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The litigant—Pita Rokoratu

The Royal Courts of Justice on G.E. Street, The Strand, London

Source: Anthony M. (via Flickr). Available at: commons.wikimedia.org/wiki/File:Royal_courts_of_justice.jpg.

Nearly 40 years after he left the Navy, Able Seaman Pita Rokoratu (FRNVR 1196) would travel to London to testify in court. In a decade-long case—ultimately unsuccessful—Christmas Island veterans from

three countries sought to use legal channels to seek civil damages from the British Government. For Rokoratu, the veterans' claims were about Britain's moral, as well as legal, responsibility:

> I can say that Britain murdered us. All the illnesses are affecting my children and grandchildren. Britain should do something to thank us. It has achieved its aims. It now has a great deal of power. It has an obligation to those who risked or gave their lives.
>
> It's true that we Fijians are always up to any challenge. Colonial days are over now. We have a time of enlightenment. Something should certainly be done. We Fijians are always embarrassed about claiming for compensation. However, since we are now living in a time of new attitudes, it is right to claim for compensation.[1]

Rokoratu's participation in the class action had its roots at the time of Operation Grapple, when he witnessed three hydrogen bomb tests at Christmas Island between August 1958 and August 1959:

> I was in the Fiji navy from 1956 up until 1960. In November 1957 we were told that they wanted some navy servicemen to replace some who were already serving there on Christmas Island. Our job was to transport equipment, supplies and material shipped from Britain from the ships to the island, as there was no wharf for the big ships there.
>
> Before going to Christmas Island, we knew that they were conducting the tests there. But they did not tell us any details of the tests or the possible effects. We were only informed about it after the first test. They told us that there was a chance of something going wrong with the plane that was carrying the bomb. If they found that we had been exposed to radiation, we would not have returned to Fiji. It was better that we stayed on Christmas Island. That was the time we realised what we were facing.

Returning from his Christmas Island deployment, Rokoratu spent four years with the survey section of the Fiji Government's marine department before joining the prison service, where he worked for the next 20 years.

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1 Interview with Pita Rokoratu, recorded in the Fijian language in Suva in 1998. The translation comes from the book *Kirisimasi—Na Sotia kei na Lewe ni Mataivalu e Wai ni Viti e na vakatovotovo iyaragi nei Peritania mai Kirisimasi* (Pacific Concerns Research Centre, Suva, 1999), pp. 40–42. Unless otherwise noted, direct quotations come from this interview.

In the 1990s, as Fiji's Christmas Island naval veterans began to organise, Rokoratu joined the Fiji Nuclear Veterans Association. As they shared stories of their lives and families, many realised that they had common health concerns:

> As the years went by working in the Prison's Department, I was getting tired easily. I noticed that I was suffering from illnesses, which never used to affect me. I used to play rugby before. Now my body was always tired. Certain parts of my body began swelling. My eyes were not as good as before. I asked to resign five years before I was to retire because of my health.

After blood tests, he was initially diagnosed with aplastic anaemia, a rare disorder that occurs when there is damage to the bone marrow and the body stops producing enough new blood cells. This illness can be caused by exposure to radiation, toxic chemicals or certain viruses. He also suffered from leucopoenia, a diminished white blood cell count, which decreases a person's ability to fight infection and disease. From 1965, he lived with extensive lipomatous growth all over his body. His only two sons are afflicted with the same skin condition.

Like many veterans, Rokoratu believed that his health problems were related to his participation in the British nuclear test program. On Christmas Island, Rokoratu was not provided with any protective clothing or radiation measuring devices when he witnessed the Grapple Z tests.

> There was one army doctor on Christmas Island, but he never made inquiries about our health. After that, we continued with our normal work … Those of us in that group were all very young. Before going abroad, we only had the normal medical checks, but we did not have any medical tests after returning. We came back and were discharged at the army camp. At that time there was no pension scheme after returning.

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As the Fiji Nuclear Veterans Association slowly built links with their British and New Zealand counterparts, the Fijians decided to join in the legal battles for compensation that had begun in Britain.

An initial case lodged by Melvyn Pearce in 1985 reached the UK High Court in 1988, where the UK Ministry of Defence (MoD) denied liability and sought to rely on immunity from suit under the *Crown Proceedings Act 1947*. Initially, Pearce won a significant victory, establishing that the ministry could not rely on the immunity of the Crown from suit.[2] However, soon afterwards, his claim was discontinued. Melvyn Pearce faced apparently insurmountable hurdles in his legal challenges against the UK Government, which continue to constrain legal action by many survivors of Britain's nuclear testing program.

First, some cancers and illnesses are only evident years or decades after the event, meaning most veterans often miss the deadline to lodge compensation cases under various statutes of limitation that bar late legal actions.

Second, many surviving veterans lack the detailed documentation required to show any direct exposure to radiation, or even to prove their physical location on the day of the tests. Even if radiation dosimeters were worn at the time, the data was not recorded or was subsequently lost or discarded.

Third, there is the fundamental difficulty of demonstrating a causal link between exposure to radiation and the disease or condition affecting the veteran. Some illnesses and cancers that can be attributed to exposure to ionising radiation can also be caused by inherited genetic factors or other exposure to toxins, chemicals or smoking.

Fourth, proving the connection between Christmas Island service and later illness is legally complex and expensive, but the burden of proof is placed on the shoulders of the veterans, not the British State. In the final words of their ruling in 2010, the UK Court of Appeal judges noted that reversing the responsibility of proof onto the MoD would change the legal terrain:

> We cannot say that any of these claimants who have, so far, not been awarded pensions will succeed in their attempts to do so, but their chances of success must be far greater with the MOD having to prove the absence of causation than they ever were while the claimants had to establish it.[3]

2 *Pearce v. Secretary of State for Defence* [1988] AC 755.

3 *Ministry of Defence versus AB and Others*, UK Court of Appeal (Civil division) [2010] EWCA Civ 1317, Case No: B3/2009/2205, para. 305.

Finally, lawyers for the UK MoD have argued that the long delay in lodging cases before the courts '"fatally and irrevocably eroded the cogency of the evidence" because many of the senior civilian and military figures whom the defendant would wish to call are now dead or so old that they cannot be expected to remember events with clarity'.[4]

There are many examples of crucial data on radiation exposure being lost or destroyed. The UK MoD does not hold records of exposure rates for Fijian personnel. In his history of the NZ Grapple deployment, veteran Gerry Wright reports that data for the New Zealand sailors from HMNZS *Pukaki* and HMNZS *Rotoiti* is unavailable, even though personnel were issued with film badges for the early Grapple tests:

> Everyone's personal radiation detection badges were marked, packaged and transferred to the carrier *Warrior*. Because of the volatility of the chemicals used in testing these films, it was considered unwise to have them read at sea. It is understood that on *Warrior's* return to the United Kingdom, the films were apparently classified as 'used' and accordingly destroyed.[5]

In a letter to the author, British veteran Dave Whyte outlined the failure of the UK authorities to accurately record evidence that could be used in claims for war pensions or compensation. Whyte served on Christmas Island during 1958, witnessing Grapple Y and the four tests during the Grapple Z series. He was involved in clean-up operations after Grapple Z Pennant (22 August) and Burgee (23 September):

> I was ordered into the highly radioactive area known as ground zero two hours after detonation of two atomic bombs to clear up the debris. I was not supplied with any protective clothing or the respirator automatically supplied to the civilian AWRE [Atomic Weapons Research Establishment] workers, but was supplied with a radiation film badge (for gamma radiation) and a Quartz Fibre Electroscope (QFE) dosimeter (for beta radiation).
>
> When I delivered my truck to the decontamination centre, I noticed a civilian AWRE worker dressed in full protective clothing and wearing a respirator jump into the truck and drive it away to empty it. Inside the centre, they took my radiation film badge and placed it, along with others, in a box, My QFE dosimeter was read and recorded and recharged for the next user. I was recorded as receiving 5R per hour [46.6 mSv].

4 *Ministry of Defence versus AB and Others* [2010] UK Court of Appeal, para. 39.
5 Gerry Wright: *We Were There—Operation Grapple* (Zenith Print, New Plymouth, n.d.), p. 128.

> My truck was returned, emptied of the cargo, but was not decontaminated. At that time, it didn't mean anything to me, as I knew nothing about radiation. So I used my vehicle to transport friends to the Main Camp and the port area for the cinema and NAAFI [Navy, Army and Air Forces Institute] facilities.[6]

Whyte is critical of suggestions by the MoD that all data during the nuclear testing was meticulously recorded:

> Years later, when I wanted to claim a war pension, I decided to find out the dose of radiation I received. I discovered that my radiation film badges had mysteriously disappeared and no records had been made regarding the radiation levels on the dosimeters. I had a blood count taken prior to Grapple Z commencing and another taken after the completion of Grapple Z. The earlier blood count is in my service records, but no trace can be found of the latter one.[7]

The failure of the British Government to conduct medical studies both before and after the tests reinforces the difficulty of documenting the changes in the veterans' health. In an interview, Fijian veteran Emori Ligica noted:

> We were all medically examined and were healthy when we left for Christmas Island. When we returned, we were never medically checked.[8]

Despite the difficulty of legal challenges, surviving veterans and their families still believe that the British Government has a case to answer. Veterans aged in their 80s as well as their children continue to testify of the illness, trauma and heartache that plague them to this day. For 20 years, the nuclear veterans have unsuccessfully lodged a series of court cases and appeals in the United Kingdom and European Court of Human Rights, seeking damages under civil law for the illnesses they attribute to their service on Christmas and Malden islands.[9]

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6 Letter to the author from Dave Whyte, 4 February 2015 (copy in author's files).
7 Ibid.
8 Interview with Emori Ligaca, Suva, Fiji, 1998, for *Kirisimasi*, op. cit., p. 151.
9 A useful summary of the UK litigation can be found in Patsy Richards: 'Nuclear Test Veterans—compensation', House of Commons Library, standard note SNSC-05145, 31 January 2013.

As founding chair of the British Nuclear Test Veterans Association (BNTVA), Scottish veteran Ken McGinley would launch one of the first cases against the British Government. In 1997, McGinley and Ken Egan lodged a case before the European Court of Human Rights in Strasbourg, which recognised the merits of their claims but sent them back to the United Kingdom to use all relevant avenues of appeal.[10] Another unsuccessful case before the European Court involved a young girl suffering from leukaemia that she attributed to her father's service on Christmas Island.[11]

In 2002, several veterans obtained legal aid in England and instructed Alexander Harris and Clarke Willmott (two different firms of solicitors) to bring claims for damages. As a legal adviser to the Fijian Nuclear Veterans Association, Adi Sivo Ganilau provided support to the British law firms to gather information in Fiji about the effects on the Christmas Island veterans and their families:

> When they sent their two paralegals down to collect data, we went around Fiji where the families were. We got to see some of the children who'd been affected—it's quite tragic. Many of them have horror stories to tell. I wouldn't wish it on anybody else.[12]

The associations of British, New Zealand and Fijian veterans soon agreed to proceed with a joint action before the British courts, rather than a series of individual claims.

On 23 December 2004, a group of 1,011 claimants lodged a case against the UK MoD.[13] The group comprised mainly British service personnel, but also Fijian and NZ veterans, as well as a few civilians and the families of veterans that had died. From the larger group, 10 test cases were chosen, with Pita Rokoratu representing the Fijian contingent. Adi Sivo notes:

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10 Judgment, *Case of McGinley and Egan v. the United Kingdom*, European Court of Human Rights, Strasbourg, France, 9 June 1998. § 68, Reports of Judgments and Decisions 1998-III (10/1997/794/995-996).

11 *L.C.B. v. the United Kingdom*, 9 June 1998, European Court of Human Rights, Strasbourg, France. § 35, Reports of Judgments and Decisions 1998-III.

12 Interview with Adi Lusiana Sivo Ganilau, Suva, Fiji, November 2016.

13 *AB and Others versus Ministry of Defence* [2009] EWHC 1225 (QB). A list of 707 survivors of the group is included as an appendix in their 2014 case before the European Court of Human Rights: *Jean Ethel Sinfield and Others against the United Kingdom*, European Court of Human Rights (Fourth Section), Application no. 61332/12, 18 February 2014.

> Both sides had to pick 10 veterans and Pita Rokoratu happened to be one of the 10 for the plaintiffs. We did some preparatory work here in Fiji. They needed some more information, so we prepared statements. Then our lawyers in England allowed us to accompany him to London.
>
> Pita was pretty good when he was put on the stand. I suppose we had gone over his statement repeatedly, so by the time he got onto the stand, he was quite confident in the way he was cross-examined by the other side.[14]

The UK MoD used a technical argument that the case should be struck out because of the long delay since the nuclear tests were conducted. The MoD argued that the claims were 'time-barred', meaning a case must be lodged within three years of the event or 'the date of knowledge (if later) of the person injured' (a difficult barrier, as many of the veterans' illnesses were only apparent decades after their service on Christmas Island). The veterans' lawyers, instructed by the legal solicitors Rosenblatt, argued in part that the new scientific study by Professor Al Rowland reaffirmed the veterans' longstanding claim that they were exposed to radiation during the tests.

During argument, the MoD accepted that a small number of cases existed where military personnel, especially pilots were exposed to 'prompt high dose' radiation (because of their close proximity to the mushroom cloud of one or more of the nuclear tests). They claimed, however, that only 159 men of the nearly 20,000 people who were present in Australia and Kiribati died as a result of radiation exposure. The veterans' associations challenged this number, arguing that many more people faced delayed low dose exposure (for example, through the ingestion of radionuclides from fallout while swimming in contaminated waters or eating contaminated fish).

A fatal problem for the veterans was that they lacked the documentary evidence of exposure rates for military personnel to prove the higher levels that anecdotal evidence has highlighted (the required data can be found in nine volumes of records—dubbed the Blue Books—that the MoD still refuses to release).

14 Interview with Adi Lusiana Sivo Ganilau, Suva, Fiji, November 2016.

On 5 June 2009, High Court judge Mr Justice Foskett ruled that the 10 test cases out of 1,011 claims could proceed to full trial, a major step forward in the bid to claim damages under civil law. Foskett effectively decided to use his discretion and 'disapply' the time limit barring the case, ruling that the veterans could sue the government:

> All things being equal, a veteran who believes that he has an illness, injury or disability attributable to his presence at the tests whose case is supported by apparently reputable scientific and medical evidence, should be entitled to his day in court.[15]

Five years into the case, the courts had not considered the core issues raised by the veterans, but were bogged down in technical arguments. Fifty-nine of the veterans had died since the claim was lodged, and more were ailing. For the legal team that prepared the case, lawyer Ian Rosenblatt welcomed Foskett's ruling:

> We are very disappointed that both the Government and the Ministry of Defence (MoD) have chosen to make our clients keep on fighting for so many years. We now hope that the MoD will accept the need to help these people and make a swift and adequate offer of compensation. So far, this case has cost the tax payer around £10 million. This sum could have provided more than £10,000 in interim compensation to each and every one of the veterans who have been affected by the MoD's irresponsible actions.[16]

However, the MoD continued to resist pleas for a negotiated settlement. It soon appealed against the High Court ruling, on limitation issues and Justice Foskett's refusal to strike out or summarily dismiss the claims. After hearings, the Court of Appeal gave judgment on 19 November 2010. Lady Justice Smith, Lord Justice Leveson and Sir Mark Waller considered, and overruled, Foskett's decision.[17] Their ruling found that nine out of the 10 cases were statute-barred and could not proceed. Just one case, by Bert Sinfield, had been brought in time.[18] As it rejected Pita Rokoratu's

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15 'Nuclear veterans win right to sue', *BBC News*, 5 June 2009. In his technical ruling, Foskett exercised the section 33 discretionary power under the *Limitation Act 1980* to disapply the limitation period.

16 'Rosenblatt Secures Victory for Nuclear Veterans', media release, Rosenblatt Solicitors, 5 June 2009.

17 *Ministry of Defence versus AB and Others*, UK Court of Appeal [2010]. The Court of Appeal upheld the trial judge's refusal to strike out the case, but on different grounds. Available at: www.bailii.org/ew/cases/EWCA/Civ/2010/1317.html.

18 Sinfield joined the case late in the day, after being diagnosed with non-Hodgkin's lymphoma in October 2005, which meant he was not time-barred. He died in February 2007, with his widow participating in the case in his stead.

action, the Court of Appeal ruled that the Fijian veteran could not prove causation or, on balance of probabilities, have his illness attributed to radiation exposure.[19]

The court decided that nine out of 10 of the test cases were rejected because of the difficulty of proving causation after more than 50 years had passed:

> We think that the judge has significantly and wrongly underestimated the claimants' difficulties on causation and is therefore unlikely to have given appropriate weight to that when applying the broad merits test. We think also that he has demonstrated an incorrect willingness to give weight to the claimants' contention that if their cases are not allowed to proceed, there will be a perceived injustice.[20]

The three appeal judges, however, recognised the political and moral significance of their ruling for the veterans:

> We recognise that these decisions will come as a great disappointment to the claimants and their advisers. We readily acknowledge the strength of feeling and conviction held by many of the claimants that they have been damaged by the Ministry of Defence in the service of their country.
>
> The problem is that the common law of this country requires that, before damages can be awarded, a claimant must prove not only that the defendant has breached its duty of care but also that that breach of duty has, on the balance of probabilities, caused the injury of which the claimant complains.[21]

On 28 July 2011, the UK Supreme Court agreed to consider an appeal from the nine unsuccessful claimants against the Court of Appeal decision, once again defeating MoD attempts to have the case thrown out. Neil Sampson of Rosenblatt Solicitors led a legal team before the Supreme Court, but the MoD deployed a larger team, with two Queen's Counsel and 15 barristers.

After hearings were held from 14 to 17 November 2011, the Supreme Court gave judgment on 14 March 2012.[22] The higher court overturned the Court of Appeal ruling that nine out of 10 lead cases in the action

19 *Ministry of Defence versus AB and Others* [2010] UK Court of Appeal, paras 286–298.
20 Ibid., para. 157.
21 Ibid., para. 303.
22 *Ministry of Defence versus AB and Others* [2012] UK Supreme Court, UKSC 9.

had been brought beyond the legal time limit.[23] The veterans' hopes were raised once again—before the Ministry again dashed them to the ground with another appeal to the full bench of the court.

The final blow came in a 14 March 2012 ruling in the full Supreme Court, with a narrow 4–3 verdict overturning the June 2009 Foskett ruling. The majority ruled the veterans' case 'had no prospect for success'. Tragically, Pita Rokoratu died of a heart attack, just days before the Supreme Court ruling on his test case. Ken McGinley of the BNTVA paid tribute, saying:

> Pita was a gentle giant. I'm glad his suffering is over and he passed away before learning of this final kick in the teeth. He volunteered to go to Christmas Island, and he deserved so much better than we gave him.[24]

Following the Supreme Court decision, the government confirmed in the House of Lords that it would not take action in response to the common law claims:

> The Ministry of Defence has no plans to pay common law compensation. On 14 March 2012, the Supreme Court ruled in favour of Ministry of Defence on all lead cases that claims by nuclear test veterans were time-barred, and further declined to allow the claims to proceed under the statutory discretion. In handing down judgment, all seven justices recognised that the veterans would face great difficulty proving a causal link between illnesses suffered and attendance at the tests.[25]

In a final blow, in December 2016 the War Pensions Tribunal rejected an appeal case seeking pension rights.[26] Applications from British veterans were rejected, even though Justice Blake accepted evidence from the veterans that had previously been rejected by the MoD (such as evidence of rainfall over Christmas Island after the Grapple Y test).[27]

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23 'British nuclear test veterans take cancer claims to supreme court', *Guardian* (UK) Thursday 28 July 2011. For Sampson's perspective on the case, see Frank Walker: *Maralinga* (Hachette, Sydney, 2014), pp. 269–272.

24 Susie Boniface: 'Nuclear test veteran dies after years of suffering as MoD throw out his court claim', *Daily Mirror*, 12 March 2012.

25 UK House of Lords, Hansard official report, 26 November 2012, col. WA2.

26 *Abdale and Others versus Secretary of State*, War Pensions and Armed Forces Compensation Chamber, Royal Courts of Justice, London, 16 December 2016.

27 Ibid., paras 194–201, pp. 57–59.

The government's cult of secrecy, so evident in the 1950s, has lingered into the 21st century. In the House of Commons, the UK Government refused to reveal details of negotiations for a potential settlement between the veterans and the MoD that Justice Foskett had encouraged to avoid drawn-out litigation. Secretary of State for Defence Robathan stated:

> In accordance with the wishes of Mr Justice Foskett of the High Court, discussions were held between representatives of the Ministry of Defence and the Claimants involved in the Atomic Veterans group litigation. I am unable to publish the terms of the discussions because these were and remain subject to a confidentiality agreement between the parties.[28]

In a final attempt, Jean Sinfield—widow of the serviceman whose case had been allowed to proceed—took her case to the European Court of Human Rights.[29] Her case alleged breaches of the European Convention of Human Rights, given that there has been no public investigation into the causes of death of the deceased nuclear veterans. She also claimed that neither legal aid nor any other source of funding was made available to allow the veterans to pursue their case, despite its size, complexity and importance. The European Court, however, ruled against the claim.

The veterans' associations in the South Pacific, who had spent a decade in fruitless litigation, were demoralised by the UK Government's refusal to act. Then the son of Chief Petty Officer Ratu Inoke Bainimarama—the leader of the first naval contingent—decided that the Fijian veterans should wait no more.

In January 2015, Rear Admiral (retired) and Prime Minister of Fiji Voreqe Bainimarama stood before the veterans and their families to state that his government would provide a financial grant to the surviving veterans and the families of those who had died:

> We need to erase this blight on our history. We need to lift the burden on our collective conscience. There is a saying that justice delayed is justice denied. And these men have been denied justice long enough.[30]

28 UK House of Commons, Hansard official report, 17 July 2012, col. 769W.

29 *Jean Ethel Sinfield and Others against the United Kingdom*, European Court of Human Rights (Fourth Section), Application no. 61332/12, 18 February 2014.

30 Prime Minister Voreqe Bainimarama: 'Speech at the first pay out to veterans of Operation Grapple', media release, Office of the Prime Minister, Suva, Fiji, 30 January 2015.

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