

**DR ANIRUDH SINGH v SOTIA PONJIASI and 5 Ors (HBC0371 of 1993)**

HIGH COURT — CIVIL JURISDICTION

5 COVENTRY J

4 September 2007

10 **Damages — personal injuries — claim for general damages — claim for exemplary damages — whether Plaintiff’s loss of career resulted from injuries and trauma — court found Plaintiff suffered post-traumatic stress disorder that gradually faded — detriment was not to Plaintiff’s entire career — sum to be awarded must be fixed in broad terms and without specific reference to posts and salary levels — exemplary damages against the sixth Defendant but not against the five other Defendants —**  
 15 **wrong for court to award exemplary damages against the five Defendants when they had faced criminal proceedings as individual servants and had been sentenced.**

20 The Plaintiff was kidnapped by the first five Defendants, serving soldiers who were members of the Special Operations Security Unit in the Fiji Military Forces. The Plaintiff had allegedly taken part in the public burning of the new Constitution a few days prior to the kidnapping. He was taken to a remote spot where he was questioned and tortured. He was left alone but was able to make his way home. The five Defendants pleaded guilty to various criminal charges and were sentenced to 12 months’ imprisonment suspended for 15 months. The Plaintiff commenced the proceedings against the Defendants claiming  
 25 general damages for his pain, suffering and loss of enjoyment of life and damages for the loss of his career which resulted from the injuries and trauma he suffered. The Plaintiff also sought special and exemplary damages.

**Held** — (1) Even though there had been little or no lasting physical injury, damages should reflect the trauma. Further, the Plaintiff felt that he was going to die. Considering the period it took for the Plaintiff to physically recover, the court found that there was  
 30 post-traumatic stress disorder which was very strong but gradually faded over the ensuing 12–24 months.

(2) There was no explanation in the evidence as to why the Plaintiff did not seek a further leave of absence from his work. There was also no evidence that, having received the termination letter in September, he sought to communicate with the university to try to persuade them to change their mind or offer to return at the earliest possible opportunity.  
 35 The Plaintiff did not seek to say that, by reason of the harm he had suffered and its continuing consequences, he simply overlooked applying for an extension of leave or revocation of the termination. The court did accept that at this time there would still have been continuing although progressively lessening effects from the assault, but not sufficient to mean he overlooked a matter such as this. In the judgment, the Plaintiff was  
 40 entitled to a sum by way of damages in respect of the detriment to his career, which arose as a result of these assaults. That detriment was not to his entire career, yet for several years after 1990 it did close off one viable and valuable career path. When he was in a position to reconsider returning to Fiji he would have had to start from near the beginning of that career path. This sum necessarily must be one which was fixed in broad terms and without specific reference to posts and salary levels.

45 (3) Exemplary damages are “punitive” by their nature and the five Defendants had been sentenced before a criminal court. The sentences were arguably wholly inadequate. Although there was no direct evidence, it was likely that they would be unable to pay sums of any substance. When the individual servants have faced criminal proceedings and been sentenced, it is wrong for the court to make an award of exemplary damages against them.  
 50 For these reasons the court found that it consistent with principle and the purpose of exemplary damages for an award to be made against the sixth Defendant (D6) but not against the remaining five.

Application for general damages allowed. Application for exemplary damages denied.

**Cases referred to**

*Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122; [2001] 3 All ER 193; [2001] 2 WLR 1789; [2001] UKHL 29, applied.

- 5 *Archer v Brown* [1985] QB 401; [1984] 2 All ER 267; [1984] 3 WLR 350, cited.  
*Rookes v Barnard* [1964] AC 1129; [1964] 1 All ER 367; [1964] 2 WLR 269, considered.

*F. Haniff* for the Plaintiff

- 10 *L. Daunivalu* for the sixth Defendant

[1] **Coventry J.** On 24 October 1990 the Plaintiff, Dr Anirudh Singh, left his home to go to work at the University of the South Pacific. He was a lecturer in the Physics Department there. He was walking along Rewa Street when he was  
 15 kidnapped by serving soldiers in the Fiji Military Forces, the first five Defendants. Those soldiers were members of the “Special Operations Security Unit” (SOSU, a unit whose purpose was “to collect and collate information about anyone or anything likely to destabilise the country”). Dr Singh had allegedly taken part in the public burning of the new Constitution a few days earlier.

- 20 [2] Dr Singh was taken by those soldiers to a remote spot. There he was questioned and tortured. A hood was placed over his head and tied tightly around his neck. He could not breathe normally. His hands and feet were tied, the former so tightly that there was little circulation. He was then tied to a tree. He was  
 25 beaten and, because of the hood, was gasping for breath; he was suffocating. Later, a vehicle tyre was set on fire close to him and he was told “we will roast you alive”. He continued to be questioned and beaten. After several hours and as darkness was descending he was unhooded and untied and his hands placed over the roots of a tree. They were then beaten with a metal pipe. After a total of 11–12 hours his captors left him alone and was able to make his way to a road  
 30 and get a lift to his home.

- [3] On 22 November 1990, the first five Defendants pleaded guilty to various criminal charges arising from this episode and were sentenced to 12 months’ imprisonment concurrent on each count suspended for 15 months and fined a total of \$340 each. The then the Commander of the Fiji Military Forces and the  
 35 soldiers immediate commander both issued statements saying that no orders were given for these actions, that they were unlawful and were no part of the functions of the military forces. Dr Singh was charged with sedition but this charge was later not pursued. As at November 2006 four of the five Defendants were still serving soldiers in the Fiji Military Forces.

- 40 [4] On 25 June 1993, Dr Singh commenced these proceedings against the of the five soldiers and the Attorney-General, being the representative of the Fiji Military Forces, claiming general, special and exemplary damages. Judgment by default was entered against the first five Defendants. After a full trial and by a judgment dated 1 November 2006 I found that the sixth Defendant was  
 45 vicariously liable for the actions of the first five Defendants. The purpose of this ruling is to determine quantum of damages to be paid. The first five Defendants have been notified at various stages of the progress of this case, but have not participated in any way.

- 50 [5] Plaintiff’s Counsel cites the dictum of Lord Scarman in *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174 at 187; [1979] 2 All ER 910 at 917; [1979] 3 WLR 44 where he stated that “The principle

of the law is that compensation should as nearly as possible put the part who has suffered in the same position as he would have been if he had not sustained the wrong”.

5 [6] Dr Singh claims general damages for his pain, suffering and loss of enjoyment of life. He further claims damages for the loss of his career which resulted from the injuries and trauma he received on that day in October 1990. He states that following these events he could not live in Fiji and thereby lost the career of his choice, namely ultimately to become a Professor of Physics at the University of the South Pacific. His curriculum vitae is exhibited showing in  
10 particular his work in Muon Implantation Studies at the Rutherford Appleton Laboratory in England and elsewhere. A schedule of his publications and presentations is attached, for example, a paper, published with others, entitled “Studies of Muon Implantation in Amorphous and Crystalline Silicon”. Dr Singh also claims exemplary damages. His counsel has stressed the fact that this action  
15 has been brought in tort and not for any kind of constitutional redress.

[7] The sixth Defendant, given my judgment, does not oppose an award for pain, suffering and loss of enjoyment of life. However, he does oppose any award for loss of career. The sixth Defendant points out that it was through the failure  
20 of Dr Singh himself to seek any further leave of absence that he lost his position at the University of the South Pacific (USP). Further, he argues that the work in England, particularly at the Rutherford-Appleton laboratory, was just as viable a career path as remaining in the South Pacific. An award of exemplary damages is opposed as the perpetrators have already faced criminal proceedings, general damages can do most, if not all, of the work that could be done by exemplary  
25 damages, the sixth Defendant is only fixed with liability vicariously and the awarding of exemplary damages does nothing more than pass on a burden to the taxpayer.

[8] For the Plaintiff’s case I have heard the evidence of Dr Anirudh Singh himself, Dr Surendra Prasad, Dr Birnen Prasad and Selina Kuruleca. I have also  
30 had read before me the two affidavits of Arvind Patel. For the Defendants I have heard the evidence of Agnes Kotoisuva and Dr Yvonne Entico. The affidavit of Dr I Waqainabete was read. Both parties have provided closing written submission and copies of authorities.

### 35 **1. Pain, suffering and loss of enjoyment of life**

[9] I have before me the oral and written evidence of Dr Singh concerning the injuries inflicted upon him and how he felt during his period of captivity and thereafter, at tab 31 of the principal bundle is a photograph of Dr Singh taken  
40 shortly after his release. In particular, it shows the injuries to his face and the gross swelling of both his hands.

[10] At tab 30 there are two reports of Dr Brian H Cameron MD, FRCSC, consultant surgeon at the CWM Hospital. In his report dated 31 October 1990 he states,

45 Dr Singh was admitted to hospital on 24/10/90 at 10.10 pm after suffering injuries in an assault

...

His injuries noted at the time of admission were:

- 50 1. Facial bruising and swelling around the left eye with sub conjunctival haemorrhage.
2. Rope burns around both wrists.
3. Fractures of right radius, left hand and left little finger.

4. Abrasions both hands.
5. Superficial bums of left shoulder and right forearm consistent with cigarette burns.
6. Contusions of anterior chest wall.
- 5 7. Decreased sensation of left hand due to neuro praxia, bruising of radial nerve from the wrist rope.

All his injuries were consistent with the history given by the patient of being tied, struck and burnt

10 [11] On 6 November 1990 Dr Cameron gave a further medical report as follows:

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

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

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

25 [12] Dr S C Ramrakha, MBBS and Dr Riju C Ramrakha of Balmain in Australia gave a further report on 29 January, 1991. They state, "Dr Singh consulted us on 4/12/90". (The injuries are then listed) and they continue:

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

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

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

45 He feels that he is more absent minded and lost for words. He occasionally forgets what he is saying in mid sentence. He has had one episode of difficulty in expressing himself, the medical term for which is Aphasia. Since the injury he also describes dreams, these most commonly occur when he is falling asleep and he hears loud noises which he describes as himself screaming. Other dreams are very realistic dreams where he sees his body being mutilated. The frequency of these dreams is increasing. For some months after the attack he complained of difficulty sleeping, and of being afraid of being dragged out of his bed. He tends to stay indoors and is afraid of walking down the street in Suva. He has also noted a recurrence of stuttering ... After an attack of this nature  
50 a post traumatic stress reaction is quite common. The symptoms he describes such as dreams, sleep disturbance, stuttering and agoraphobia like symptoms are very common.

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

The prognosis with respect to these psychological conditions cannot be ascertained for some time.

5 [13] Dr Singh in evidence described how he felt over the ensuing months and years and how he feels today. All the physical injuries appear to have cleared up after approximately 12 months, save for some remaining loss of use of his left little finger.

10 [14] Dr Singh also described in evidence how he viewed this episode, its effect upon his ability to gain employment commensurate with his abilities, qualifications and experience, his financial reliance upon his wife, the deteriorating relationship with his wife and children, the jobs he has applied for and those that he has obtained up to his current position as senior lecturer in the  
15 School of Physics at the University of the South Pacific, a post he says which would probably have been his in the early to mid-1990s had it not been for this episode. I accept his evidence on these matters.

[15] I have before me the brief of evidence and evidence of Selina Kuruleca. She is a trained and qualified psychotherapist in private practice in Suva. In her  
20 opinion, Dr Singh suffered:

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

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

30 [16] She then continued in her brief of evidence to describe PTSD and its symptoms. In particular, she stated that Dr Singh's desire to be away from Fiji, his feelings when persons in uniform were close to him and his feelings of apprehension when there was physical activity near him were entirely consistent with PTSD and what he had suffered. She could not say how long these  
35 symptoms had lasted but says "at present he is not exhibiting symptoms consistent with PTSD". I accept Selina Kuruleca's evidence.

[17] The affidavit of Dr Eferemi Waqainabete was read. He stated "Based on the medical reports presented to me (those set out above), I cannot say that Dr Singh has suffered any permanent injury as the result of the beatings he  
40 incurred in 1990 ... given the lack of the final assessment of Dr Singh's physical injuries and the absence of an ongoing recent medical review, it is not possible to assess whether he has suffered any permanent, physical incapacity for which he can be compensated". Defence counsel called Dr Yvonne Entico. She could add little to what had already been said, agreed there might be PTSD and that  
45 given the lack of a final assessment she could not give "a proper psychological or psychiatric assessment". I accept the evidence of both doctors.

[18] Counsel for Dr Singh has suggested that a figure of \$45,000 for pain, suffering and loss of enjoyment of life would be proper.

50 [19] Counsel for the sixth Defendant set out in his written submissions the awards made in a number of cases of physical injury. A figure of \$10,000 is put forward as fair and reasonable.

[20] I do bear in mind this is not an ordinary case where, for example, someone has suffered physical injury in a road accident.

5 [21] Even though there might have been little or no lasting physical injury from such acts as the beatings, hooding and cigarette burning, damages should also reflect the trauma. Further, Dr Singh describes how, fairly soon after the commencement of his ordeal, he felt that he was going to die. Damages must reflect this and the effect of being hooded and beaten, the fear he felt when the tyre was placed close to him set on fire, the loss of sensation in his hands and his thought “what do hands matter when my life is at stake”.

10 [22] I look to the period it took for him to physically recover. I do find that there was post-traumatic stress disorder which was very strong after these events but gradually faded over ensuing 12–24 months. Despite the fact is described as not now suffering from PTSD and is psychologically very well adjusted, the memory of this episode and all that comes with it will be with him for the rest of his life. It is difficult to determine, aside from other factors, what effect this ordeal had upon his relations with his wife and family. There must be some allowance for this.

15 [23] When all these factors are taken into account, I find that counsel’s suggested figure of \$45,000 is too low. I award \$75,000. Although a court will look carefully to figures suggested by counsel, the court is not bound by them. This figure does not include any element of aggravated damages; none were claimed.

## 25 **2. Loss of career**

[24] At para 6 of Plaintiff counsel’s written submissions he states;

It is submitted that the evidence ... establishes not merely on a balance of probability but very positively, that, absence the actions of the first to fifth defendants on 24th October 1990, Dr Singh would have been a senior lecturer between 1992–1995, Associate Professor at an Associate Professorship of Level 3 between 1996–1998 and have been Physics Professor from 1999.

30 [25] In a schedule entitled “special damages” counsel sets out Dr Singh’s claimed loss from 1996–2007 as \$402,251.64. This envisages 3 years at associate professor level from 1996 and then as professor from 1999–2007. The figure of \$97,618.23 is then claimed for loss of future earnings from 2008–15. Counsel states that a discount rate and a contingencies discount have been applied in accordance with precedent to arrive at this figure.

35 [26] Dr. Surendra Prasad, who was in 2004 and 2005 Head of the Physics Department at USP, and Dr Biman Prasad, who is currently Head of School of Economics and an associate professor, gave evidence in support. The two affidavits of Arvind Patel, Head and Associate Professor in the Department of Accounting and Financial Management at USP, were read to the court. They each supplied their curriculum vitae and lists of publications. Dr Surendra Prasad and Dr Biman Prasad both stated their high opinion of Dr Singh and the quality of his work and both had no doubt that had Dr Singh not suffered the events of 24 October 1990 he would have achieved the post of Professor of Physics. Arvind Patel, Head and Associate in Department of Accounting and Financial Management at USP, gave detailed evidence, figures and tables to support the claimed figures.

[27] In response the Defendants called Agnes Kotoisuva, Director of Human Resources at USP She produced a resume of Dr Singh's employment history with the University (DW1) and the termination letter of 15 September 1992 to Dr Singh (DW2). At para 1 that letter reads:

5 I write to formally inform you that since you failed to resume duty on 6th July 1992, you are, therefore, deemed to have resigned from your post at the University of the South Pacific.

[28] The employment history reads:

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9. 22/4/1991	30/1/1992	Special Leave without pay	Dr Singh was abducted and assaulted
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10. 31/12/1992		LWOP (Leave With Out Pay) extended	
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11. 10/3/1992		Resumed duties at the Physics Department	
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12. 14.2.1993	6/7/1992	Approved Leave	
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13. 15/9/1992		Letter informing Dr Singh that since he had failed to resume duties on 6/7/1992 therefore he has been deemed to have resigned from his post at USP	
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NB at 12, "14.2.1993" should probably read "14.3.1992".

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[29] Agnes Kotoisuva could not help with any further explanation beyond what is apparent on the face of DW1. She did however set out the procedures to be followed and assessments made before a person is considered for appointment as associate professor or professor. She referred to Dr Singh's unsuccessful application for the post of temporary lecturer in Physics in June 1998.

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[30] It was also part of the defence case that there would not necessarily have been available a professorial post available at any particular time and Dr Singh's expertise is in a narrow field. The Plaintiff countered by saying that there would be nothing to stop the university creating a professorial post for him, given his high levels of knowledge and expertise.

35

[31] The main thrust of the defence case was that Singh lost his post at USP because he failed to apply for any further leave of absence.

40

[32] I cannot, on the balance of probabilities, find that had Dr Singh not been subjected to the assault in October 1990 his career would have progressed as his counsel suggests. By this finding, I do not in any way detract from academic and practical achievements of Dr Singh, the calibre of physicist that he is or the descriptions of him as provided by Dr Surendra Prasad and Dr Biman Prasad. I do accept that such was the effect of this assault upon Dr Singh that in 1990 he felt he simply could not live in Fiji. I also accept when he says at para 44 of his continuation of brief of evidence "I returned to Suva in March 1992, at the expiry of the leave from USP. However, upon my return, I realized I was not feeling much better after the absence. I was still afraid of being abducted, and fearful of my surroundings. I simply had to leave Fiji. I returned to the UK and shortly thereafter received a letter from USP that I was deemed to have resigned. I was devastated".

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[33] There is no explanation in the evidence as to why Dr Singh did not seek a further leave of absence from USP. There is also no evidence that, having received the termination letter in September, he sought to communicate with USP

to try to persuade them to change their mind or offer to return at the earliest possible opportunity. Dr Singh in evidence did not seek to say that by reason of the harm he had suffered and its continuing consequences he simply overlooked applying for an extension of leave or revocation of the termination. I do accept  
5 that at this time there would still have been continuing although progressively lessening effects the assault, but not sufficient to mean he overlooked a matter such as this.

[34] His curriculum vitae for the period 1990–1995 (AS/1 of the continuation of the brief of evidence) shows — “Research Associate — Leicester University, UK”. His duties as set out included assisting with grant applications for funding for experimental projects in Muon Implantation Studies, work at the prestigious Rutherford-Appleton Laboratory in England, and in Vancouver and elsewhere. For the period from 1992–95, he co-authored some twelve scientific publications on solid state physics and was involved orally or in other ways in some twelve  
10 presentations in London, (including the Royal Institution), Leicester, Cambridge, Hawaii, and Vancouver. Dr Singh’s work permit in the United Kingdom expired and he had to leave by October 1995. I do note that even after that date he was involved in the publication with others of learned papers and also in giving  
15 presentations.

[35] In everyone’s career there are decisions which have to be made which might in the longer term lead on to higher posts or which might for one reason or another fail to enhance one’s career. It might well be that Dr Singh having found himself in the United Kingdom working with others on prestigious projects  
20 would have decided to stay there had he been fortunate enough to have been offered further postings. It might well be that had that happened he would have sought to make his academic career in the United Kingdom. In these circumstances, I cannot award any damages for loss of career to-date or in the future the way that is sought by his counsel. Further, I do not find that a  
25 calculation of loss by means of multipliers and multiplicands is the correct approach. I do acknowledge the substantial and painstaking work counsel has in for this approach had it been accepted.

[36] However, I do find on the evidence that one career avenue that was open to Dr Singh in 1990 was closed to him as a result of these assaults. There is no  
35 reason why in 1990 Dr Singh could have considered his future by saying “I wish to further my PhD work, carry out studies and research in United Kingdom yet still have available to me the possibility of an academic career at the University of the South Pacific in a few years time”. The assaults effectively closed off for several years, and possibly completely, one career option available to Dr Singh.  
40 I further accept that for some 4–5 years after 1990 he felt so apprehensive about returning to Fiji to live and work he could reasonably decide not to do so. That feeling clearly diminished over further years till the point he felt able to return here and work. He did in fact apply for a post of temporary lecturer in physics in 1998 but was rejected. That shows he felt able to return and live in by that  
45 time. There is no reason shown on the evidence why application was refused; it is possible that the University authorities felt he was over qualified. This does mean that in academic career terms it could be said he had “missed the boat”.

[37] In my judgment, Dr Singh is entitled to a sum by way of damages in respect of the detriment to his career, which arose as a result of these assaults.  
50 That detriment was not to his entire career yet for several years after 1990 it did close off one viable and valuable career path. When he was in a position to



reconsider returning to Fiji he would have had to start from near the beginning of that career path. This sum necessarily must be one which is fixed in broad terms and without specific reference to posts and salary levels. Doing the best I can in the circumstances, I find that Dr Singh is entitled to the sum of \$75,000 under this head. It is not a coincidence that is the same as the sum awarded in respect of pain and suffering. In broad terms, it can be said that the two have an equivalence.

### 3. Exemplary damages

[38] Counsel for D Singh states he is entitled to exemplary damages for the deliberate, intentional and or reckless conduct of the Defendants. He suggests a figure of \$25,000 would be proper. For the reasons summarised at the beginning of this judgment counsel for the sixth Defendant states there should be no award.

[39] This claim necessarily raises two questions:

- 15 (a) Can and should there be an award of exemplary damages and if so against whom?  
 (b) If so, how much should that award be?

20 *(a) Can and should there be an award of exemplary damages and, if so, against whom?*

This action has been brought in tort and not as one seeking constitutional redress. In the *Proceedings Commissioner, Fiji Human Rights Commission v Commissioner of Police and Attorney General of Fiji* (Civ. App. No ABU0003 of 2006) the Court of Appeal at [77] stated “we have reached the conclusion that although the Constitution envisages the Court having jurisdiction to make such orders as ‘It considers appropriate’ to ‘redress’ contraventions of Chapter 4, exemplary damages should not be available for a breach of constitutional rights in Fiji”.

[40] In the case of *Rookes v Barnard* [1964] AC 1129 at 1226; [1964] 1 All ER 367 at 410D; [1964] 2 WLR 269 (*Rookes*), Lord Devlin stated:

35 There are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law, and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal. I propose to state what these two categories are; and I propose also to state three general considerations which, in my opinion, should always be borne in mind when awards of exemplary damages are being made ...

[41] The first category is oppressive, arbitrary or unconstitutional action by the servants of the government ... in the case of the government it is different (from private individuals or corporations), for the servants of the government are also the servants of the people and the use of their powers must always be subordinate to their duty of service.

[42] Cases in the second category are [a second category is then set out] ... To these two categories, which are established as part of the common law, there must of course be added any category in which exemplary damages are expressly authorised by statute.

[43] I wish now to express three considerations which I think should always be borne in mind when awards of exemplary damages are being considered. First, the Plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour ... Second, the power to award exemplary damages constitutes a weapon that, while it can be used in defence of liberty, as in the

*Wilkes* case, can also be used against liberty. Third, the means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages. Everything which aggravates or mitigates the Defendant's conduct is relevant.

5 [44] Thus the case for exemplary damages must be presented quite differently from one for compensatory damages; and the judge should not allow it to be left to the jury unless he is satisfied that it can be brought within the categories which I have specified. But the fact that the two sorts of damage differ essentially does not necessarily mean that there should be two awards. In a case in which  
10 exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may of course be a sum aggravated by the way in which the Defendant has behaved to the Plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such a conduct and to deter him from repeating it, then they can award some larger sum.

[45] The question of exemplary damages was again considered by the House of Lords a few years later in the case of *Cassell & Co Ltd v Broome* [1972] AC 1027; 1 All ER 801; [1972] 2 WLR 645 (*Cassell*). The reason for the award of exemplary damages in this case fell into the second category outlined by Lord Devlin in *Rookes*, being one where the Defendants conduct had calculated by him to make a profit which might well have exceeded the compensation payable to the Plaintiff. *Cassell* was a libel case. By a majority the House agreed that the decision in *Rookes* had correctly formulated the principles of law governing  
20 circumstances in which exemplary damages, a damage by way of punishment to the Defendants in excess of those necessary to compensate the Plaintiff for the injury done to him, might be awarded in the case of certain decision (*Rookes*) were applicable to defamation cases, the decision could not be said to have been made per incuriam since it had been arrived at after a full consideration of the authorities.

30 [46] A further and important consideration arose and was addressed by Lord Hailsham at AC 1062; All ER 816 in a section entitled "Single Award or Two?". The dicta of Lord Denning MR and Salmon LJ in the Court of Appeal hearing of *Cassell* were discussed and Lord Hailsham continued:

35 I think the effect of the law is ... that awards of punitive damages in respect of joint publications should reflect only the lowest figure for which any of them (the defendants) can be held liable. It seems to flow inexorably both from the principle that only one sum may be awarded in a single proceeding for a joint tort, and from the authorities which were cited to us by counsel for the appellants in detail in the course his argument ... I think that the inescapable conclusion to be drawn from authorities is that only one sum  
40 can be awarded by way of exemplary damages where the plaintiff elects to sue more than defendant in the same action in respect of the same publication, and that this sum must represent the highest common factor, that is the lowest sum for which any of the defendants can be held liable on this score ... plaintiffs who wish to differentiate between the defendants can do so in various ways, for example, by electing to sue the more guilty one only, by commencing separate proceedings against each and then consolidating, or, in case of book or newspaper article, by suing separately in the same proceedings for the publication of the manuscript to the publisher by the author.

[47] The High Court of Australia considered the question of exemplary damages in the case of *New South Wales v Ibbett* (2006) 229 CLR 638;  
50 231 ALR 485; [2006] HCA 57 (*Ibbett*). In that case Mrs Ibbett sued the State New South Wales for damages following upon the trespass into the garage of her

home at 2 am by police officers in plain clothes, one of whom pointed a gun at her. Police officers are deemed by statute to be persons in the service of the Crown and the Crown is vicariously liable in respect of torts committed by such persons in the course of their service and in performance or purported  
5 performance of an independent function, (ss 6 and 8 of the Law Reform (Vicarious Liability) Act 1983). In addition to other remedies Mrs Ibbett was awarded exemplary damages. That award was upheld on appeal by the Court of Appeal. The High Court also upheld the awarding of exemplary damages citing the dictum of Lord Hutton in *Kuddus v Chief Constable of Leicestershire*  
10 *Constabulary* [2002] 2 AC 122 at 147–9; [2001] 3 All ER 193 at 212–4; [2001] 2 WLR 1789; [2001] UKHL 29 when he said:

... in certain cases the awarding of exemplary damages serves a valuable purpose in restraining the arbitrary and outrageous use executive power and in vindicating the strength of the law. Members of the security forces seeking to combat terrorism face constant danger and have to carry out their duties in very stressful conditions. In such  
15 circumstances an individual soldier or police officer or prison officer may, on occasion, act in gross breach of discipline and commit an unlawful act which is oppressive or arbitrary and in such cases exemplary damages have been awarded ...

In my opinion the power to award exemplary damages in such cases serves to uphold and vindicate the rule of law because it makes it clear that the court 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  
20 times.

25 [48] At para 55 under the heading “Conclusions respecting vicarious responsibility and exemplary damages”, the High Court of Australia stated:

First, the course of development over the last two and a half centuries of the law respecting Crown liability and tort does not support attention the financial means of the  
30 miscreant public officers as a significant and limiting determinant of the quantum of liability.

[49] There was then a discussion, over the “masters tort” theory and the New South Wales legislation. Given my finding in the principal judgment that the soldiers actions were so closely connected with their duties as to affix vicarious  
35 liability, this issues does not bear upon this case. The High Court also found at [60] that the behaviour of the state was a relevant factor in determining questions of exemplary damages. In the *Ibbett* case the police officers concerned were required to go on a “re-education course”. That was found to be “perfunctory in the extreme”.

40 [50] There are also authorities (for example *Archer v Brown*) [1985] QB 401; [1984] 2 All ER 267; [1984] 3 WLR 350 where it is has been held that exemplary damages should not be awarded if the Defendant has already been punished in criminal proceedings. In respect of the first five Defendants they have faced  
45 criminal proceedings and been punished. Although it does not affect the judgment in this case, it must be stated that the sentence imposed on these five men, even on a guilty plea after full cooperation with the police, is off the lower end of the scale and necessarily raises a concern as to the circumstances pertaining when the magistrate came to pass sentence.

50 [51] It is right to point out that although the five soldiers concerned were sentenced before a criminal court no criminal proceedings were brought, had that been possible, against the Fiji Military Forces.

[52] I must also consider the fact that the first five Defendants are likely to be men with little capital or income whereas the sixth is in a position to pay a substantial sum.

5 [53] I must also consider whether in making an award of exemplary damages I can or should differentiate between the first five Defendants and the sixth. Further, if only one award can be made whether that should be the lowest according to my estimate of their means or whether it should reflect a level commensurate with the wrongdoing. *Cassell* was a “Category Two” case.

10 [54] In all cases falling within the first category as formulated by Lord Devlin the individual wrongdoer will necessarily be immeasurably less wealthy than the government itself Lord Devlin’s second category is not aimed at governmental action in itself but commercial world where the principle of one award and the lowest is more fitting.

15 [55] If the first category is going to have any efficacy, then it cannot be limited to the means of the offending servant. The whole purpose of the category would be lost were that to be so.

20 [56] There is a difference between Defendants who are joint tort-feasors and, as in this case, where the liability of the sixth Defendant is fixed vicariously. In the principal judgment I found the actions of the five Defendants were so closely related functions and purposes of their unit that the military forces were fixed with vicarious liability their acts (paras 57 and 58). I continued that there was a broad and important policy purpose in seeking to ensure that if any unit of a disciplined force is charged with the gathering of information and watching  
25 people then it is most important that that force exercises the greatest diligence and active control over the unit to ensure that the unlawful use of force or other wrongful acts are not employed in its activities. There must exist a clear knowledge that if members of that unit do act unlawfully, then vicarious liability will be affixed to the force. This principle applies to any unit of or servant in a  
30 government disciplined force.

[57] I do consider it is right in principle and within the facts of this case that exemplary damages should be awarded. The very purpose of category one exemplary damages, as propounded by Devlin, addresses oppressive, arbitrary or  
35 unconstitutional actions by servants of the government. The actions of the first five Defendants were clearly oppressive and arbitrary and, although not argued as such, were clearly unconstitutional. While there is no evidence that anyone in the military forces ordered the kidnapping and the assaults, I have found that they are vicariously liable therefor. It must be taken into consideration that on the  
40 evidence no apology has been forthcoming, no disciplinary action was taken against any of the five soldiers and four of them at the time of judgment were still serving officers, one having had a sought after overseas appointment.

[58] In making this award there is a broad and vitally important policy consideration.

45 [59] It is important at all times that the commanders and officers in charge of disciplined forces, — military forces, police, prison officers, — ensure full and proper control of those under their command at all times and that human rights and the rule of law are upheld. The imposing of exemplary damages is necessary  
50 to ensure that happens and that commanders and officers in charge know the courts will not flinch from awarding exemplary damages if torts are committed by those under their command.

[60] Accordingly, I will make an award of exemplary damages against the Republic of Fiji Military Forces.

[61] While I do carefully take into account the dicta concerning the making of one sum covering compensatory damages and exemplary damages, within the Republic of Fiji I am of the opinion that it is more beneficial for the rule of law if courts it clear what sum is compensatory and what sum is exemplary. In respect of the latter, the Fiji Military Forces or other disciplined body concerned and the public can see clearly the sum that has been awarded in respect of exemplary damages. Those in-charge should necessarily have to account to the tax paying public for the payment of those sums.

[62] I next consider whether exemplary damages should be awarded against the first five Defendants. It must be remembered that exemplary damages are “punitive” by their nature and those five Defendants have been sentenced before a criminal court, albeit the sentences were arguably wholly inadequate. Although I have no direct evidence, it is likely those men will be unable to pay sums of any substance.

[63] In my judgment, in a category one kind of case, when the individual servants of the have faced criminal proceedings and been sentenced, it is wrong for a court to make an award of exemplary damages against them. The Fiji Military Forces as a body faced no kind of criminal or other punitive proceeding, if such were possible. For these reasons I find it consistent with principle and the purpose of exemplary damages for an award to be made against the sixth Defendant but not against the remaining five.

*(b) Quantum of exemplary damages?*

Counsel for Dr Singh has sought the sum of \$25,000 in exemplary damages. Defence counsel put forward no particular figure

[64] The fixing of exemplary damages must necessarily be approached on a broad brush basis. The figure is intended to mark the court’s assessment in monetary terms of the level of punishment that would be fitting for the failings and the wrongful acts being considered. In this particular case, there was the failure to control, direct and discipline soldiers in a unit necessarily would come into close and direct contact with the public. The figure is aggravated by the military forces failure to make any kind of apology or discipline or discharge the soldiers concerned.

[65] In sentencing in criminal cases there is necessarily an element of deterrence in the fixing of the punishment. The same applies to the fixing of exemplary damages.

[66] In my judgment the figure of \$25,000 sought by the Plaintiff’s counsel is too modest given the circumstances of this case. Although a court will look carefully to figures suggested by court is in no way bound by them. In my judgment a figure of \$100,000 is the correct sum.

**4. Interests and costs**

[67] I consider the Plaintiff is entitled to interest. The sum of \$75,000 awarded in respect of the loss of a career path is special damages and the interest on that sum runs from 24 October 1990. That will be at half the rate I set. Interest upon the compensatory and exemplary awards will run from the date of service of these proceedings.

[68] It is now some 14 years since these proceedings were filed. It is an injustice that any case, let alone one as important as this, should take so long to reach finality. Over that period interest rates have fluctuated. The Plaintiff's counsel claims 6%, defence counsel suggests 5 per cent. I fix the rate of interest at 5 per cent.

[69] Accordingly I award Dr Anirudh Singh a total of \$250,000 together with interest as set out in the preceding paragraphs against the sixth Defendant. I find that total sum is reasonable given all the circumstances.

[70] Dr Singh's counsel sought indemnity costs. This was opposed by defence counsel who suggested there should be no award of costs against the sixth Defendant arguing that there had been excessive delays which were not of the sixth Defendant's making, complexity of the case, the difficulties in locating the first five Defendants, the novelty of the point of law which they faced, the fact they did everything they could to progress the case quickly and that the actual wrongdoing was not the fault of the sixth Defendant. I emphasise that the wrongdoing is vicariously that of the Fiji Military Forces by reason of close connection between the actions of the soldiers and purpose of their unit. This was exacerbated by their failure to bring disciplinary proceedings against those soldiers with a view to their discharge, the apparent lack of any detriment to their careers and the lack of an apology.

[71] In my judgment, the Plaintiffs are not entitled to indemnity costs against the sixth Defendant. The latter had an arguable case, albeit they were unsuccessful. Once the current counsel for the sixth Defendant was seized of the matter the defence case was conducted with expedition and propriety. I will award costs against the sixth Defendant on the standard scale. If invited, I will assess those costs.

[72] I do add that as far as the first five Defendants are concerned judgment is also entered against each of them in the sum of \$150,000 being the compensatory and special damages awarded. The same calculation of interest will apply. I will make no order for costs against the first five Defendants. Although at various stages they have been notified of these proceedings none of them has made any attempt to defend the Plaintiffs claim.

[73] I would conclude by complimenting both Mr Faisal Haniff and Mr Luke Daunivalu for their professional, expeditious and diligent conduct of these proceedings. In particular, I acknowledge the perseverance and hardwork of Mr Haniff.

*Application for general damages allowed. Application for exemplary damages denied.*