the Supreme Court of the Fiji Islands) in ***XL Petroleum (N.S.W.) Pty. Ltd. v. Caltex Oil (Australia) Pty. Ltd*** (1985) 155 CLR 448; (Austlii: [1985] HCA 12, 28 February 1985, <http://www.austlii.edu.au/au/cases/cth/HCA/1985/12.html>), when he said, at page 471 (paragraphs 9-10):

*"As an award of exemplary damages is **intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again**, the considerations that enter into the assessment of exemplary damages are quite different from the considerations that govern the assessment of compensatory damages. There is no necessary proportionality between the assessment of the two categories. In ***Merest v Harvey*** (1814) 5 Taunt 442 (128 ER 761) substantial exemplary damages were awarded for a trespass of a high-handed kind which occasioned minimal damage, Gibbs C.J. saying:*

'I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages?'

*The social purpose to be served by an award of exemplary damages is, as Lord Diplock said in ***Broome v. Cassell & Co.*** (1972) AC 1027, at p 1130, **'to teach a wrong-doer that tort does not pay'**." [My emphasis]*

[161] In addition, as I discussed recently in ***Rokotuiviwa v Seveci*** [2008] FJHC 221; [HBC374.2007](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2008/221.html) (12 September 2008), the Court must also consider whether an award should also take into account that a message should be sent to those responsible for overseeing of the force. This was taken up by Priestly JA (with whom Sheller and Beazley JJA agreed) in ***Adams v Kennedy*** (2000) 49 NSWLR 78; (Paclii: [2000] NSWCA 152, 26 June 2000, <http://www.austlii.edu.au/au/cases/nsw/NSWCA/2000/152.html>) wherein he said:

*“ In the present case, although strictly it would be proper to award a separate amount for each cause of action, it seems to me that since the different causes of action arose out of the one series of closely connected events, it is appropriate to award one aggregate figure in respect of all the causes of action. **That figure should indicate my view that the conduct of the defendants was reprehensible, mark the court's disapproval of it. The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses of the kind that occurred in the present case do not happen.”** [My emphasis]*

[162] This issue was considered by the High Court of Australia in *State of NSW v Ibbett* (2006) 231 ALR 485; (2006) 81 ALJR 427); (Austlii: [2006] HCA 57, 12 December 2006, Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJA, <http://www.austlii.edu.au/au/cases/cth/HCA/2006/57.html>). The Court noted that “Lord Hutton was to speak to similar effect” in *Kuddus v Chief Constable of Leicestershire Constabular* [2002] 2 AC 122 at 149; (Bailii: [2001] UKHL 29), where he concluded:

*“I think that a number of cases decided by the courts in Northern Ireland during the past 30 years of terrorist violence give support to the opinion of Lord Devlin in *Rookes v Barnard* ... that in certain cases the awarding of exemplary damages serves a valuable purpose in restraining the arbitrary and outrageous use of executive power and in vindicating the strength of the law ... In my opinion the power to award exemplary damages in such cases serves to uphold and vindicate the rule of law because it makes clear that the courts will not tolerate such conduct. It serves to deter such actions in future as such awards will bring home to officers in command of individual units that discipline must be maintained at all times.”* [My emphasis]

[163] Singh J in *Navualaba* (supra) awarded a sum of \$18,000.00 as exemplary damages. This has been cited by the Plaintiff as well as Counsel for the Second and Third Defendants in their submissions. The Plaintiff in *Singh* (supra) sought exemplary damages of \$20,000 but Coventry J awarded \$100,000 saying that “*the figure ... sought by the plaintiff’s counsel is too modest given the circumstances of the case*”.

[164] Whilst the Court can appreciate the difficulties facing the personnel of the First Defendant at an extremely tense time, particularly when they were looking for missing firearms from Monasavu at the time of the takeover of the Dam, this did not justify what the Court has found occurred in relation to the Plaintiff.

[165] In reaching an appropriate figure, the Court has taken into account that two assaults occurred and, to paraphrase the words of Priestly JA in *Adams v Kennedy* (supra), the figure should indicate “*that the conduct of the defendants was reprehensible*” and to “*mark the court's disapproval of it*”. In addition, it “*should also be such as to bring home to those officials of the State who are responsible for the overseeing of the Military forces that soldiers must be trained and disciplined so that abuses of the kind that occurred in the present case do not happen.*”

[166] **Therefore, it is the finding of the Court that in relation to “exemplary damages”, there is clear evidence to support it in relation to two incidents of unlawful assault and battery on 25 and 26 August 2000. The Court orders a lump sum of \$30,000 for exemplary damages.**

5. Compensatory damages

[167] In the Plaintiff’s Statement of Claim it was stated that the Plaintiff was seeking “general damages for the breach of the Plaintiff’s constitutional rights aforesaid”.

[168] In his written submissions, Counsel for the Plaintiff is seeking “*compensatory damages for Constitutional breaches of \$40,000 i.e. \$20,000 against the First and Second Defendants respectively*”.

[169] The Court has made an award of damages for the tort of assault and battery upon the Plaintiff. As Singh J held in *Navualaba* (supra), it would not also grant an award for breach of constitutional rights for the same wrong as “*it would be against the whole object of compensatory damages*”.

[170] The Court has not made an award of damages for the tort of false imprisonment, however, as it was not pleaded. In addition, for the reasons outlined above, this Court cannot now allow a “back door” claim for Constitutional Redress which was previously dismissed by Singh J on 24 March 2004. Further, for the reasons outlined above, a claim for unlawful detention has not been proven. Therefore, a claim for “*compensatory damages for Constitutional breaches*” cannot succeed.

6. Interest

[171] The Plaintiff is seeking interest on the judgment sum to be computed at 6 per cent.

[172] According to Section 3 of the *Law Reform (Miscellaneous Provisions) (Death and Interest) Act* [Cap 71]:

“... the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment”

[173] Even though I note that this is a matter which, perhaps, could have been resolved soon after it occurred by way of an apology and an ex gratia payment, and, if not, then soon after the Statement of Claim was filed in 2005, by again, perhaps, an apology and an offer of settlement, rather than the Plaintiff having to wait for some three and half years to be vindicated through the Court's determination. Therefore, I see no basis as to why I should not allow interest on the \$30,000 awarded for general damages and, accordingly, I will allow it. I do not believe, however, that interest is appropriate on an award of exemplary damages as this is only something which a Court could have awarded at the end of a hearing.

[174] On my calculations, this represents three years and one week from 25 July 2005 until 4 August 2008 when the matter was heard, making a total of \$1,800.00 per year for three years plus \$34.62 for one week giving a combined total of \$5,434.62 . I do not believe that the Defendants should have to pay interest in the post hearing period while written submissions were being filed and the judgment then written.

[175] **Therefore, it is the finding of the Court that it is fair and reasonable to award interest on the general damages awarded of \$30,000 at a rate of 6% per annum for the period from 25 July 2005 until 4 August 2008 which the Court has calculated to be \$5,3434.62.**

7. Costs

[176] The Plaintiff is seeking costs to be summarily fixed at \$5,000 against the First and Second Defendants respectively. Because of the way the submissions were filed, the First Defendant has not had a chance to respond to this submission. In addition, as I have only found against the First Defendant, Counsel for the Plaintiff may wish to amend this aspect of his submissions and Counsel for the Second and Third Defendants no doubt also wishes to address the Court. I note in Navualaba (supra), Singh J allowed costs fixed summarily in the sum of \$3,000 for the Plaintiff and \$2,000 for the Second and Third Defendants. I will allow Counsel for the respective parties to address me further on the question of costs after the formal orders have been pronounced.

H. ORDERS

[177] The formal Orders of this Court are as follows:

1. **Judgment is entered for the Plaintiff against the First Defendant in the amount of \$65,434.62 comprising:**
 - (a) **An award of general damages in the sum of \$30,000;**
 - (b) **An award of exemplary damages in the sum of \$30,000;**
 - (c) **An award of interest on the general damages at a rate of 6% per annum for the period of 3 years and one week from 25 July 2005 until 4 August 2008 which the Court has calculated to total \$5,434.62.**
2. **Liberty to the Plaintiff and First Defendant to re-list on 48 hours notice if either of them are of the view that the above calculations are incorrect.**
3. **The Plaintiff's claim against the Second and Third Defendants is dismissed.**

I will now hear the parties as to costs.

Thomas V. Hickie
Judge

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