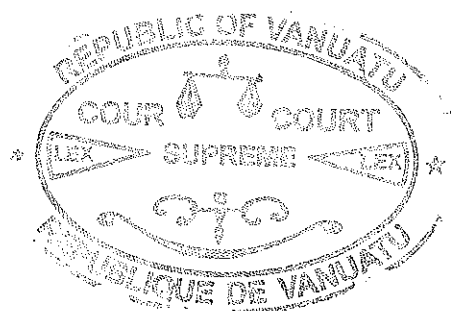




4. *Such further or other orders as the Applicant may depose to in his sworn statement or that which he may advance through counsel.*
2. The grounds of the constitutional application are set out in the application. They are these:
    1. *That the Applicant was seriously and gravely assaulted by members of the Police Force, among whom was the Second Defendant, and was permanently subjected to injuries that are permanent and are crippling the Applicant Claimant's ability to live, and enjoy a normal life.*
    2. *After he was assaulted by the police, he was afraid that the police would repeat the assault. As a result he retreated into Teouma Bush to have his injuries treated with custom medicine.*
    3. *The Applicant attended the Vila Central Hospital on a number of occasions, however there was no confirmation that his injuries had healed entirely.*
    4. *The Applicant sustained serious injuries and the extent and permanency of these injuries was only able to be confirmed on 16<sup>th</sup> August 2002, at which time the Applicant was informed that he will have a permanent disability as a result of the injury he sustained to his right upper jaw during the assault*
    5. *At this point in time the Applicant's Claim was clearly out of time hence he had to make this Application according to the Rules to be granted leave over a Claim involving personal injuries.*
    6. *The delay in having this case heard within time is not the Applicant's fault but is due to circumstances beyond his control will be shown in his Sworn Statement in support of this Application.*



7. *The Applicant has exhausted all other avenues available to engage the recognition, and enforcement of his Constitutional rights and unless this Honourable Court intervenes a wrong precedent is set whereby a gross injustice is being allowed an opportunity to prevail and the wrong never rectified.*
  8. *Such further or other Grounds as the Applicant may depose to in his Sworn Statement or that which he may advance through Counsel.*
3. On 11 November 2008, Applicant Dick laukas through his lawyer filed an amended constitutional application seeking for the same relief and on the same grounds save, this time, the Respondent to his constitutional application seeking for the enforcement of his rights pursuant to Article 6 of the Constitution is the Republic of Vanuatu.
  4. On 25 November 2008, the Learned Attorney General filed a response to the Applicant's Amended Constitution application. It says:
    1. *The respondent denies each and every allegation contained in grounds 1 and 2 of the Amended Constitutional Application ("the Application").*
    2. *The respondent does not know and does not admit any allegation in grounds 3 or 4 of the Application and says that Civil Case No.9 of 2005 was dismissed by the Supreme Court on 27 March 2008.*
    3. *The respondent does not plead to any allegation in grounds 5, 6 or 7 of the Application.*
    4. *In further answer to the Application the respondent says that:*
      - (a) *If, which is not admitted, the applicant was assaulted by any police officer, such action was neither ordered or condoned by the respondent, which is not vicariously liable there for; and*



*(b) The power of arrest is independent and discretionary, and the respondent is not vicariously liable for any miscarriage, which is not admitted, thereof.*

5. On 9 February 2009, Applicant Dick laukas through his lawyer, filed a (further) amended constitutional application pursuant to Article 6 of the Constitution seeking for:-

1. *Orders that the Government of the Republic of Vanuatu (The Government) infringed the Constitutional rights of the applicant in respect of his right to liberty, security of the person and freedom from inhuman treatment.*
2. *Orders that the Government of the Republic of Vanuatu is liable for injuries inflicted upon the applicant by members of the Vanuatu Police Force on 25 January 1998.*

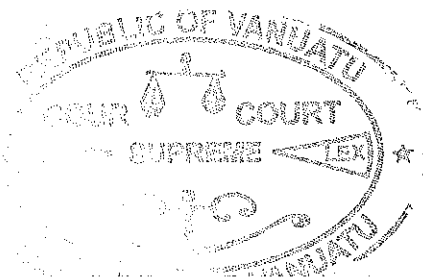
**ON GROUNDS THAT**

3. *The Constitution of the Republic of Vanuatu (The Constitution) sets out certain fundamental rights and freedoms. These fundamental rights and freedoms are set out in Article 5 of the Constitution.*

4. *Article 5 of the Constitution sets out that all persons are entitled to the following fundamental rights and freedoms*

- *Article 5 (1) (b) liberty*
- *Article 5 (1) (c) security of the person*
- *Article 5 (1) (e) freedom from inhumane treatment and forced labour*

5. *The Government infringed upon the rights of the applicant as set out under Article 5 (1) (b), Article 5 (1) (c) and Article 5 (1) (e) of the Constitution by:*



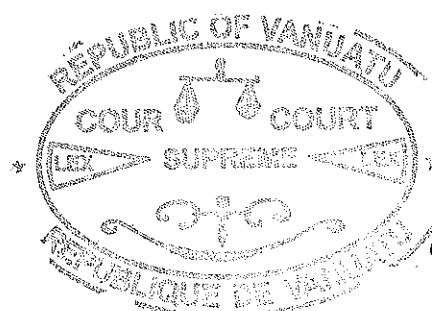
(a) *Failing to discharge its duty to ensure that all Government agencies and entities under its control, and in particular the Vanuatu Police Force, have necessary policies, training, supervision and monitoring processes in place to ensure the fundamental rights and freedoms conferred by Article 5 of the Constitution are respected and applied to the citizens of Vanuatu, and in particular the fundamental rights and freedoms of the applicant.*

(b) *The actions of members of the Vanuatu Police Force in*

- i. Falsely arresting and imprisoning the applicant;*
- ii. Physically abusing and beating the applicant; and*
- iii. Not rendering appropriate assistance to the applicant, (including, medical assistance) in respect of injuries suffered by the applicant; were in contravention of the applicant's constitutional rights and freedoms.*

6. *The Government is vicariously liable for the actions of members of the Vanuatu Police Force in respect of :*

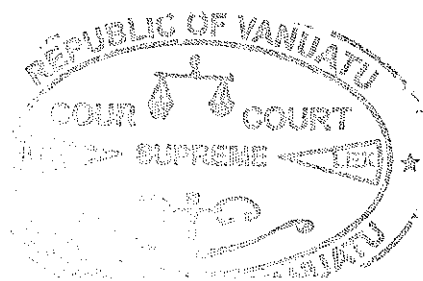
- i. The false arrest and imprisonment of the applicant*
- ii. The physical abuse and beating of the applicant by Police officers.*
- iii. The inaction of other Police officers present at the time of the physical abuse and beating of the applicant to prevent or stop the physical abuse and beating.*
- iv. The inaction of Police officers to render assistance or arrange and facilitate proper medical attention to the applicant following the physical abuse and beating suffered.*



A handwritten signature in black ink, appearing to be a stylized 'A' or similar character, is written over the bottom right portion of the seal.

**FACTS ON WHICH THE APPLICATION IS BASED**

7. *On 25 January 1998 the applicant was arrested by members of the VMF and Police at Korman stadium. The arrest was unlawful as it had no proper basis. The applicant was never charged with any offence nor any proceedings brought against him that justified his arrest.*
8. *The applicant was transported in Port Vila police station where he was stripped of his clothing, searched and placed into a cell.*
9. *Subsequently two Police officers held the applicant whilst a third officer (identified as Uriel Leo) struck the applicant a number of blows across the face and head causing significant injuries to the applicant.*
10. *During the course of the beating by the Police officers, a senior officer (identified as Peter Bong) was present and the applicant appealed to him for assistance. The applicant's appeals for assistance to that senior officer were ignored and that officer left the vicinity without rendering any supervision, intervention or assistance.*
11. *The applicant was further beaten by several Police officers using truncheons until he was rendered unconscious.*
12. *The applicant was provided no further assistance and was left lying in the cell until approximately 3pm. At approximately 3pm the applicant was handcuffed and transported to Vila Central Prison.*
13. *The applicant was left at Vila Central Prison handcuffed and without adequate shelter or medical assistance until the next morning where he was discovered by Sergeant Maoung and*



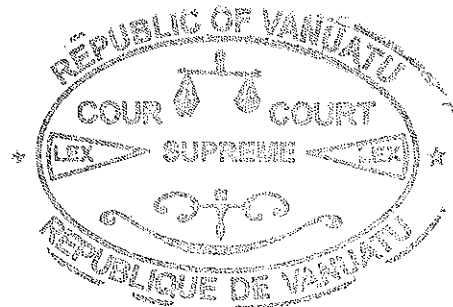
*transported to Port Vila Central Hospital for emergency medical treatment.*

*14. As a result of the actions of Police the applicant experienced pain and suffering and received permanent injuries.*

**REMEDIES SOUGHT**

*15. The applicant seeks orders to Article 6 (2) that the Government pay monetary compensation for false imprisonment, pain and suffering and permanent injuries suffered as a result of the actions of Police as set out in this application.*

6. On 9 February 2009, the Attorney General filed an application to strike out certain paragraphs of the Amended Application filed 9 February 2009.
7. On 19 May 2009, the Court issued a decision declining to dismiss the constitutional application summarily without hearing the merit.
8. It is noted that the response of the Respondent remains the same.
9. It is worth nothing that the applicant had commenced actions against the Government of the Republic of Vanuatu in Civil Case No. 09 of 2005 claiming damages for severe injuries he sustained when he was arrested on 25 January 1998, detained at a cell at the Police station in Port-Vila and two unnamed police officers held him while a name police officer (Urie Leo) assaulted him causing him permanent injuries on his body.
10. These actions in Civil Case No.9 of 2005 were dismissed by this Court on 27 March 2008 as they were statute – barred.
11. The applicant then pursued the vindication of the alleged breaches of his constitutional rights by filing the Constitutional Application seeking for compensatory damages under Article 6 (2) of the Constitution against the Republic of Vanuatu.



12. The applicant alleges that his constitutional rights as specified in Article 5 of the Constitution have been infringed. In particular he alleges his rights pursuant to:
  - Article 5 (1) (b) liberty;
  - Article 5 (1) (c) security of the person; and
  - Article 5 (1) (e) freedom from inhuman treatment have been infringed in relation to him.
13. The applicant alleged his constitutional rights were infringed by members of the Vanuatu Police Force on January 25 1998, when they arrested him at Korman Stadium, held him in custody without charge and that a number of police officers assaulted him causing permanent injuries to him.
14. To progress with the hearing of this case, both counsels agree by consent that the Court shall determine the following preliminary question:

Whether the Republic is liable under Article 6 for an assault by a Police man?
15. That is presently the preliminary question that the court is considering. Both Counsel filed submissions on behalf of the respective parties.
16. Before I refer to the specific submissions of Counsel, it is noted that the applicant filed a first submissions on 9 February 2009. As mentioned earlier, the applicant also filed a (further) Amended Constitutional application on the said date of 9 February 2009 and the corresponding submissions were filed on 13 June 2009.
17. I treat and consider the Amended Constitutional application filed on 9 February 2009 as the applicant's Constitutional application that the court will consider and its corresponding submissions filed 13 June 2009 to be the applicant's submissions for the purpose of considering the preliminary question the court has to determine.
18. It is noted also that at this stage of the proceeding, the Applicant had filed two sworn statements on 19 June 2008 and 18 November 2008 in support of his application. One Maung Matatas, a retired police officer, also filed a sworn statement to the effect of distributing the food to prison officers at the





French prison in 1998 after the VNPF riots. A number of suspects rioters were placed in the French prison by the Police. He recalled that several days after the riots in 1998 he saw Dick Iaukas inside one of the prison cells. He spoke to Dick Iaukas but he said Dick Iaukas did not answer him but just shook his head. Dick Iaukas indicated to him by gestures he could not talk and that he had injuries to his jaw. He took Dick Iaukas to Port-Vila central hospital for medical treatment.

19. Mr Uriel Leo, a Police Officer, of Port-Vila, filed a sworn statement on 7 April 2009 on duty at the time of VNPF riots in or about 1998. There were many police officers on duty at that time. He cannot remember with certainty who they were. He denies beating the Applicant as alleged or at all. Patu Navoko Moli, then commissioner of police since 23<sup>rd</sup> August 2006 filed a sworn statement on 6 April 2006. He deposes that there was never any complaint made to the police in relation to the matters alleged by the Applicant. His deposition is to the effect that the matters alleged by the applicant are said to have occurred during or about January 1998. It is extremely difficult, if not impossible, for Vanuatu Police Force to now investigate these allegations. It was a busy time for the Police because of the VNPF riots. He says even if they could identify who was present at the time of the allegations, it is not possible to determine with any certainty any training these police officers had received possibly several years prior to then. There were no records available.

20. The submissions of the Applicant are advanced on two (2) bases. First, Counsel for the Applicant submits that the Government of Vanuatu is strictly (and/or vicariously) liable for the acts of police officers that infringe the constitutional rights of individuals as set out in Article 5 of the Constitution. Counsel refers to the case of *Francois -v- Ozols [1998] VUCA 5* where the Court of Appeal stated:

*"the provisions of Article 6 provide the means by which compliance by the Republic can be enforced. The purpose of Article 5 is to protect the individual against arbitrary or unjust treatment by the organs of government through which the affairs of the Republic are administered.*



21. Counsel for the Applicant refers to authorities from other jurisdiction that have similar constitutional provisions as found in the Constitution of the Republic of Vanuatu, that relates to the ability of the Government to be held liable in circumstances where an individual employed by a government agency and/or a government agency infringed an individual's constitutional rights.
22. The Applicant submits that these authorities should be followed and applied in Vanuatu.
23. It is further submitted for the Applicant that overseas authorities clearly hold that in relation to this sort of Constitutional application it is a matter of public law and not a matter in the private law of torts. It is submitted that this has resulted in the Government being held to be strictly liable for actions of Government agencies and/or Government employees.
24. It is also submitted that as a result the submissions on behalf of the Respondent in this matter regarding the exclusions of liability in tort for the actions of a police officer are not relevant in respect of a constitutional application that is decided on the basis of public law.
25. The Applicant, therefore, submits the Government is strictly (and/or vicariously) liable for the acts of police officers that infringe the constitutional rights of individuals as set out in Article 5 of the Constitution.
26. Counsel for the Applicant refers and relies on the following case authorities:
  - (i) *Francois –v- Ozols [1998] VUCA; Picchi –v- Attorney General of the Republic of Vanuatu [2001] VUCA 12.*
  - (ii) *Ferguson –v- The Attorney General of Trinidad and Tobago [2001] UK PC3 ; and the Attorney General of Trinidad and Tobago –v- Whiteman [1991] 2 AC 247; and Maharaj –v- The Attorney General of Trinidad and Tobago (No. 2) [1979] AC of which Counsel for the Applicant substantively cited its passages and relied heavily on it;*



- (iii) *The decision of the Court of Appeal of New Zealand in Simpson -v- Attorney General [Baigent's case] 3 NZLR 667. In that case the court held that:*

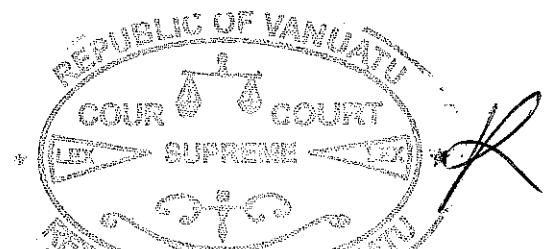
*An action for damages under the Bill of Rights Act was not a private law action in the nature of tort claim, for which the state was vicariously liable. Rather, it was a public law action against the state for which the state was primarily liable. Since the action for breach of the Bills of Rights Act would not be an action in tort, the immunity of section 6 (5) of the Crown Proceedings Act would not applicable to it.*

- (iv) *The following Papua New Guinea case authorities:*

- *Kuriti -v- The State [1994] PGNC 27;*
- *Koimo -v- Independent State of Papua New Guinea [1995] PNG LR535;*
- *Apa -v- The State [1994] and PGNC 60 where it is said there is a clear statement of the principle of a strict liability of the state for actions of the police even though these actions were unlawful. It is said that case does limit the liability of the State and protects it from awards of exemplary damages but clearly requires the state to pay compensation the court said:*

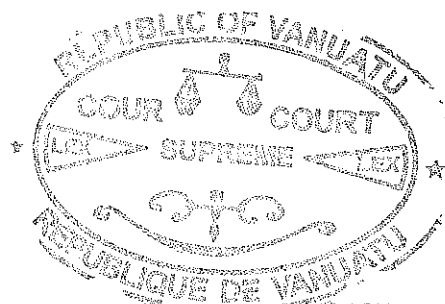
*"In this case the Plaintiffs have sued the State for the wrongful actions of the Police force. None of the Police officers responsible have been joined as a party to these proceedings, only the head of the Police Force and the State. Effectively in this case there is one Defendant only to meet the penalty of damages. While Department of State has its own legal entity nonetheless the financial burden of that Department falls on the State alone. It is certainly true that the State must be responsible for the unlawful acts of its disciplined forces, nonetheless it cannot be said that the actions of these police officers was in pursuance of a policy of the Department of the State.*

*"Without such evidence it does not appear to me that there should be imposition of an exemplary damages on the State*



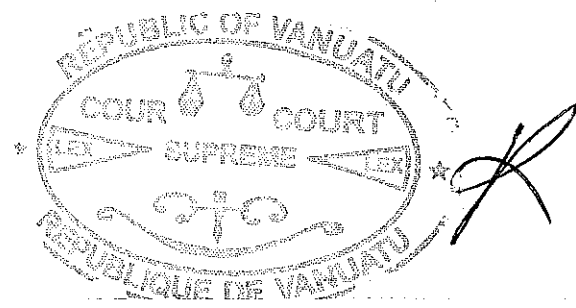
*which in any case has as its time obligation under the Constitution, a duty to ensure the safety of its citizens. While the State must accept responsibility for compensation for the wrongful acts of its servants it does not seem reasonable that it should be punished, fined for them as well."*

27. The Applicant submitted that on the basis of these authorities from other jurisdictions the State can be held liable for damages for breach of the applicant's constitutional rights by the actions of a policeman in relation to the Applicant.
28. The second aspect of the Applicant's submissions is this. The Applicant submits that if the court is against the applicant in respect of the submissions that the Government has strict liability for breaches of an individual constitutional rights then the Applicant submits that the Court would find that the Government bears a positive duty to ensure that there are appropriate policies, training, supervision and monitoring within each agency under its control to ensure the constitutional rights are adhered to and protected by those agencies in dealing with citizens.
29. In this regard the applicant submits that the Government failed to discharge that duty in respect of the conduct of relevant members of the Police force towards the Applicant at relevant times.
30. In respect to the second aspect of the Applicant's submissions, the Leaned Solicitor General responded that in terms of the allegations of breaches of Article 5 (1) (b) of liberty, Article 5 (1) (c) of security of the person and Art 5 (1) (e) of inhuman treatment, there is no duty as alleged expressed or implied in the Constitution. He submitted that duties are not to be implied in the Constitution.
31. It is further submitted for Respondent's that even if such duty could be implied, there is no evidence which will enable the Court to conclude that there is a prima facie infringement on the rights of the Applicant.



A handwritten signature in black ink, consisting of a stylized, cursive letter 'R' followed by a flourish.

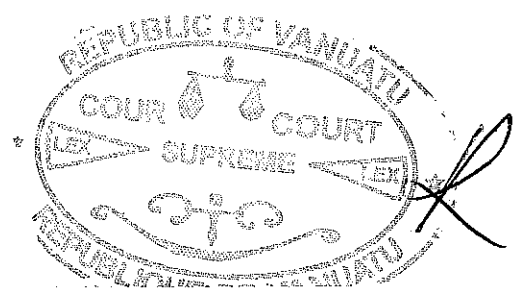
32. In my judgment, I think the Solicitor General is right in his submissions on this point. First, there is no expressed or implied duty as alleged in the Constitution. Second, there was no evidence for the Applicant to ascertain or justify a breach of this type of positive duty-right considerations.
33. The Constitution under Article 5 provides for the fundamental rights and freedoms of the individual. The Constitution under Article 5 does not impose duties on the State (Republic). It recognizes rights and freedoms and by limiting its application to the acts of the State (Republic) and to those performing public functions, powers or duties, the Constitution commits the State (Republic) to the protection of these rights and freedoms (*see Francois -v- Ozols [1998] VUCA 5*). That is not quite the same as the imposition of a duty. And while it may be said that the converse of a right is a duty to observe it, that simple proposition is not sufficient to found a breach of the constitutional rights. A positive duty creating a constitutional obligation on the State (Republic) in relation to rights recognized under Article 5, will exist in this way. I propose to illustrate this on an assumption. We assume that in some parts in the Constitution of Vanuatu duties to make certain provisions for the benefit of the citizens are imposed on the State (Republic) in terms which bestow rights upon the citizens and, unless some contrary provisions appears in the Constitution, the Constitution must be deemed to have created a remedy for the enforcement of these rights. It follows that, where the right is one guaranteed by the State, it is against the State that the remedy must be sought if there has been a failure to discharge the constitutional obligation imposed.
34. In the present case, to maintain such submissions, the Applicant has, first, to establish the existence of a duty in the Constitution to make certain provisions for the benefit of citizens; second, that the Duty is imposed on the State (Republic) in terms which generate rights upon the Applicant as a citizen; third, that the right complained of is one guaranteed under Article 5 of the Constitution; Fourth, that there has been a failure to discharge the constitutional obligation imposed.



On the basis of the above considerations, I reject the second aspect of the submissions of the Applicant relating to the positive duty arguments.

35. In respect to the Applicant's first submissions, the Solicitor General responded by the following submissions.
36. It is said that the Applicant alleges that the Republic has infringed his right of freedom from inhuman treatment guaranteed by Article 5 (1) (e) of the Constitution in that he was assaulted by a police officer.
37. It is agreed that the assault is an offence, and also a tort. A police officer commits an assault in the same way that any person can commit an assault. The only difference between a police officer and any person, is that the police officer has a license (delivered from statute and common law) to use force in the performance of his/her duty. The use of force outside these circumstances may amount to an assault.
38. It is also argued that police officers are not "servants" of the Republic. Rather, they are independent officers appointed to a statutory office. Reference is made to the case of *Enever -v- The King* [1906] 3 CLR 969 at 977. It is also advanced that the functions of the Police Force are set out in section 4 of the Police Act, Section 4 (1) and 2 provide:

- (1) *it shall be an essential duty of the Force to maintain an unceasing vigilance for the prevention and suppression of crime.*
- (2) *The Force shall be employed throughout Vanuatu and its territorial waters for –*
  - (a) *the preservation of peace and the maintenance of order;*
  - (b) *the protection of life and property*
  - (c) *the enforcement of laws;*
  - (d) *the prevention and detection of offences and the production*



*of offenders before the Courts; and*

- (e) *such other duties as may be expressly provided for by law.*

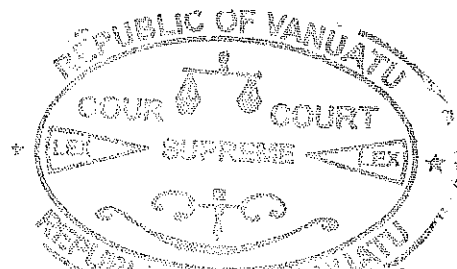
39. It is also said that the nature of the office of the police is underscored by section 35 of the Police Act:

35. *General powers and duties of members of the Force*

- (1) *Every member shall exercise such powers and perform such duties as are by law conferred or imposed upon him, and shall obey all lawful directions in respect of the execution of his office which he may from time receive from his superiors in the Force.*
- (2) *Every member shall be considered to be on duty all times and may at any time be detailed for duty in any part of Vanuatu.*
- (3) *It shall be the duty of every member to promptly obey and execute all orders and warrants lawfully issued to him by any competent authority, to collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances to detect and bring offenders to justice and to apprehend all persons that he is legally authorised to apprehend and for whose apprehension sufficient ground exists.*

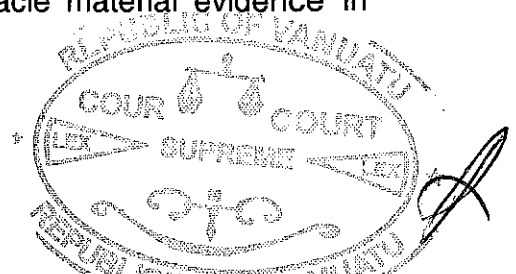
40. On the basis of the above arguments, it is submitted on behalf of the Respondent that at common law, the Republic is not vicariously liable for the torts committed by police officers. *The cases of Fisher –v- Oldham Corpn [1930] 2KB 364 and Enever –v- The King [1906] 3 CLR 969 at 977* are said to be the case authorities for this proposition.

41. The case of *Racz –v- Home Office [1994] 1 ALL ER97 followed in Temar –v- Republic of Vanuatu [2004] VUSC 70 and Temar –v- Government of the Republic of Vanuatu [2005] VUCA 30* are the case authorities on the test for vicarious liability where it was stated:



*"If the unauthorised and wrongful act to the servant is not so connected with the authorised act as to be made of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside it."*

42. It is also contended that a police officer who is involved in an assault is acting outside the course of his employment. Accordingly, the Republic cannot be liable for such actions. *Temar –v- Government of the Republic of Vanuatu [2005] VUCA 30* are referred to as case authority on this point.
43. It is finally submitted on behalf of the Respondent that in the present case, the application and the supporting evidence alleged that the Applicant was intentionally and systematically beaten by police officers in circumstances which, if it occurred, it could not possibly have been said to be connected to the (lawful) process of arrest that the Republic is vicariously liable there for.
44. It is further submitted on behalf of the Respondent that the three Papua New Guinea cases referred to by the Applicant in his submissions are not authority for the general proposition that the State is strictly liable for the actions of the police. These cases may be distinguished on the basis that the actions of the police complained of occurred in the context of police operations. The police officers were acting in the course of their employment, *section 1 of the wrongs (Miscellaneous Provisions) Act 1975 (PNG) codifies the general liability of the State in tort in Papua New Guinea; in Kuriti –v- The State [1994] PGNC 27*, the parties reached agreement in relation to the quantum of the claim for damages; and in *Koimo –v- Independent State of Papua New Guinea [1995] PNGLR 535*, judgment was entered by default.
45. I now consider the preliminary question that the Court is asked to determine in light of the Constitutional application, the Constitutional rights (Article 5 (1) (b) (c) and (e) and their alleged breaches complained of, the means by which their compliance by the State (Republic) can be enforced (Articles 6 and 53 of Constitution), the prima facie material evidence in





support so far filed, the respective submissions of the parties and the other form of redress available to the Applicant to vindicate the alleged breaches of his constitutional rights.

46. In the present case, there is no other mode of redress available for the Applicant to go to in order to vindicate his rights. In that respect, the statement of *Holt CJ in Ashby –v- White (1703) 2 Ld Raym 938,953 cited in the case of Simpson –v- AG [Baigent’s case [Hardie Boys J] is very relevant:*

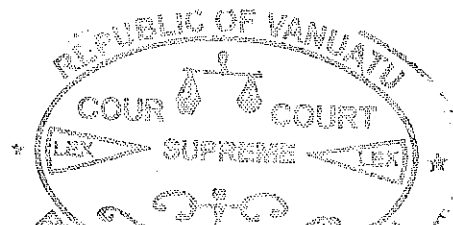
*“2. If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; (a) want of right and want of remedy are reciprocal.”*

47. The court has before it a Constitutional application alleging breaches of constitutional rights guaranteed under Article 5 of the Constitution by actions of police officers after an arrest made and while in detention in the Police cell (custody of police), the Applicant was severely assaulted by a named police officer while two other unmade police officers held him. The result is that the Applicant suffered injuries of permanent nature on his body (jaw). His civil actions seeking for damaged for tort are dismissed on grounds of statute barred.

48. *In Francois –v- Ozols [1998] VUCA 5, the court of Appeal stated:*

*“The purpose of Article 5 is to protect the individual against arbitrary or unjust treatment by the organs of government through which the affairs of the Republic are administered... The provisions of Articles 6 (and also those of Article 53) provide a new procedure for seeking the review of administrative decisions by organs of government and public officials, and the corrections of inappropriate, unlawful or unjust exercises of government power.”*

49. In my judgment, such organs of government obviously include the police authority endowed by law with coercive powers (see *Maharaj –v- Attorney General of Trinidad and Tobago (No.2) [1979] A.C. 385, 396; also Attorney General of Trinidad and Tobago –v- Whiteman (PC) [1991] 2 A.C 247*).



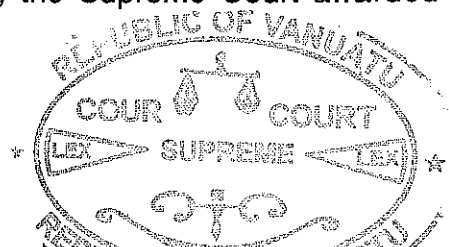
50. The history of the way the applicant was trying to have access to the court and obtain the assistance of counsel is very telling of his understanding as a lay man of the court process with his limited means and also the type of legal assistance he obtained from counsel.

It may be alleged that he has still a means available to him by filing a claim against his lawyer for damages. [see judgment of court in *Dick Iaukas –v- The Government of Republic of Vanuatu (First Defendant) and Uriel Leo (Second Defendant) Civil Case No.09 of 2005*]. But filing a claim against his lawyer would be an action in private law of negligence.

This present case is not about that. It is about a right recognised to him by the Republic of Vanuatu as a person and guaranteed by the Constitution. It is an action under the Constitution to vindicate the alleged breach of that Constitutional protected right. It is an action under the Constitution as a matter of public law and if the breach of the right is proved then the consequential remedy in the Constitution as a remedy in public law will be available to him. This is not the case of an abuse of the Constitutional process under Articles 6 and or 53 of the Constitution. It is his only mode of redress of his alleged breaches of right against the state or organs of the state.

51. The Constitution of Vanuatu empowers the Supreme Court to enforce rights guaranteed in it. In this case, it is my judgment that, if the Applicant proves the breaches of his constitutional rights as alleged, the Court could award monetary compensation pursuant to Articles 6 and 53 of the constitution. If this remedy is awarded, it is not a remedy in tort, but one in public law based on strict liability for the contravention of fundamental rights to which the principle of sovereign immunity does not apply. Article 5 of the Constitution is concerned with public law, not private law and so the remedy sought there for is one of public law, not in tort. The leading case is *Maharaj –v- Attorney General of Trinidad and Tobago* already mentioned.

Another valuable authority comes from India, where the Constitution empowers the Supreme Court to enforce rights guaranteed in it. In *Nilabati Bahera –v-State of Orissa [1993] Cri 2899*, the Supreme Court awarded



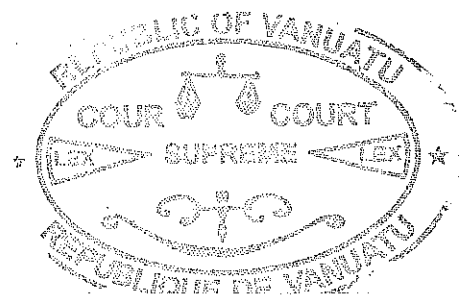
damages against the State to the mother of a young man beaten to death in police custody. The Court held that its power of enforcement imposed a duty to “forge new tools”, of which compensation was an appropriate one where that was the only mode of redress available. This was not a remedy in tort, but one in public law based on strict liability for the contravention of fundamental rights to which the principle of sovereign immunity does not apply. Those observations of Anan J at p.2912 may be noted:

*“32. The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too much as protector and guarantor of the indefeasible rights of the citizens. The courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations. The purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system which aims to protect their interests and preserve their rights.”*

The three judgments of the National Court of Papua New Guinea referred to earlier are also on the same way and relevant persuasive authorities.

The Supreme Court of Vanuatu, in the Constitutional case of *Makenock –v- Republic of Vanuatu [2006] VUSC 104; Civil Case 06 of 2005 (21 April 2006)* found the Republic liable for the actions of police officers at Lakatoro pursuant to Articles 6 and 53 of the Constitution for the contravention of the fundamental rights and freedoms of the Applicant as recognized and guaranteed under Article 5 of the Constitution. That action was an action based in public law but not private law of tort. The remedy of compensatory damages sought are compulsory damages pursuant to Article 6 of the Constitution.

On the basis of the above considerations, I accept the submissions made on behalf of the Applicant. I reject the submissions made on behalf of the Respondent as not relevant and not applicable.



R

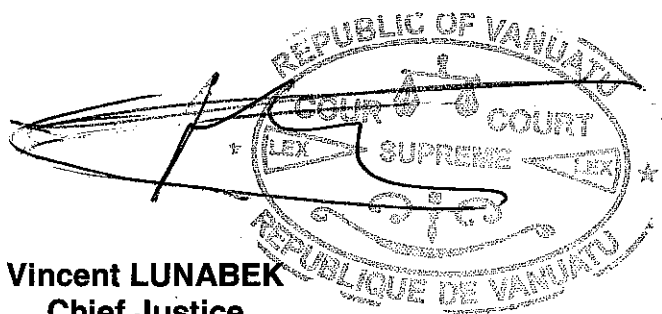
In the present case, I hold that on the basis of the above authorities, the Republic could be held liable for the alleged actions of police towards the applicant should the Applicant be able to prove these actions occurred to the requisite standard of proof. Further, on the basis of the above authorities, if the applicant is able to prove his allegations to the requisite standard of proof the court would find the Republic liable in this matter.

The costs are reserved.

This case is listed for pre-trial management on Tuesday 8 September 2015 at 8.30am o'clock.

**DATED at Port Vila this 27<sup>th</sup> day of August 2015**

**BY THE COURT**



**Vincent LUNABEK  
Chief Justice**