Claims Against the State: The Legal Soundness and Implications of the Nare v State

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Introduction

The case of *Nare v State* (2017) SC1584 *(*Nare case*)* was a landmark decision by the Supreme Court, consisting of 5 judges 2017. It was an appeal against the decision of the National Court which dismissed the entire proceeding for failure to name the principle tortfeasor or wrongdoer as parties to the proceeding in a police raid matter. The trial judge had dismissed the proceedings based on the principles enunciated in the Supreme Court case of *Kewakali v State* (2011) SC1091 (Kewakali case). The main ground of appeal in the Nare case was that the trial judge wrongly applied the Kewakali case as the principle was inconsistent with the *Constitution*, other existing laws and legal principles.

This paper will consider the legal soundness and implication of the Nare case on claims against the State by contrasting it with the Kewakali case, the case of *Pinda v Inguba* (2012) SC1181 (the Pinda case) and other related cases.

The Nare Case

The Nare case was an appeal from a decision of Poole, J, dismissing the proceedings on procedural grounds. The substantive claim was in respect of damage caused by a group of people in police uniforms driving police vehicles accompanied by a police helicopter who raided Teremanda Village in Enga Province. The residents of the village who suffered loss sued the State, claiming the cause of the loss was the wrongful acts of police officers acting for and on behalf of the State, as its servants and agents. The plaintiffs only named the commanding officers in the Statement of Claim. The defendants raised the defence that the primary tortfeasors were not named. The State also requested for further and better particulars. However, in its reply to the defendant's request for further and better particulars, the plaintiff repeated the names of the police officers who commanded the raid that were supplied in the amended Statement of Claim. During the trial, the State raised the argument that the primary tortfeasors should have been named and joined as parties to the proceedings by relying on the Kewakali case. Justice Poole, in this decision, noted that the raid was a well organised operation which did not bring into play the issue of police officers acting in the frolic of their own, refused to enter liability against the State based on the principle established in the Kewakali case which he found that the plaintiffs breached.

The plaintiffs appealed the decision of Poole J, challenging the legal soundness of the Kewakali case. The Supreme Court heard the appeal and subsequently overruled the Kewakali case and established that:

1. It is not necessary to name the principal tortfeasor or wrongdoer in a claim or suit against the State as it is sufficient to only name the State as the defendant.
2. It is sufficient to name only the State as a defendant and that it is otiose and contrary to principle to name senior officers in the event that a principal tortfeasor or wrongdoer cannot be identified and named in the suit as;
    a) the State is in a better position to know all its servants and agents unlike senior officers who may have had no knowledge of their junior officers' activities;
    b) senior officers can only be named as defendants if they are alleged to be a tortfeasor or a person or body vicariously liable for the acts of a principal tortfeasor;
    c) a senior officer is not vicariously liable for the acts of his or her subordinates; and

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d) a senior officer can only be liable if directing or authorising the tortuous conduct.

3. The onus to identify and name principal tortfeasors or wrongdoers in the pleadings is upon the State if they want to shift liability upon that principal tortfeasor, i.e;

   a) State should identify and then apply for the name principal tortfeasors or wrongdoers to be joined as parties to the proceeding; and
   b) the State has to request particulars through interrogatories for the plaintiff to disclose knowledge of the identity of the relevant tortfeasor/officer.

4. The 'independent discretion rule'[1] no longer applies.

5. A cause of action against the State is made out if;
   a) the tortuous conduct is perpetrated by;
   b) the officers of the State, including police; and
   c) were acting or purporting to act in the course of their duties.

So what was the Kewakali case? This was an appeal against a decision of the National Court refusing an application by the appellant for default judgement in a police raid matter. The trial judge refused the application on the basis that the plaintiff had failed to name the principal tortfeasor**.** The main ground of appeal was that the trial judge erred in dismissing the application for default judgement on the basis that the alleged policemen tortfeasors were not named as defendants. The Supreme Court ruled in favour of the State. The Supreme Court held that:

1. It is mandatory to name principle tortfeasor when vicarious liability is claimed. It is not sufficient to only name the State.

2. Senior officers can be named if principal tortfeasor cannot be identified.

The principles in the Kewakali case were reaffirmed by the Supreme Court in the Pinda case. This was an appeal against a decision of the National Court dismissing the entire proceeding. It was also a police raid matter. Trial judge refused the application for the plaintiff's failure to disclose a reasonable cause of action**.** The main ground of appeal was that the trial judge erred in revisiting the issue of liability by reviewing the pleadings and dismissing the proceeding when the issue of liability was already established by default judgment. Supreme Court ruled in favour of the State. The Supreme Court held that to succeed in establishing vicarious liability against the State for tort of negligence, the National Court has to be satisfied that:

1. The policemen as servants or agents of the State committed the tort of negligence during the course and within the scope of their employment (Section 1(1)(a) of the *Wrongs (Miscellaneous Provisions) Act,* Ch 297).

2. The policemen as officers of the State committed the tort of negligence while performing or purporting to perform functions conferred or imposed upon them by statute or the underlying law (Section 1(4) of the *Wrongs (Miscellaneous Provisions) Act,* Ch 297).

Key Issues arising out of the Nare Case. Is the Judgment in the Nare Case Legally Sound?

The questions that arise from the Nare case in light of the Kewakali case and the Pinda case are:

1. Is the judgement in Nare case legally sound?
2. Will there be any serious implication to the State in light of the principles established by Nare case?
3. Can the Nare case be challenged?

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[1] This rule implies that if employees or servants of the State exercised their own discretion in the performance of their duties without authority from their superiors and also not in accordance with set laws, process and procedure; they will be held personally liable for their own actions in the event a wrong is committed.

Each of these questions are considered below

1. Is the Decision in the Nare Case Legally Sound?

In order to answer this particular question, the following additional questions need to be answered first. These are:

a) Is the Nare case consistent with Parliament's intention expressed in the *Claims By and Against the State Act* 1996 (CBASA)?

b) Is the Nare case consistent with the principle of vicarious liability?

c) Is the Nare case consistent with the rules of proper pleadings in regards to the principle of vicarious liability?

d) Is Nare case consistent with other case law regarding vicarious liability of the State?

e) Whether the Nare case failed to take into consideration the prevailing situation in PNG with regards to State's liability?

Inconsistent with Parliament's intention as expressed in the CBASA.

Firstly, it is submitted that the principles established in the Nare case are inconsistent with the legislative intention of the CBASA. When the Bill was first introduced in Parliament on 20 November 1996, the then Minister for Justice, Hon Arnold Marsipal MP, said:

> Mr Speaker, I take great pleasure in introducing this Bill which will safeguard the interests and the finances of the State.
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> In recent years, a large number of civil claims and other claims for compensation on infringement of human rights have been made against the State in respect of alleged unlawful actions by public servants. These claims often included compensation claims of police brutality against the people.
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> There are set procedures laid down by the law governing and regulating the bringing of such claims to court. Under the present circumstances, it is difficult for the State lawyers to comply with time limits and other court restrictions. The numbers of claims are increasing alarmingly.
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> At the same time, lawyers for claimants seem determined to try every possible avenue to press their clients' cases, using every loophole they can find. This frequently results in unwarranted payouts, thereby putting increased unnecessary pressure on the State resources.
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> In order to overcome the problems being encountered and to ensure that the law deals fairly with both the State and its citizens, various measures will be put in place by this Bill. This include a scheme of prior notice of making a claim against the State. It will be similar to the scheme of notifying the Motor Vehicle Insurance Trust of proposed claims. Service on the State cannot be done by mail. It must be personally served on the Attorney-General or the Solicitor-General or left personally at his office. However, lawyers operating outside Port Moresby can still accomplish personal service through their city agents. …
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> The Bill … will go a long way towards remedying the impossible situation the Government lawyers find themselves in when trying to protect the interests of the State.

It is my view that the Nare case runs contrary to the legislative intent of the CBASA. The CBASA was enacted to reduce the pressure faced by State agencies especially State lawyers' compliance with previous time limits and other court restrictions, to prevent claimants' lawyers using loopholes to benefit their clients interest, and to prevent unwarranted payouts which usually put unnecessary pressure on the State resources. The Nare case has establishes has set a very bad precedent and opens the floodgate for frivolous and unmeritous claims against the State.

Secondly the Nare Case has established that that it is the responsibility of the State to cause its own enquiry to, ascertain whether the alleged incident did happen, and whether the employee or

servants of the State were involved. And if employees, agent and servant of the State are identified, who are these servants or agents, and lastly what was the legal justification for the employees' actions.

The Nare case has now increased the pressure faced by State lawyers in embarking on an enquiry that does not have parameters and markers to ascertain an allegation. The main parameter that assists the State in its enquiry into a particular allegation is the name of the servant or agent of the State that is alleged to have been involved in the alleged tort or breach. This is the main information that puts the State in a position where it can verify the claim and either defend itself or settle the claim. Also, the Nare case has now created a loophole were claimants or lawyers can only name the State in cases where:

1. They are of the opinion that the tortfeasor is an agent or employee of the State.
2. A private person is responsible for the breach or tortuous action however the claimant is of the opinion that he or she will not benefit by instituting an action against that private person but may see if profitable to institute an action against the State.
3. An agent or employee of the State was acting in the frolic of his own when the tortuous action or breach happen however the claimant is of the opinion that he or she cannot recover anything if they instituted an action against the tortfeasor in his or her private capacity but may see if profitable to institute an action against the State.

Based on the foregoing, if in the event that judgment is entered against the State in one of those scenarios above, the court would be sanctioning unwarranted payouts which will put unnecessary pressure on State resources. Also a closer look at Section 5 of the CBASA and how the courts have applied it begs the question of whether or not, the Nare case took into consideration the legal requirements stipulated under Section 5.

In the case of *Kami v Department of Works* (2010) N4144 (Kami case), the court stated that in order to comply with Section 5 of the CBASA, a notice has to fulfil the requirements of that provision. The requirements for notice were outlined as follows:

1. It must be written.
2. It must contain sufficient particulars.
3. It must be personally served.
4. It must be served on one of the specified persons.
5. It must be given within six months.
6. The claim to which the notice relates should not be statute-barred.

In the Kami case the court addressed the requirement that the notice must contain sufficient particulars. The court said:

> The CBASA does not specify or state the particulars to be included in a s 5 Notice. However, the purpose of a s 5 Notice is clear and that is to put the State on notice of a proposed claim so that inquiries may be undertaken and instructions obtained. Fortunately, it is well settled that a purposive interpretation will be given to s 5. The leading case on this point is *Hewali v Papua New Guinea Police Force* (2002) N2233. The commonly cited passage in that judgment;
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> It follows therefore, that notice must be given within the extended period. Such notice must give sufficient details about the impending claim so that the State can carry out its investigations and gather its evidence to properly address the claim once lodged against it. Such details should include dates, time, name of people and places, copies of any correspondence or such other information that could enable the State to carry out its own investigations. Only when notice is given with such details or information, can one safely say that notice of his or her intended claim has been given to the State.

The underlined sentence suggests that a purported notice which does not provide sufficient particulars is not good notice under s 5 of the CBASA.

Therefore, it can be concluded from the Kami case and the case of Hewali that a notice must contain 'sufficient particulars', which would include:

1. Name of the tortfeasors.
2. Place alleged action took place.
3. Date or time.
4. What actions or omissions the alleged tortfeasor committed.
5. What injuries the claimant suffered.

As mentioned above, in my view the Nare case goes against the intent of the CBASA.

Inconsistent with the Principle of Vicarious Liability

My second proposition is that, the Nare case deviates from the common law principle of vicarious liability. 'Vicarious liability' is a form of a strict, secondary liability that arises under the common law doctrine of agency, *respondeat superior*[2], the responsibility of the superior for the acts of their subordinate or, in a broader sense, the responsibility of any third party that had the 'right, ability or duty to control' the activities of a violator. It can be distinguished from contributory liability, another form of secondary liability, which is rooted in the tort theory of enterprise liability because, unlike contributory infringement, knowledge is not an element of vicarious liability.[3] Employers are vicariously liable, under the *respondeat superior* doctrine, for negligent acts or omissions by their employees in the course of employment (sometimes referred to as 'scope and course of employment').[4]

In the case of *Paliwa v Kombul* (2008) N3499, the National Court stated that:

> In Papua New Guinea, the Parliament legislated the common law principles of vicarious liability through an Act of Parliament called the Wrongs (Miscellaneous) Provisions Act, Ch 297 (WMP Act).

Section 1 of the WMP Act is set out in full:

> 1. General liability of the State in Tort
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> (1) Subject to this Division, the State is subject to all liabilities in tort to which, if it were a private person of full age and capacity, it would be subject-
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> (a) in respect of torts committed by its servants and agents; and
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> (b) in respect of any breach of the duties that a person owes to his servants or agents under the underlying law by reason of being their employer; and
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> (c) in respect of any breach of the duties attaching under the underlying law to the ownership, occupation, possession or control of property.
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> (2) Proceedings do not lie against the State by virtue of Subsection (1)(a) in respect of an act or omission of a servant or agent of the State unless the act or omission would, apart from this Division, have given rise to a cause of action in tort against the servant or agent or his estate.
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> (3) Where the State is bound by a statutory duty that is binding also on persons other than the State and its officers, then, subject to this Division, the State is, in respect of a failure

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2 In Latin it means 'let the master answer'; plural: *respondeant superiores*) is a doctrine that a party is responsible for the acts of his agent (vicarious liability). This rule is also called the 'master-servant rule', recognized in both common law and civil jurisdictions.

3 *Religious Tech Center v Netcom On-Line Comm*., 907F.Supp.1361 (N.D.Cal 1995) GoogleScholar, (Retrieved 6 Sept 2017).

4 Sykes, Alan O, "The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines" *Harvard Law Review* (1988) 101 (3): 563–609.

to comply with that duty, subject to all liabilities in tort (if any) to which it would be subject if it were a private person of full age and capacity.

(4) Where functions are conferred or imposed on an officer of the State as such either by a rule of the underlying law or by statute, and the officer commits a tort while performing or purporting to perform the functions, the liabilities of the State in respect of the tort are such as they would have been if the functions had been conferred or imposed solely by virtue of instructions lawfully given by the Government.

(5) An Act or subordinate enactment that negatives or limits the amount of the liability of a Department of the Government or officer of the State in respect of a tort committed by the Department or officer applies, in the case of proceedings against the State under this section in respect of a tort committed by the Department or officer, in relation to the State as it would have applied in relation to the Department or officer if the proceedings against the State had been proceedings against the Department or officer.

(6) Proceedings do not lie against the State by virtue of this section in respect of anything done or omitted to be done by a person while discharging or purporting to discharge responsibilities of a judicial nature vested in him, or responsibilities that he has in connection with the execution of judicial process.

Also in *Vincent Kerry v The State* (2007) N3127, Justice Cannings stated that:

> Vicarious liability is a common law principle by which one legal person (such as the State) is held liable for the acts or omissions of another person or group of persons over whom the first person has control or responsibility. The principles of vicarious liability have been codified by Section 1 (general liability of the State in tort) of the *Wrongs (Miscellaneous Provisions) Act*.

From the above, the law dictates that in order to establish vicarious liability of the State, the plaintiffs must prove the following:

1. The perpetrator of the tort is a servant or agent of the State.
2. The particular act or omission would have given rise to a cause of action in tort against the servant or agent.
3. The tort was committed by the servant or agent in the course of his employment.

The first element is crucial for the purposes of this paper. In any proceedings against the State, the principle of vicarious liability will come into play if the perpetrator of the tort is a servant or agent of the State. Without ascertaining whether a perpetrator is a servant or agent of the State, it is impossible to find the State liable for a tortuous action. In the case of *Huaimbukie v Baugen* (2004) N2589, (Huaimbukie case) the National Court after considering the Supreme Court cases of *The Independent State of Papua New Guinea v David Wari Kofowei & Ors* [1987] PNGLR 5 (Kofowei case) and the subsequent judgment of the Supreme Court in *Abel Tomba v The Independent State of Papua New Guinea* (1997) SC518 (Tomba case) stated that:

> I find persuasion in these observations and add on my part that the Supreme Court judgments in *The Independent State of Papua New Guinea v. David Wari Kofowei & Ors* [1987] PNGLR 5 and *Abel Tomba v The Independent State of Papua New Guinea* (1997) SC518 did not say that, vicarious liability automatically follows against the State as soon as the wrong doer is found as an employee of the State. That is only one-half of the consideration. The Court must also consider whether the circumstances giving rise to the action against the State are such that they give rise to vicarious liability.

In the Kofowei case, the Supreme Court said:

> There is indeed a distinction between the liability of the State under s 1(1) and s 1(4) of the Wrongs Act.
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> The provision in s 1(1) applies where a servant or an agent of the State commits a tort during the course and within the scope of his employment and s 1(4) is applicable in cases where an

officer of the State performs functions or purports to perform functions conferred or imposed on him by statute or the underlying law. It is also to be noted that s 1(1) is made subject to s 1(4) so that the State's liability for an officer's tort committed whilst the officer is performing functions under a statute or the underlying law must be considered under s 1(4). The importance of the distinction between s 1(1) and s 1(4) is that not all officers of the State are its agents or servants nor are all its agents or servants also its officers. Because of this distinction the State's liability under s 1 of the Wrongs Act must be properly considered under either the provisions of s 1(1) or s 1(4) and whether one provision or the other applies would be dependent on the facts of the case."

In the Huaimbukie case, the National Court observed that:

> The Supreme Court decisions made it clear that, the liability of the State in an unlawful police raid, arrest and or any breach of a person's Constitutional right is dependent on two considerations. The first is whether the wrong doer was an employee or servant of the State at the time of the conduct of action in question. Secondly, if the first question is answered in the affirmative, then the next consideration is whether the circumstances render the State vicariously liable. They did not displace the common law requirements for a plaintiff to show against an employer that his offending employee was in the course of his or her employment pursing the employer's interest.

It follows that to identify whether a perpetrator is a servant or agent of the State, the State must first identify who the perpetrator is? Whether he is in fact a servant or agent or officer of the State. What job he does, which office or branch of the State he or she is attached to. As stated in the Kofowi case, *not all officers of the State are its agents or servants nor are all its agents or servants also its officers*. If the State fails to put a name to a character, it would be impossible for the State to verify whether that nameless character is in fact a servant, or agent, or an officer of the State. I am therefore of the view that the Kewakali judgment was sound in law:

> In addition, we view the provisions of s 1(2) of the Wrongs Act provides by necessary inference that a servant or agent of the State who has been alleged to have committed the wrong, must be named as a party or a co-defendant. In our view, if a plaintiff does not name the alleged principal tortfeasor there is a no nexus or connection so there will not be a cause of action against the nominal defendant (the State). Thus, it is our opinion that to do justice to all parties, the Plaintiff must name the servant or agent of the State or the alleged tortfeasor and must also plead in the Statement of Claim the nexus or connection between the principal tortfeasor and the nominal defendant. This is because to succeed in having the State held liable for the tort of a policeman, the Court has to be satisfied that*:*
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> (a) The policeman as a servant or agent of the State, committed the tort during the course and within the scope of his employment (s 1(1)(a) Wrongs Act); and
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> (b) The policeman as an officer of the State, committed the tort while performing or purporting to perform functions conferred or imposed upon him by statute or the underlying law (s.1(4) Wrongs Act; *The Independent State of Papua New Guinea v David Wari Kofowei and Ors* [1987] PNGLR 5, and *Abel Tomba v The Independent State of Papua New Guinea* (1997) SC518 did not say that vicarious liability automatically follows against the State as soon as the wrong doer is found as an employee of the State. That is only one-half of the consideration. They must have been found to have been acting within the scope of their employment.

There has therefore got to be a nexus or connection between the tortfeasor and the State in terms of servant-employer relationship to bring into play the principle of vicarious liability.

The Kewakali case also considered the instances were the primary tortfeasors cannot be identified by the claimant, and has provided an exception as follows:

> In saying so, we do not for the moment suggest that, for instance, if there is a police raid that all the policemen involved should be named. On the contrary it would be sufficient to name at least one or two of the policemen involved as co-defendants or follow what was done in Pyali's case, that is, name the immediate commander, so as to bring into play the principles of vicarious liability between the principal tortfeasor and the nominal defendant.
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> Even where the plaintiff is unable to identify the principal tortfeasor, for example, if such a raid occurred in the dark and middle of the night, it would still be necessary to establish the nexus by naming the commander as in Pyali's case. The plaintiff may need to investigate to satisfy himself which station, unit or division the policemen came from to identify the commander of the station, unit or division and name him as a defendant. Otherwise a pleading claiming unlawful conduct by policemen not named as parties to the proceedings, could well be struck out as general and vague.

I am of the view that the Kewakali case was not unreasonable in stating the principle of naming the principal tortfeasor was the only option to establish the principle of vicarious liability. The Supreme Court also provided the exception to that rule where tortfeasors are impossible to identify, a co-defendant as identified with the tortfeasor or the commander may be named as parties. The Kewakali case is in my view consistent with the principle of vicarious liability.

> *Inconsistent with the rules of proper pleadings in regards to the Principle of Vicarious Liability*

Thirdly, my view is that the Nare case is inconsistent with the rules of proper pleadings in regards to the principle of vicarious liability. In the Nare case, the Supreme Court stated that:

> It is not part of the cause of action that the offending officers be identified or be parties to the cause pleaded against the State. Indeed, there may be good industrial relations reasons why the State would not seek indemnity against an employee or agent who committed such a tort.

First, in regards to the law of pleadings, the Supreme Court case of *Papua New Guinea Banking Corporation (PNGBC) v Tole* (2002) SC694, stated as follows:

> The law on pleadings in our jurisdiction is well settled. The principles governing pleadings can easily be summarized in terms of, unless there is foundation in the pleadings of a party, no evidence and damages or relieves of matters, not pleaded can be allowed. This is the effect of the judgements of this Court in *Motor Vehicles Insurance (PNG) Trust v John Etape* [1995] PNGLR 214 at p221 and *Motor Vehicles Insurance (PNG) Trust v James Pupune* [1993] PNGLR 370 at pp 373 –374. These judgements re-affirmed what was always the position at common law and consistently applied in a large number of cases in our country. The list of such cases is long but reference need only be made to cases like that of *Repas Waima v Motor Vehicles Insurance Trust* [1992] PNGLR 254 and *Carmelita Mary Collins v Motor Vehicles (PNG) Insurance Trust* [1990] PNGLR 580 for examples only.

The Supreme Court went further and stated that:

> This position follows on from the objects behind the requirements for pleadings. As the judgement in *Motor Vehicles Insurance (PNG) Trust v James Pupune* [1993] PNGLR 370 at p 374 said in summary, pleadings and particulars have the object or functions of:
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> 1. They furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it;
> 2. They define the issues for decision in the litigation and, thereby, enable the relevance and admissibility of evidence to be determined at the trial; and
> 3. They give a defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into court.

From the above, it can be noted that, proper pleadings play a vital role in placing the foundation of a claim which would allow the opposing parties to answer to the allegations. Therefore, in a

case based on the principles of vicarious liability, proper pleadings plays a very vital role in allowing the State a fair opportunity to meet it, define the issues for decision in the litigation and, thereby, enable the relevance and admissibility of evidence to be determined at the trial and lastly it gives the State an understanding of a plaintiff's claim in aid of the State's right to make a payment into court.

In the Pinda case, the court observed that:

> In this case, the cause of action was based on the tort of negligence. To succeed in having the second respondent held liable for the negligent actions or omissions of the policemen, the National Court has to be satisfied that:
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> (a) the policemen as servant or agents of the second respondent committed the tort of negligence during the course and within the scope of their employment (Section 1(1)(a) of the *Wrongs (Miscellaneous Provisions) Act*, Ch 297); and
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> (b) the policemen as officers of the second respondent committed the tort of negligence while performing or purporting to perform functions conferred or imposed upon them by statute or the underlying law (Section 1(4) of the *Wrongs (Miscellaneous Provisions) Act*, Ch 297).

The Supreme Court then held that:

> In a case of illegal police raid, for the second respondent (the State) to be held vicariously liable in damages for the negligent acts or omissions of policemen, the appellant must plead that the policemen were acting in the course and within the scope of their employment or while performing or purporting to perform functions conferred or imposed upon them by statute or the underlying law when they conducted the raid (Section 1(1) & (4) of the *Wrongs (Miscellaneous Provisions) Act*, Ch 297).
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> The failure to plead that the policemen were acting in the course and within the scope of their employment or while performing or purporting to perform functions conferred or imposed upon them by statute or the underlying law when they conducted the raid is a point of law and it was open to the trial judge to consider it, notwithstanding the entry of default judgment and trial on assessment of damages. *Coecon Limited v National Fisheries Authority & The State* (2002) N2182; *William Mel v Coleman Pakalia, The Police & The State* (2005) SC790 and *Rupundi Maku v Steven Maliwolo & The State* (2012) SC1171 referred to.
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> Further, the Nare case suggested that if the State wishes to pursue a case against its employee or agent, the State could apply to join officers known to it, who committed or were responsible for the commission of the tortuous acts because the State is better placed than the hapless victims to identify such persons. Moreover, the State is also not precluded from demanding by request for particulars or interrogatories that the plaintiffs disclose such knowledge as they had of the identity of the relevant officers.
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> Those two suggestions are more or less impractical and have reversed the burden of proof from the party alleging, to the party defending. As to the first suggestion, the State does not exist on its own. The State is an in animated being which only derives its nature from its servants and agents. The State is neither an abstract human being nor an artificial intelligence who would know the conduct of its and every one of its servants and agents. That is why, Parliament saw it fit to enact the CBASA which amongst other things provides a condition precedent of giving notice to the State. This notice requirement includes giving sufficient particulars to the State to enable it to cause its own enquires to ascertain the validity of the case. For these reasons, the State is very much hapless if a victim cannot provide the name of the employee or agent responsible or name of its commanding officer.

The court seems to contradict itself when it said:

> The court in Kewakali did acknowledge the difficulty of naming the perpetrators, particularly as they might well wish to avoid detection. Nevertheless, the naming of senior officers who may well have had no knowledge of their junior officers' activities is not only otiose but contrary to principle. To be named as a defendant a person must be alleged to be a tortfeasor or a person or body vicariously liable for the acts of a principal tortfeasor. A senior officer is not vicariously liable for the acts of his or her subordinates. He or she can only be liable if directing or authorising the tortious conduct.

The contradiction is that, the State cannot be separated and seen in a different light than its employees; especially the senior officers, superiors and managers in a particular branch, office or established government institution. The superiors and managers are in actual fact the eyes and ears of the State. The State as an abstract entity does not have the human personality to know the conduct of junior officers. The senior officers, the superiors and the managers are the appropriate persons who can answer for the conduct of their subordinates or even cause an inquiry as to allegations raised against his or her subordinates.

In regards to the second suggestion, the State cannot be burden by what has already been sanctioned by Section 5 of the CBASA**.** The State should not be burdened to file applications requesting for particulars or interrogatories that the plaintiff disclose such knowledge as they had of the identity of the relevant officers. For that reason, the claimant ought to name the principal tortfeasor or its superiors to enable the State to answer the allegations raised against the State's servants or agents.

Considering what has been stated in the Nare case in light of the law of pleadings outlined above, naming the principal tortfeasor in the pleadings pays a vital role in giving a fair opportunity to the State to answer the allegations raised against it through the actions or omissions of its servants or agents.

Inconsistent with other case laws regarding Vicarious Liability as against the State

The Nare case in its endeavour to pronounce the Kewakali case bad law has made the cardinal error of not addressing all Supreme Court cases that deal with the issue of vicarious liability against the State. A significant judgment that was not considered is the Pinda case.

The Pinda case is significant as the Supreme Court clearly set out the parameters and requirements of pleading a cause of action of tort of negligence as against the State. As outlined earlier, the Pinda case established the rule that, '*for the State to be held vicariously liable in damages for the negligent acts or omissions of policemen, the appellant must plead that the policemen were acting in the course and within the scope of their employment or while performing or purporting to perform functions conferred or imposed upon them by statute or the underlying law when they conducted the raid.* The court further ruled that:

In this case, the cause of action was based on the tort of negligence. To succeed in having the second respondent held liable for the negligent actions or omissions of the policemen, the National Court has to be satisfied that:

(a) the policemen as servant or agents of the second respondent committed the tort of negligence during the course and within the scope of their employment (Section 1(1)(a) of the *Wrongs (Miscellaneous Provisions) Act*, Ch 297); and

(b) the policemen as officers of the second respondent committed the tort of negligence while performing or purporting to perform functions conferred or imposed upon them by statute or the underlying law (Section 1(4) of the *Wrongs (Miscellaneous Provisions) Act*, Ch 297).

Without considering the Pinda case, the Nare case concluded its judgment that:

> It follows that the cause of action against the State is established if:
>
> - Tortuous conduct is perpetrated by; and
> - Officers of the State, including police; and

- Acting or purporting to act in the course of their duties.

Even though the Nare case briefly considered the term 'purporting to act' in brief terms, it failed to consider what it means to be 'acting in the course and within the scope of duties.' In considering the term 'purporting to act', the Nare case stated that the wording is of great significance. The Supreme Court further stated that, it is not part of the cause of action that, the offending officers be identified or be parties to the cause, pleaded against the State, and that there may be good industrial relations reasons why the State would not seek indemnity against an employee or agent who committed such a tort.

If the Nare case had taken into account the Pinda case, the Supreme Court would have noted that the Pinda case specifically stated and used the words; '*committed the tort of negligence during the course and within the scope of their employment*'. The terms 'scope of employment' and 'course of employment' are sometimes used interchangeably[5]. Also if the Supreme Court had considered the above wording in detail, it would have noted the factors in determining whether the act was committed in the course of employment and would have expounded on when exactly can a cause of action be established against the State. These factors are as follows[6]:

1. The mode of doing the work that an employee is employed to do.
2. Authorised limits of time and space.
3. Express prohibition.
4. Connection with employer's work.
5. Deliberate criminal conduct.

There are several important points that need to be made about vicarious liability that stand out in this case. First, if the servant of the State undertakes a mode of doing the work that he is not employed to do than the State would not be vicariously liable.[7] There are however certain exceptions to this particular rule.

Second, the conduct of an employee is within the scope of his employment only during his authorised period of work (or a period which is not reasonably disconnected from the authorised period). However, in the case of *Stanley v Kawa* (2005) N2865, the court held that although the police officers were off-duty, they remained police officers 24 hours a day and, using a public road, they owed a duty of care to fellow road users.

I am of the view that, it would be contrary to the principle of vicarious liability and also public policy for the State to be held liable for every single tortuous actions of a policeman. My argument is based on the proposition in *Joel v Morision*[8] that:

> If he was going out of his own way, against his master's implied commands when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable.

Third, most or all employers expressly prohibit certain acts or conduct to safeguard them. Nonetheless, there are issues whether defiance of the prohibition is thereby place outside the scope of employment. In the case of *Plumb v Cobden Flour Mills Co Ltd*[9]**,** the House of Lords laid down the rules as follows:

> there are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent

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5 Peel. W. E. & Goudkam. J, *Tort* (London: Thomson Reuters (Professional) UK Limited,2014) 652.
6 Brazier. M., *Street on Torts* (London: Butterworth & Co (Publishers) Ltd, 1993) 498.
7 *Ricketts v Thos Tilling Ltd* [1915] 1 KB 644, CA. See also *Ilkiw v Samuels* [1963] 2 All ER 879, CA.
8 (1834) 6 C & P 501 at 503.
9 [1914] AC 62 at 67 (per Lord Dunedin) HL; (a workmen's compensation case, but the principles are still the same).

recovery of compensation. A transgression of the former class carries with it the results that the man has gone outside the sphere.

Having considered the above and also the case of *Twine v Bean's Express Ltd*[10], I am of the view that if employees or agents of the State act contrary to express prohibitions which most of them are prescribe by law, then they will be deemed to be acting outside the scope of their employment.

Fourth, the issue of whether the acts were connected to the employer's work, determines whether an employee is acting in the course of his employment. On most occasions, employees do tasks which have no express authority, but with the intention to further their employer's objectives. If the means of accomplishing this objective is so outrageous that no employer could reasonably be taken to have contemplated such an act as being within the scope of employment, the employer would be liable for torts that are committed. The case of *Makanjuola v Metropolitan Police Comr*[11] is a classical example of a case were a conduct was unconnected with the employer's work. In that case, a police officer extracted sexual favours from the plaintiff in return for a promise not to report her to the immigration authorities. It was held that his act was entirely for his own purposes, and not an act his employer, in any sense authorised. The PNG example is the case of *More v The State* [1998] PNGLR 290. In that particular case, a police squad, headed by the second defendants, entered the plaintiff's village pursuant to a valid search warrant. The warrant entitled the policemen to search houses and recover unlicensed firearms and ammunition. In the process of their search two unidentified policemen assaulted and raped the plaintiff, an adult female. The court held that whilst a policeman's title and uniform is no shield against criminal prosecution for criminal offences, the State as their employer cannot be held liable for the crimes, including rape, committed by the policemen in the course of performing their duties.

Lastly, the issue of whether it was a deliberate criminal conduct of the employee and agent determines whether an employee is acting in the course of his employment. There are cases which the wrongful conduct is in no way in the employer's interests, if it is so much part and parcel of the job, the employee is engaged to do, then the employer remain liable for that conduct.[12] When a criminal conduct happens which is in no sense in the employer's interest and also was not in any way related to the job the employee was engaged to do, the employer would not be liable.

Because of that pertinent omission in not considering what the wording 'in the course and within the scope of employment' means and whether or not it was appropriately used in the Pinda case, but more importantly, the omission in not considering the whole of the Pinda case, I am of the view that the Pinda case is still good law.

Failure take into consideration the prevailing situation in PNG with regards to State's liability

A close examination of the Nare case reveals that the Supreme Court failed to take into consideration the prevailing situation in PNG where most employees and servants of the State are abusing their powers and acting out of the frolic of their own. If the Supreme Court had considered the line of cases that deal with the State's liability, then it would have noted that the majority of these cases stem out from the unruly behaviour and conduct of the servants and agents of the State which have resulted in the State forking out millions of kina as damages.

In the case of *Application by Kunzi Waso* [1996] PNGLR 218, Justice Jalina stated at page 224 that:

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10 (1946) 175 LT 131, CA, (This was a case were the employer had a contract to employ his vans on Post Office business. Contrary to his express instruction, his driver gave a lift to a third party. It was held that giving the lift was outside the scope of employment. Operating what was in effect a 'free taxi service' was not the job the driver was employed to do.

11 [1992] 3 All ER 617, CA.

12 *Bracebridge Enginneering Ltd v Barby* [1990] IRLR 3.

> In the past the courts have been ordering the State to bear the financial burden on the principle of vicarious liability. This has resulted in the ordinary tax-payer footing the bills. It has resulted in moneys that could have been used on development projects such as health and education being used to pay damages. I am therefore going to differ from my brethren. I am of the opinion that when a member of the disciplined forces, be he a soldier, policeman or warder goes beyond the bounds of the law and ends up breaching someone's constitutional rights, then he should be made to personally bear the consequences of his actions. The reason for this is simple. The State does not say to the officers on duty 'you go and beat up that person badly, you go and burn houses and kill pigs and chickens and rape women'. Not at all. Officers are not only told but expected to go and carry out their duties within the bounds of the law. What happens in the field of operation and how far one should go in carrying it out is in the hands of the individual. I believe that by awarding damages against officers individually will result in not only the amount paid by the State in damages being reduced but may also reduce the frequency of unruly behaviour by policemen and warders and others.

This case goes to point out that the courts, have observed that a lot of money has been paid out by the State because of the bad conduct of its employees and that the State has observed that, ordinary tax-payers are footing the bills which such monies could have been used on development projects. Jalina J, also stated that by awarding damages against the officers of the State individually, this will achieve two outcomes for the State;

1. Reduction in the amount of damages paid by the State; and
2. Reduction of the frequency of unruly behaviour by servants of the State.

The case of *Desmond Huaimbakie v James Baugen & The State* (2004) N2589 and *Peter Aigilo v The Independent State of Papua New Guinea & Ors (No1)* (2001) N2102 also supports this position.

The second line of case includes the case of *Koi v Anseni* (2014) N5580. In that judgement, Justice Cannings noted the above cases, but made these remarks:

> If these decisions stand for the proposition that as soon as it can be established that a police officer, such as the first defendant, has done something obviously unlawful, it follows that he has acted outside the scope of his employment, therefore excusing the State from liability, I respectfully decline to follow them. I have a different view entirely.

Since there are two lines of cases regarding this position, the Nare case should have considered both lines of cases. The omission by the Supreme Court goes to the core of the soundness of the judgment itself.

2. Are there Serious Implications for the State in light of the Nare Case?

There are serious implications for the State in light of principles established in the Nare case. An immediate implication will be the high tendency of opportunist fabricating claims against the State based on the fact that they cannot be able to identify the principal tortfeasor.

As I have outlined above, the Nare case opens the floodgate to claimants or lawyers who will merely name the State in cases where:

1. They are of the opinion that the tortfeasor is an agent or employee of the State.
2. A private person is responsible for the breach or tortuous action however, the claimant is of the opinion that he will not benefit by instituting an action against that private person, but may see it profitable to institute an action against the State.
3. An agent or employee of the State was acting in the frolic of his own when the tortuous action or breach happen however the claimant is of the opinion that he or she cannot recover anything if they instituted an action against the tortfeasor in his private capacity but may see if profitable to institute an action against the State.

Since the Nare case, a couple of cases, including those cases that have adopted and relied on the

Nare case, have held the State liable and also order damages against the State. These include; *Lyanga v Independent State of Papua New Guinea* (2017) SC1635; *Pade v Nangas* (2018) N7073; *Gaian v Yawing* (2018) N7099; *Munvi v Takai* (2018) N7100; and *Pote v Smith* (2018) N7117.

If the principles in the Nare case remain in effect, it will cause the State millions of money in cases where the State cannot be able to identify the primary tortfeasors and also in cases which are totally baseless and bogus altogether.

3. Can the Nare Case be Challenged?

I am of the view that based on the inconsistencies discussed above, the Nare case is *per in curiam* and can be challenged by applying the principles set out in the case of *Christian v Namaliu* (1996) SC1583 (Christian case).

In the Christian case, the Premier of Morobe Provincial Government applied to the Supreme Court for declarations that the repeal and replacement of the *Organic Law on Provincial Governments* made by the Parliament were invalid. He relied on the grounds that the passage of the amendments through Parliament had not observed procedural requirements of the *Constitution,* in particular Section 14 which required a proposed amendment to the *Constitution* to be distributed to Members of Parliament at least one month before the Bill is to introduced into Parliament.

The Supreme Court refused the application. The court also ruled that the application was *res judicata* and the application incompetent for want of right to apply. The court held that:

1. A prior judgement is *per in curiam* if the earlier decision was given in inadvertence of some well established principle, or some other decision of a court apparently binding on the court giving such judgement, which if the court were adverted to, it would have affected the decision given, such that the Court would have decided otherwise than it did, if in fact the Court had applied the authority or principle; and

2. The Supreme Court should only depart from an earlier statement it had made on the law:
   a) in the most exceptional circumstances; and
   b) when the Chief Justice is presiding, unless the Chief Justice is being asked to reverse one of his own decisions;-
      (i) after the most careful scrutiny of the precedent authority in question and after a full consideration of what may be the consequences of doing so;
      (ii) where the earlier decision can be said to be clearly and manifestly wrong, or in conflict with some other decision of the Court or well established principle, and that its maintenance is injurious to the public interest.

Conclusion

After the Nare case was decided, it has caused a lot of issues in regards to the defence the State is entitled to raise. It has resulted in an uphill climb for the State in terms of conducting investigations to verify the allegations raised, putting a defence that would safeguard the State's interest and also exonerating the State from bearing liability. The Nare case has also increased the hardship on the part of the State in ascertaining whether a claim against it is actually genuine or another attempt to defraud the State.

Nevertheless, this paper was purposed to set out the inconsistencies in the Nare case and suggest the way forward for the State and that is to challenged the Nare case as a decision ***per in curiam.*** If and when the Nare case is challenged, the Supreme Court can address the issues raised in this paper and can make a determination on the issue on whether or not it is manifestly wrong, or in conflict with some other decision of the court or well established principle, and that its maintenance is injurious to the public interest.