IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU

CIVIL CASE NO. 117 OF 1992

BETWEEN : RICHARD SOLZER

- Plaintiff

A N D : PIERROT GARAE

- 1st Defendant

A N D : GOVERNMENT OF VANUATU

- 2nd Defendant

JUDGMENT

CORAM Chief Justice

John Malcolm for the Plaintiff

Oliver Saksak for both Defendants

This is a claim for damages for personal injuries suffered by the Plaintiff Mr Richard Solzer as a result of an accident that occurred on Friday the 24th day of March 1989 as a result of the negligent driving of a Toyota Hiace Police Bus by the 1st Defendant Mr Peter Garae. The second Defendant herein are the employer of the 1st defendant and owners of the Police Bus driven by the 1st Defendant.

The facts are as follows :

The 1st Defendant in this case Mr Pierrot Garae was at the time of this accident a private in the Vanuatu Mobile force, a paramilitary force, of the Republic of Vanuatu. He was employed as a driver in the force's transport pool.

On the date of this accident, it would appear that the 1st Defendant had had a mere 4 1/2 hours of sleep in the previous 24 hours. He was despatched, indirectly through his senior officer Major Holi Simon, to act as Driver of the Toyota Police Bus in order to transport members of the force and their families for a Picnic at the White Sands Country Club, on the south of Efate. It seems that the Defendant had already done a return trip to Vila with members of the forces family at 1600 hrs and had returned to the White Sands where he had collected the remaining members of the party, all men, at 1700 hrs.

In the Bus at the time of the accident which it would appear from the evidence of 2 independant witnesses, would have been at about 17.30 hurs, there were some 13 people including the 1st Defendant.

Inspite of the fact that this was a party, a picnic, I am told by the 1st Defendant, that there was no alcoholic drink at all at the picnic that day and that he was not driving under the influence of alcohol. To the extent that he had not consumed any alcohol, his evidence is corroborated by Mr Nelson TAHUMPRI one of the passengers in the bus, who claims that the Defendant was not drunk and did not drink at all. It is true to say that

there appears to be no evidence that the Defendant had consumed any alcohol.

The first defendant claims that he was driving at 40 km/h and was partly on the wrong side of the road because he was manoeuvring in order to avoid potholes in the road. In both these matters, his evidence is supported by seven other passengers in his car, including Kalghem Bangran, who says in his affidavit that he was asleep at the time of the accident and therefore did not see it. Quite how he can, therefore, depose as to those matters is beyond me. All the witnesses on the bus religiously depose to the fact that "It was not the intention of the 1st Defendant to travel on the wrong side of the road". I believe that they mean to say is that he had no choice but to travel on the wrong side of the road if he wished to avoid potholes, because on the evidence, it would appear to me, at the very least, that the 1st Defendant, on his own admission was quite deliberately travelling on the wrong side of the road for the very purpose of avoiding potholes.

All the witnesses Depose to the fact that the Plaintiff was driving fast - they say too fast for the condition of the road. As to whether or not he was exceeding the speed limit, I do not know as no one has informed me in evidence as to what the speed limit is in that area of Efate - but that is an unnecessary consideration here in any event. To the extent that the driver and passengers of the bus are corroborated in that part of their evidence by two independent witnesses, Mr Alick Robert and Mr Charlie Pakoa. I accept their evidence in full on that matter.

The speed given by the 1st Defendant and "his" witnesses is that he was travelling at approximately 40 km/h. How they could all know that in the circumstances is also beyond me.

The two independant witnesses in this case Mr Robert & Mr Pakoa, who were in a bus following the 1st Defendant's bus, put his speed at an average of 60 km/h. They both claim that all on board were of high spirits and according to them, were playing cat and mouse with their bus.

Far from weaving about to avoid potholes, the 1st Defendant ws deliberately weaving from side to side to prevent the following bus, in which both independant witnesses were passengers, from overtaking, to the great amusement, of all in the 1st Defendant's vehicle, so much so that it appeared to both independant witnesses that they did not see the Plaintiff's car coming towards them at some speed, as a result the accident occurred.

It is just as well that I do not have to determine that particular issue. I note that in answer to the enterro-gatories, the 2nd Defendants admit that the 1st Defendant was disciplined. What I am not told, is whether the Plaintiff was wearing a seat belt or not. In this country the wearing of a seat belt is not obligatory under the law. But were I to have to decide an issue of contributory negligence, I would not hesitate to say that the lack of a seat belt would weigh in the balance when it comes to quantum. Fortunately that too has been decided. For I am told that in this case, the percentage of contributory negligence to be attached to the defendant has been agreed at 17.5%. I am also told that liability has been agreed at 82.5% equally between each of the two defendants. Quite how that has been arrived at, I do not know and it may be as well that I should not.

As a result of these accident the defendant has suffered multiple injuries. I am asked to assess the General quantum of damages for the injuries pain and suffering. The special damages are agreed at Vt3,092,988 and even the cost I am told have been agreed at Vt 500,000.

Therefore, I must look with care at the nature of the injuries suffered by the Plaintiff. They are generally catalogued in the particulars of claim, but more specially in the accompanying medical reports, they were found to be as follows :-

Severe diffuse closed head injury
Fractured right calcaneum (i.e. the heel bone)
Fractured right distil radius and Ulna
Fractured left Zygorma (or cheek bone)

The Plaintiff is a young man born on the 27th August 1967, he will therefore, be 25 years old this August and was 21 years old at the time of the accident. He was immediately admitted into Vila Base Hospital following the accident, where his lacerations were sutued and his limb fractures were manipulated and plastered. He was semi-conseious over the next 24 hours, that improved slowly. He was transported to the Royal Brisbane Hospital in Australia, where he arrived on the 29th March 1989, conscious but restless.

He was operated upon for his left cheek bone which was elevated and his heel bone which was internally fixed with a steinman pin. Dr Crawford in a report dated 13th April 1989, some 20 days after the accident states as follows:-

Richard has shown progressive improvement in his neurological state since that time. His left sided tone has decreased to near normal. He now has good, but not quite full, power and function in all limbs. his left pupil remains delated but reactive and left facial weakness, although improving still persists. He is currently alert, orientated and able to speak fluently although intellectual function is still significantly less than would be predicted from his pre injury state". He was finally discharged from the Royal Brisbane Hospital on the 14th April, 21 days after the accident.

He was an in patient thereafter for a further 3 weeks at the Princess Alexandra Hospital in Brisbane. I have seen a report dated 12th may 1989 by Dr Paul Hopkins the Rehabilitation Consultants, who describes his conditions as of that time as follows :-

"Very mild mental slowness
Slight in coordination down (L) side

His plaster and heel pin had been removed, but he was to be on crutches for 5 weeks. He was to resume part time work after 2 months. He should not drive for 3 months and not drink for 12 months."

According to the speech therapist Michelle Slee, Richard would appear to have some impairment at that time Auditory Reception, Reading Comprehension verbal Expression and Written Expression in the English language, although she notes that English is Richard's 3rd language and that she found it would be difficult to judge Richard's "pre-morbid" use of the English language. By that I understand her to mean pre the accident. She notes that according to his family, his use of the French an German languages appeared to have regained its normal level - personally I feel to understand, why his French and German would be restored to normal and not his English. He appears to have been discharged from the Princess Alexandra Hospital in Brisbane on the 15th May 1989 and was therefore Hospitalised for six (6) weeks.

A report dated 15th September 1989 from Mr Roberts ~~and~~ out Port Vila makes the

following observations :-

"Prolonged concentration causes fatigue. His eyesight has deteriorated since the accident (I am not told by how much) there is limited movement of the right wrist, (but I am told that will improve) - there is a permanent soft tissue thickening at the right ankle but no disability."

The last report is from Dr Frank Spooner, a general medical practitioner of Port Vila who states that Mr Solzer had almost recovered fully except :-

1. The Right wrist - where he still suffers from pain and experiences some difficulties of movement.

2. Pain in the right heel.

3. His eyesight is failing and stands at 6/24 in both eyes.

4. Feels very tired in the afternoon.

In short, this is a young man now almost 25, who was 21 at the time of the accident. He was driving at some speed but plainly as a result of the 1st Defendant's carelessness and negligent driving, was involved in a head on collision which left him severely injured. He received multiple head wounds, a broken (R) forearm and (L) Heel. After some six (6) weeks hospitalization both here and in Australia, he has made good recovery. There will always be some after effects of the accident e.g. failing eye sight niggling pain to (R) wrist and (L) Heel and some tiredness. There is also an inherent belief that the plaintiff is likely to suffer from arthritis in later years. (see Report by Dr Blenlim Appendix D of 5.5-89). There was also a period of time - for some 6 months or so, when the Defendant suffered the usual traumas associated with such an accident e.g. headache, mightmare, difficulties encountered about driving again and being a passenger in car etc....

Dr Spooner's Report dated 3/3/92 in accepted by both parties as being a correct and accurate and honest report of the present state of Affairs re Mr Solzer.

On the 8th day of June 1992, I heard the evidence of Mr Richard Solzer. he impresses as being a nice young man, truthful and accurate in his evidence, inspite of a slight tendency to exaggerate, his present state, that can be easily be explained by the fact that this has been quite a traumatic period for him, he has undergone a particularly difficult time. Added to the obvious pain and suffering which one associates with such an accident, there was the added trauma, for an intelligent young man of the uncertainty of whether he would fully recover or not. His period in hospital was followed by intensive Speech, occupational and physiotherapy courses. It is fortunate indeed that he has almost fully recovered. At the time of the accident he was, as I said previously, 21 years of age. An age when most young men contemplate finishing their studies. He had intended to go back to Germany in order to take a Master's degree in his particular field of office equipment engineering. This accident has set him back by four years. It is fortunate that it has not totally discouraged him from completing his studies, for he is now of an age when most young people have completed their studies and thinking of establishing themselves in life. So that as events would have it he would be, in the student 'milieu', a mature student. That in itself may not be a bad thing. He is more fortunate than most in that his long term future is, from what he told me, assured. His father is the owner of a prospering family business which he will, one day no doubt, take over.

ollowing the accident, he had a particularly bad period, when he feared being driven in a car or being at the wheel of a car. That is not an un-natural consequence of such accidents. This is now over, but he has lost the enjoyment he previously found in driving cars. He tells me he goes out less. He has suffered in his sporting life. He enjoyed riding and owned two horses. He use to ride daily - this present physical condition will only permit him to do so once or twice a month, as a result of which he has sold one of his two horses. Bush walking, a particularly well known pass time on these islands, is now denied him, as any long distance walking is out of the question as a result of the injury to his left heel (from which he still has the occasional pain). His eye sight, before the accident, was excellent. He did not wear any glasses. Now he has 6/24 vision in both eyes, which is corrected by use of spectacles. That causes him some anxiety and fear that he may one day loose his sight altogether. That is not, it seems a well founded fear, not did I hear any expert evidence in support of it.

He told me that he still suffered from bouts of headaches, which he parts down to his accident, as before he had none bar what one could term the usual migraine pains. Finally, it is said by Dr Spooner, whose report is placed before this Court by both parties and is relied upon as being accurate, that there is a real fear that Mr Solzer is likely to suffer arthritic pains in his wrist and heel in later years.

Apart from the above, Mr Solzer has made good recovery and there is still hope that he will improve further.

Based on those facts - I have to determine the Quantum of general damages for pain and suffering and any future loss of amenities. Learned Counsel for the Plaintiff, Mr John Malcolm, places a number of precedents before me, all taken from the recent edition of Kemp and Kemp. He accepts that none are squarely on the issue. They are all he can find to assist. He further urges this Court to award damages at the same rate as one would obtain, if this case had come before my brother judges in England. I can easily understand why. The likely award in pound Stirling, if translated into Vatu, would amount to a sizeable sum of money for this jurisdiction. The std of living in both countries is v. different

However commendable it is for Mr Malcolm to so urge on behalf of his client, I find no difficulty in declining such a request and for good reasons. The cost of living here and in Great Britain are very different. Finally and more appropriately, the earning capacities are considerably different. The average wages in England is now in the region of 12,000 pounds a year, whereas, the average earning in Vanuatu, i.e. the mean earnings I worked out as being (500 pounds per month. In other words 50% of that in Great Britain and I will explain later, how I come by that figure. One would live well here on 12,000pounds/annum, whereas in Great Britain, as I am well placed to know, it goes no where. For those reasons, I find, therefore, that it would be quite unfair to import the British figures (as opposed to the old and established principles of law) to this jurisdiction.

I must, therefore, find a way of determining a fair and just figure to compensate Mr Solzer for his injuries. I have not found it easy and both parties are entitled to know how I come by my decision, should they wish to take this matter elsewhere. Necessity, as they say, is the mother of invention. I have used for my calculations, a number of matters. First, I have looked at those cases to which Mr Malcolm has referred me. I have also considered a number of other cases to be found in brief in the last six issues of Quantum, most helpfully published by Sweet and Maxwell as a kemp and Kemp service. Specially the following cases, (whose facts I do not propose to iterate here, they can easily be found by referring to issues 4,

5 and 6 of 1991 and 1, 2 and 3 of 1992 of Quantum), namely, Harrison -v- Graine, Re Harris, Durr -v- Strata Surveys Ltd, Sheil -v- Chamberlain, Re Cooper, Re G. (A Minor), Faulkner v. Sham, Goodger -v- British Rail, Byatt -v- Britrish Coal, Re Winterton, Robinson -v- Taylor and Roger Claih Cars Ltd, Hunt -v- Barnett, Re Horton, Nicholson -v- Hallamshire Constructions, Gibson and Hughes -v- Hodges, Styles -v- Liverpool City Council and Fryer -v- Smith.

Using two tables, the first to be found in the 1983 survey on employment in the private sector, I have been able to work out that the mean earnings in Vanuatu in 1983 was Vatu 60,000, or approximately 300 pound/month. that takes into account a broad Spectrum of the population, including the ~~lightly~~highly paid professional, and the expatriate population, but excluding the rural areas, where figures are unknown and impossible to find. I used thereafter the inflation table to be found in Kemp and kemp - for lack of any better indicator and found that the mean earning presently in Vanuatu would be approximately 500 pound or 100,000 Vt per month or in other words, about half of that in the U.K.

Using as a guide all those cases to which I have been refaced and those which my own research has brought up, I have decided, that if I were in England and I had to put an English figure on the Quantum of damages to be awarded to Mr Solzer, I would have awarded him 30,000 pounds. On a multiplier of 200, that would give us the figure of 6,000,000 Vatu. Transcribed into what I believe to be the correct earning capacity in this country, namely, approximately 50% of that of the U.K. I believe that the correct award to Mr Solzer should be 3,000,000 Vatu.

It is agreed between all the parties, that Mr Solzer is responsible for his own injuries to the extend of some 17.5% - I, therefore, proportionately reduce the 3,000,000 Vatu figure to 2,475,000 Vatu in general damages. Added to that there should be the special damages, which are agreed at a total of Vt 3,749,077 making a grand total of 6,224,077 Vatu, to which must be added a figure of 15% by way of interest, which has been pleaded, from the date of issue of the writ, namely from the 27th day of August 1991 to the date of this action i.e. the 8th June 1992, some 9 1/2 months in other words 9.5/12 x 15 = 11.87% of the total.

I work out the interest figure to be 738,797.94 Vt. Accordingly, I award Mr Solzer a total figure of Vatu 6,962,874.94 and cost agreed at Vatu 500,000

DATED this 15th day of June 1992.

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HON. CHARLES VAUDIN d'IMECOURT
Chief Justice