IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU (Appellate jurisdiction)

Appeal case No 1 of 1996

BETWEEN: **Marie Rose Banga**

Appellant

AND: **Emily Waiwo**

Respondent

Coram: **The Chief Justice: The Honourable Mr justice Vaudin d'Imécourt**
Mrs Stacy Cowell of Counsel, for the Appellant
Mrs Marrin Mason of Counsel, for the Respondent

JUDGEMENT

This matter comes before this Court in its appellate jurisdiction from a judgement of the senior Magistrates' Court delivered by Senior Magistrate Vincent Lunabek (as he then was) on the 28th day of February 1996. In the said judgement the learned Senior Magistrate held, inter alia, that 100,000 vatu damages was not, in all the circumstances of the present case, an excessive award of damages against the Appellant, who was the co-respondent in a divorce suit alleging that she had committed adultery with the present respondent's husband, which in turn led to the break-up of the marriage. It would appear that this was an award of 'punitive' damages against the co-respondent for her role in the break-up of the marriage. The Learned Magistrate further held that the rules of custom applied when interpreting the Matrimonial Causes Act because it seemed to him that the British and French laws preserved by and referred to in Article 95(2) of the Constitution of Vanuatu would not apply to the indigenous citizens of Vanuatu, on the basis, presumably, (although the Learned Magistrate does not expressly say so) that those same laws did not apply to the indigenous New Hebrideans prior to Independence. He went on to hold that, unlike the previous English legislation which had at one time applied in England and in the New Hebrides prior to Independence, the rules of 'custom' allowed for punitive damages to be awarded for adultery against named corespondents. The facts of this case as I understand them to be from the judgement, the submissions of counsel and the divorce order, are as follows:

The Respondent herein had married her husband in a civil ceremony celebrated on the 31 January 1992 at the Tafea local Government Office. The marriage was performed

pursuant to the Matrimonial Causes Act 1986 CAP 192. There was only one child of the marriage. All the parties to the divorce suit, including the Appellant, were from Tanna. Sometime in 1995 the present Respondent discovered that her husband had committed, apparently, a solitary act of adultery with the Appellant. She felt so strongly about it that as a result the marriage broke-up. She then petitioned for divorce on the ground of adultery pursuant to section 5(a)(i) of the Matrimonial Causes Act CAP 192 in a petition dated 6 December 1995, in which she claimed damages against the co-respondent for the adultery with her husband in the sum of 100,000 vatu, pursuant to section 17(1) of the Act. The petition was heard on the 12 February 1996 and the learned Magistrate granted the divorce and the damages prayed-for in the sum of 100,000 vatu. There was no inquiry into damages. It was awarded on the basis presumably, of the hurt feelings of the petitioner. The Learned Magistrate reserved his reasons which he delivered on 28 February 1996. He allowed himself to be persuaded that the Vanuatu Matrimonial Causes Act had been copied on the former English Matrimonial Causes Act of 1965, which was the submission of counsel before him, as it was in this appeal before me. He accepted that under that Act, as it was then applied, only compensatory damages were awarded and expressed the view that the English authorities that purported to interpret the word "damages" in the Act, had so construed it that it did not allow for punitive damages to be awarded in a suit for divorce on the ground of adultery. The learned Magistrate then sought to distinguish the Vanuatu Act from the English Act and found that there was no reason to interpret the word 'damages' under the Vanuatu Act in the manner in which it had been interpreted by the Courts in England, and indeed, by the Courts in the New Hebrides prior to Independence, during the period that it had had effect of law because, he said, the Vanuatu circumstances were very different to those that prevailed in England and that in Vanuatu adultery was considered a serious 'offence' in custom. He based his decision on his personal knowledge of custom and on an award made by custom Chiefs, in a custom ceremony in this very case in question, which amounted to an award of 2000 vatu and two pieces of calico to the petitioner, which he said was an example of punitive damages for the break-up of the marriage. He went on to say that if it had been the intention of Parliament that the Vanuatu Act should be interpreted as it had been by the Courts in England, then Parliament would have said so. The learned Magistrate accepted and adopted, nevertheless, the principle of interpretation referred to in **Meydon's case** referred to by Fletcher-Moulton L.J. in **Macmillan v Dent** (1907) 1 Ch 120 that states that ***"in interpreting an Act of Parliament, one is bound to look at the state of the law at the date of the passing of the Act; not only the common law but the law as it then stood under previous statutes"***, and again, relying on the principle in **Brett v Brett** (1826 2 D & C 480-500 that states that ***"the particular phrase is not to be viewed detached from its context, meaning by this as well the title and preamble as the purview or enacting part of the statute".*** He referred to **section 8 of the Interpretation Act CAP 132** which states that ***"An Act shall be considered to be remedial and shall receive such fair and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".*** Having stated the principles correctly, he then said that therefore the intention of Parliament must be construed according to the Act itself. He found that any damages claimed under the Act must be awarded in accordance with customary principles because the Act must be interpreted on the basis of Vanuatu circumstances which the Vanuatu Parliamentarians must be presumed to have known and intended to reflect in the Act namely that

adultery, in Vanuatu society "founded on Melanesian values", is considered to be a serious offence on the basis of custom and that consequently they must have intended that any damages were to be awarded on the basis of "customary punitive damages". He found that there was a lacuna in the law of Vanuatu and stated that there was no law that covered the situation and that therefore the Act must be interpreted according to "custom". He based the latter proposition on Article 49 of the Constitution which states ***"The administration of justice is vested in the judiciary, who are subject only to the Constitution and the law. If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom"***. He found that the award of [2000 vatu plus two pieces of calico] which was in fact the amount that the custom Chiefs had ordered the Appellant to pay to the Respondent herein, in a custom ceremony that had taken place prior to the divorce petition being heard, as damages for the adultery, was an example of an award that, in the learned Magistrate's view, amounted to an award of punitive damages awarded by custom chiefs, from which he could infer that customary law called for punitive damages to be awarded. There was, nevertheless, no direct evidence before the learned magistrate to show on what basis the custom chiefs had made their award for damages. In his judgement the learned Magistrate makes reference to an award of 5000 vatu and two pieces of calico, not 2000 vatu, but I am told by counsel that this was an error and that in fact the award to the petitioner by the custom Chiefs had been 2000 vatu and two pieces of calico. From that award the learned Magistrate held that: *"it follows from what is said above that in custom adultery is seen as a serious offence ... Thus damages claimed in respect of adultery in Tanna and throughout Vanuatu as a whole should be considered as punitive damages on the basis of custom"*. The learned Magistrate then found that the amount of 100,000 vatu, claimed by the petitioner in her petition as damages, was not excessive in accordance with customary principles. He stated that regarding proof of custom; *"a Court should not be bound to observe strict legal procedures or apply technical rules of evidence, but shall admit and consider such relevant evidence as is available (including hearsay evidence and expressions of opinion) and the Court shall otherwise inform itself as it sees fit"*. The learned Magistrate formed that opinion, no doubt, upon reading section 25 of the Island Courts' Act which gives specific statutory powers to the Island Courts' justices to interpret custom in that way. But section 10 of the same Act also states that "the Island Court shall administer the customary law prevailing within the territorial jurisdiction of the Court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order". The learned Magistrate later stated, (drawing an analogy with the justices of the Islands Courts, who are themselves either Custom Chiefs or persons knowledgeable in custom and are appointed as Island Court Justices in the area to which they belong exactly because of their expert knowledge of that particular area's custom) that: *"on the same line of thought, one can maintain that Judicial Officers (Judges & Magistrates) and Chiefs (appointed as justices of the Island Court) if they are themselves familiar with the customs of the people of this country and generally speaking require no evidence to inform them what those customs are"*. It is of course correct that custom Chiefs are appointed to sit only in the areas from which they come, and not somewhere else, exactly because they are knowledgeable (and are considered experts) in the custom of their own areas. It is also true that custom varies widely from one part of Vanuatu to the other, and often from one village to the next and that none of it is written. One must not forget either that in true custom, money plays no

part at all as there is no money in custom. It is only in relatively recent times that money has made its way into custom settlements. It is essential also to remember that Judges and magistrates are not custom Chiefs and are not experts in custom of any area let alone of the whole of Vanuatu. Nor is there any such a thing as THE custom of Vanuatu. Although it is conceivable that there might not be a need for strict rules regarding the obtaining of evidence of a particular custom if and when the need arises to establish a particular custom, evidence must, nevertheless, be obtained and a clear custom must be established. It is important to remember that the judiciary is exhorted ***"to do substantial justice and whenever possible in conformity with custom"*** only in the event that there is no rule of law applicable to a matter before it. We must ask ourselves if this is indeed the case here, and in order to determine this issue and in order to do justice to this case, we have to look with care at the laws of Vanuatu regarding divorce, and the general principles of the rules of law applicable to Vanuatu have to be reviewed. Historically, prior to Independence on 30 July 1980, Vanuatu had been ruled as a co-colony of France and England known as the Anglo-French Condominium of the New Hebrides. The consequences of which were that there were two distinct administrations and three distinct sets of laws in application. The Anglo-French Protocol of 1914, which was signed in London on August 6, 1914, and which was ratified on March 18, 1922, came into force and had effect of law following an Order in Council made at the Court at Buckingham Palace on the 20th day of June 1922, in the following terms: ***"This Order shall have the force of law and shall be binding upon all persons within the said Islands over whom His Majesty shall at any time have jurisdiction, and the provisions of this Order and of all the laws and regulations made thereunder shall be read and construed subject to the terms of the said Protocol in all respects.... It shall be lawful for the High Commissioner for the New Hebrides or the Resident Commissioner in the New Hebrides, to make, alter, and revoke any regulations (to be called King's Regulations) which may seem desirable to him for the peace, order, and good government of all persons who are British subjects or who, under the said Protocol of the 6th day of August, 1914, or otherwise, are subject to the jurisdiction of His Majesty and such regulations shall, on publication in the said Islands, be binding on all persons, being British subjects or otherwise, subject to the jurisdiction of His Majesty"*** *See: The Western Pacific High Commission Gazette for 1922 at p 151.* The Protocol mentioned in this Order in Council was the 'charter' that regulated the government of the New Hebrides. It provided that the citizens of each of the two signatory powers would have equal rights, with each of the two powers retaining sovereignty over its nationals and neither exercising a separate authority over the New Hebrides. It further provided for foreign citizens of other powers to 'opt' for one or other of the two signatory powers' 'nationality' within one month of arriving in the New Hebrides, or sooner if the person concerned had committed any action involving the application of the laws of one or other of the two powers: **See Article 1(2) of the Protocol of 1914.** The Order in Council (as well as the Protocol itself) also provided the High Commissioners with powers to issue joint regulations binding on all inhabitants and optants, as well as powers to make binding joint regulations for the "natives" which meant ***"any person of the aboriginal races of the Pacific who was not a citizen or subject or under the protection of either of the two signatory powers":*** **See Article 8(1) of the Protocol.** It provided for a joint court to administer the laws and the law applicable to each party was to be those made under the Protocol itself and the law of the country to which the party belonged. To the French and their 'optants' French law applied. To the English

and their 'optants' British law applied: **See Article 13 of the Protocol:** ***"The law applied shall be: ... (C) the law of the country to which the non-native party belongs or the legal system made applicable to him".*** After the abolition of the High Court of the Western Pacific by the New Hebrides Order 1975 and its replacement by the High Court of the New Hebrides, **the High Court of the New Hebrides Regulation 1976** provided that ***"so far as circumstances admit ... the statutes of general applications in force in England on the first day of January 1976 were to be applied as well as the principles of common law and equity".*** So therefore, at the time of Independence, British nationals and optants were subject to statutes of general application in force in England on January 1, 1976, to the substance of English common law and Equity and to those laws made specifically for the New Hebrides under the King's and Queen's Regulations as well as any particular British Acts of Parliament and subsidiary legislation expressly stated to apply in the New Hebrides. They would have been, it also seems, subject "to the law of the country to which [they belonged] The local indigenous New Hebrideans were not subjected to those laws or to French law. For them Joint Regulations were made by the Resident French and British Commissioners under the Anglo-French Protocol of 1914 which authorised the two Resident Commissioners of Britain and France, as well as making Joint Regulations binding on all, also to make joint regulations binding only on the indigenous peoples of the New-Hebrides. These powers were vested in the Resident Commissioners under Articles 2(2), 7, 8 and 9 of the 1914 Protocol. Therefore, at the time of Independence, had matters been left there, there would have been no laws applicable to the newly formed State of Vanuatu as the old laws made prior to Independence would no longer apply. In order to prevent this state of 'lawlessness' the Constitution of Vanuatu was drafted in such a way that it preserved the existing laws of the New-Hebrides for the newly formed State of Vanuatu until such time as Parliament drafted new laws for Vanuatu.

Article 95 of the Constitution referring to existing laws states:

(1) *Until otherwise provided by Parliament, all Joint Regulations and subsidiary legislation made thereunder in force immediately before the Day of Independence shall continue in operation on and after that day* ***as if they had been made in pursuance of the Constitution*** *and* ***shall be construed with such adaptations as may be necessary to bring them into conformity with the Constitution.***

(2) Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day ***continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom.***

(3) Custom law shall continue to have effect as part of the law of the Republic of Vanuatu.

Was it intended by Article 95 to preserve the status quo or to create laws for Vanuatu generally. In other words, was it intended that English and French laws should

continue to apply as before Independence to the English and French nationals and their optants only, or was the Constitution making laws for the whole of Vanuatu? The answer can be found in Article 2 of the Constitution:

> *2. The Constitution is the Supreme law of the Republic of Vanuatu.*

and in the wording of Article 95(1) ***"...as if they had been made in pursuance of the Constitution"*** and the words of Article 95(2) ***"...continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu".***

It is therefore clear that all the laws promulgated under the Constitution are laws of Vanuatu to be applied to everyone in Vanuatu equally. Nor is there any conflict in such a piece of legislation. As indicated above, prior to Independence Joint Regulations were made by the two Resident Commissioners under the Protocol of 1914. Some were made to apply to everyone in Vanuatu, while others applied solely to the indigenous New-Hebrideans who were defined as ***"Persons of the aboriginal races of the Pacific who are not citizens or subjects, or under the protection of either of the Governments of France and Great Britain".*** Could it have been the intention of the Constitution that such a state of affairs should continue to operate even for a very short while after Independence, or was it the intention of the Constitution that all laws applied to everyone in Vanuatu until replaced or repealed by Parliament. It may assist to consider the following situation. As indicated above, before Independence, foreign nationals who were neither French nor English were called upon to 'opt' for one or the other nationality and were thereafter and until their departure from the New-Hebrides subject to French or English laws according to their option on entry. They were also, of course, subject to those Joint Regulations that applied to all inhabitants of the New-Hebrides. Is this something that could have continued after Independence and been compatible with the Independent status of the young Republic? In fact, after Independence the facility for such 'option' was no longer available. If the Constitution had intended to preserve the status quo, what laws would then apply to those foreign nationals who entered Vanuatu after independence, if they could no longer 'opt'. The position would have been this: the laws of England would apply to the English, as would some Joint regulations that were common to all; the French laws would apply to the French as would some Joint Regulations that were common to all; only the Joint Regulations that had applied to all and those that had been made to apply solely to the indigenous population would apply to all the indigenous Ni-Vanuatu, leaving enormous lacunae in the law. What is more, the only laws that would apply to the new foreign entrants, if any at all at that stage, would only have been those Joint Regulations that applied to all inhabitants of Vanuatu and nothing else. This would mean, for instance, that no criminal law could apply to those other foreign nationals, that is, other then the French or the English. Whereas if it was, as clearly it must have been, the intention of the Constitution, that all the laws applicable in the New Hebrides prior to the Day of Independence should apply to all, there could not be any lacunae. This would be subject, of course, ***"to such interpretation, construction and adaptations as would be necessary to bring them in conformity with the Constitution and they would be made to apply so long as they were not incompatible with the independent status of Vanuatu and wherever possible taking due account of custom".*** One example may suffice to make the point.

On the day immediately before the Day of Independence, there were three distinct sets of criminal laws applicable to Vanuatu. The French Penal Code, the English Penal Code made under the Queen's Regulation 9 of 1973 and the Native Criminal Code made under Joint Regulation 12 of 1962, which applied only to the native New Hebrideans. Under Section 8 of the Native Criminal Code Premeditated Homicide (Murder) carried the death penalty, under Article 302 of the French Criminal Code, Murder carried the death penalty, whereas under the British Criminal Code that applied in Vanuatu, Murder carried life imprisonment. The Vanuatu Penal Code did not come into force until 7 August 1981. Therefore, if Article 95 of the Constitution intended the status quo to remain, it would have meant that under the laws of the Independent Sovereign State of Vanuatu and for a whole year and more after Independence, if a Frenchman, an Englishman and a Ni-Vanuatu of indigenous origin had plotted together to kill say a foreign national, the English national would have gone to prison for life for murder, whereas the French national and the indigenous Ni-Vanuatu would, for the same murder, have suffered the death penalty. What of the foreign nationals? The right to opt was given under the 1914 Protocol which itself was terminated "with effect from Independence Day" (see paragraph C to the exchange of notes of 23 October 1979 that precedes the Constitution) would it have meant that since there was no criminal law applicable to him, the foreign national could have gone about pillaging and murdering to his heart's content. There are, of course, no example of this ever occurring in Vanuatu I may add, but could that really have been what the Constitution intended? In any event such an occurrence would have been discriminatory and as such would have fallen foul of Article 5 of the Constitution. No doubt the Joint Regulation would have been construed with such adaptations as to bring it in conformity with the Constitution as would have been French law. Nevertheless, it is plain that all three laws did exist side by side until 7 August 1981. I suspect that it would have been up to the Public Prosecutor of the day to choose under which law he wished to proceed and up to the Courts to do "substantial justice". Regarding divorces, prior to Independence, the French were subject to French divorce laws and the English subject to English divorce laws. There were no Queen's Regulations concerning English divorces in the New Hebrides, nor were there any Joint Regulations permitting the indigenous New Hebrideans to divorce. The only divorce laws that applied to Vanuatu immediately before the Day of Independence and until the Vanuatu Matrimonial Causes Act 1986 CAP 192 became law were: the French Divorce laws under the Code Civil Article 242 (See: Jimmys v Pourouoro Civil Case 5 of 1980; Toulet v Toulet Civil Case 23 of 1980; Bonavita v Bonavita Civil Case 50 of 1980; Trenus v Ratu Civil Case 79 of 1980; Lecourieux v Lecourieux Civil Case 195 of 1981; Lebovic v Lebovic Civil Case 231 of 1981; etc ...) and the English laws of Divorce as they then applied in England, that were treated as Acts of general application. The English Divorce laws that applied in the New Hebrides as laws of General Application can be stated as: The Matrimonial Causes Act 1857, which in so far as it had not been totally repealed by other Acts, was repealed by the Administration of Justice Act, 1965, section 34 Schedule 2. The Matrimonial Causes Act 1950, which was repealed by the Matrimonial Causes Act, 1965, Schedule 2. The Matrimonial Causes Act 1965 which was in parts repealed by the Divorce Reform Act 1969 and the Matrimonial Causes Act 1973 which repealed the whole of the 1969 Act and most of the 1965 Act with some minor exceptions. So that immediately before the Day of Independence the British laws concerning divorce that applied to the New Hebrides was for all intent and purposes the Matrimonial Causes Act 1973. (See:

Hughes v Hughes Civil Case 170 of 1976; Leong v Leong Civil Case 106 of 1977; Elliott v Elliott Civil Case 85 of 1980; Tor V Pedro Civil case 48 of 1982; Wesley-Smith v Wesley-Smith Civil case 114 of 1982; Tidmarsh v Tidmarsh Civil case 8 of 1983; Churchill v Churhill Civil Case 10 of 1983; Rail v Rail Civil Case 94 of 1983 etc ...) Whereas section 30 (1) of the 1950 Act and section 41 (1) of the 1965 Act which were in identical terms, gave the right to husbands only to claim damages for adultery "*from any person on the ground of adultery with the wife of the petitioner*" that right remaining in the 1965 Act was repealed by the 1973 Matrimonial Causes Act which was the only 'British law' applicable regarding divorce in Vanuatu on "the day immediately before the Day of Independence". So that, French laws aside, the only other law under which anyone could be divorced after 1973 in the New Hebrides or in Vanuatu after July 30, 1980, was under the Matrimonial Causes Act 1973. This Act, in terms of the present divorce law applicable to Vanuatu, namely the Matrimonial Causes Act 1986, CAP 192, was a very liberal law. Whereas the divorce law that Vanuatu chose to adopt for itself was certainly more in line with the English 1950 or 1965 Matrimonial Causes Act. Vanuatu chose for itself, quite deliberately, a law that brought back the principle of damages for adultery, but unlike English laws that did allow damages for adultery, the Vanuatu Act allowed either the wife or the husband petitioner to claim damages for adultery. This was, in the context of any of the divorce laws that had ever applied to Vanuatu, even in the context of any divorce law that had ever applied to England, a novel proposition. The 1986 Vanuatu Act also had marked differences to any of the English statutes. It did, for instance, allow for dissolution of custom marriages. Prior to Independence there were three marriage laws that applied to Vanuatu: The French marriage laws, the English Marriage laws applicable to the New Hebrides namely, Queen's Regulation 5 of 1974 and finally the New Hebridean Marriages Act under the Joint Regulation 16 of 1970 which governed marriages between indigenous New Hebrideans. The latter, unlike the others recognised three forms of marriages: at District Registries; before an authorised Minister for the celebration of Marriages; and marriages performed in accordance with custom. It was the latter namely, Joint Regulation 16 of 1970 that in fact became the Marriage Act CAP 60 that is now the only Marriage Act that applies to everyone in Vanuatu. [It is interesting to note that the first Act passed by the Sovereign Parliament of Vanuatu was (now CAP 124) The Visiting Forces (Agreements) Act 1980, which came into force on the 14 August 1980. The second Act was a validating Act, which validated Joint Regulation 30 of 1980, The Courts Act (now CAP 122) and Joint Regulation 31 of 1980, The Land Reform Act (now CAP 123) on 4 November 1980.] Of course, the passing of the Vanuatu Marriage Act CAP 60, had the effect, pursuant to Article 95 of the Constitution, both at sub-Article (1) and (2) which states: *"Until otherwise provided by Parliament ... "* of abolishing both French and English Marriage laws that also applied until then to Vanuatu. In the same manner, the passing on the 15 September 1986, by the Parliament of Vanuatu of the Matrimonial Causes Act 1986 (Now CAP 192) had the same effect on the French and English Divorce laws that also applied until then to everyone in Vanuatu. It is true to say that until then the English chose to be divorced under English Law and the French under French law, but there was no obligation on them to do so. As I have said above, it is clear that under Article 95 of the Constitution, the French and English Laws that applied on the day before the Day of Independence applied to everyone in Vanuatu, irrespective of Nationality and irrespective as to whether they were Indigenous Ni-Vanuatu or not. They were no longer French or English laws but they became the law of Vanuatu. All those English

and French laws that still now apply in Vanuatu, (but it must be remembered that many French and English Laws that did apply have either expressly been repealed or have been repealed by the passing of express Vanuatu Laws) form part of the law of Vanuatu and apply to everyone in Vanuatu irrespective of creed, colour or Nationality. There cannot be a law for the English and another for the French and yet another for the Ni-Vanuatu in the Republic. Article 95 of the Constitution created laws for Vanuatu as a gap filling process. That gap has taken many years to fill and will continue to take many years to fill entirely, but it is gradually narrowing. There are for instance no specific laws of adoption made for Vanuatu, or laws of inheritance regarding intestacy. Does that mean that the Ni-Vanuatu have no laws of Adoption that apply to them, or no laws of intestacy that apply to them? I think not. They can choose to proceed under the existing Vanuatu English or French laws. Indeed they do. In events of conflict, the Courts have the duty to resolve the matter and do substantial justice. Again, as I pointed out above, there is no right of election in the parties. The right of election was abolished when the Protocol of 1914 was repealed on the Day of Independence as stated in the Exchange Notes of 23 October 1979 signed by the representatives of the joint signatories to the Protocol, Lord Carrington and Monsieur de Leusse de Syon. I venture to suggest that an action began under French law as it applied to Vanuatu at the time of Independence, must be completed under French law and an action under English law as it applied to Vanuatu at the time of Independence, must be completed under English law. The defendant has no choice. One other aspect of Vanuatu law that is worth noting, is that many of them were not enacted directly by Parliament itself, but was the product of subsidiary legislation. This arose in this way. In 1985, Parliament determined to pass an enabling Act called the Revision and Consolidation of the Laws Act 1985. This Act came into force on the 19 January 1987. It authorised the Minister for the time being to appoint a Commissioner *"To prepare a revised and consolidated edition of the laws of the Republic of Vanuatu":* See Section 2 of the Act. The purpose was to consolidate the laws of Vanuatu and to provide a definitive collation of all the laws of Vanuatu: See Sections 8 and 11(2) of the Act. The purpose was not to create new laws, but to *"... have effect as a consolidation and as declaratory of the written laws ... "* It was to contain, inter alia, the Constitution, the Acts and Joint Regulations in force in Vanuatu on the appointed day, subsidiary legislation in operation, and a chronological list of Acts, Joint Regulations that were included as well as those that were not included etc... . There was also a saving clause because under Section 5 *"no omitted law was to be deemed to be without force and validity by reason only of the fact that it is so omitted".* Therefore the French and English laws that still apply to Vanuatu were not abolished by the 1985 Act, and remain in force in so far as they have not otherwise been revoked either expressly or by natural implication. If one looks at the chronological list of Acts and Joint Regulations contained in the Revised Edition, pursuant to the 1985 Act, it is obvious that all the Joint regulations have either been repealed or been converted into Acts of Vanuatu. It is also obvious that the Acts contained in the Revised Edition from CAP 1 to CAP 123 inclusive were Joint Regulations that had existed for a very long time and had only more recently, that is, on 30 June, 1988, (the appointed day under the 1985 Act) become true legislation of the Vanuatu Parliament by means of delegated authority. The Marriage Act CAP 60 was such an Act. At the same time, the Revised Edition had the effect of 'repealing' some of the laws of Vanuatu (that is English and French laws) that had applied to all until then. The Matrimonial Causes Act (CAP 192) on the other hand, was a completely new Act that came into operation

on 15 September 1986. The passing of that Act did away immediately with the French and English laws of divorce that had applied side by side until that date; but until the 15 September 1985 both those laws were the only laws under which anyone in Vanuatu could have obtained and did obtain a divorce in Vanuatu, and as I have shown above, regularly did so. What Parliament has not done so far, and I venture to say, is unlikely to do, is to do away with the element of British 'Common Law and Equity' that apply in Vanuatu. After 16 years of Independence, it would be difficult to do so. Further more, it is likely to cause enormous upheaval in the legal system if it sought to do so now. One need only to consider the fact that virtually all the country's lawyers, including the Ni-Vanuatu lawyers are common law trained. We have also just opened a Branch of the University of the South Pacific, the Law Section for the training of law students for the Pacific. That law school teaches law applied according to the ethos of the British common law that applies not only in Vanuatu but in the whole of the South Pacific bar one exception. I believe that now we can no longer call it the 'British common law' but merely the common law that binds all the Commonwealth countries under one legal system. Thus creating a pool of authorities from which we can borrow in order to create our own jurisprudence.

The Learned Senior Magistrate was right in saying that we have to create our own jurisprudence, without necessarily following, to the letter, interpretations given in Britain to Acts of Parliament. We come from very different backgrounds and live in quite different circumstances. But it does not follow that we have to depart from the norm of the common law to such an extent that we no longer have tangible rules of law on which to base our legal interpretation. As already mentioned above: *"the High Court of the New Hebrides Regulation 1976 provided that so far as circumstances admit ... the statutes of general applications in force in England on the first day of January 1976" were to be applied as well as the principles of common law and equity".* By operation of Article 95 of the Constitution those same principles became the law of Vanuatu, and has never been repealed In any event, there are many decisions of the Vanuatu Courts that have made it plain that now after so many years after Independence we have become, by the passage of time and the way in which we have applied our laws since Independence, a common law jurisdiction: See Timakata v The Attorney-General (1992) V.L.R vol: 2 p 575 at 583 *"It is clear that the legal system of this nation is intrinsically linked to the system of those nations of the world as apply the common law system and the rule of law".* See also Bill Willie v Public Service Commission (1992) V.L.R. vol 2 p 634 at p 645 again: *"So there can be little doubt that the common law applies to Vanuatu ...".* I beg to differ with the learned Senior Magistrate when he states that the pre-independence French and British laws would not apply to Ni-Vanuatu nationals after the Date of Independence by virtue of Article 95, thus leaving a vacuum in the law of Vanuatu triggering the application of Article 47 (1) of the Constitution which would entitle the Court to *"determine the matter according to substantial justice and whenever possible in conformity with custom".* His construction of Article 95 limiting the application of French and British laws to the manner in which they had applied before Independence is, in my opinion, unnecessarily restrictive and not in conformity with the clear intention of the Constitution. As indicated above, the Constitution purports to make laws for Vanuatu not merely for a section of the population. The intention of the drafters of the Constitution would have been to put in place as full a set of laws and regulations as would be necessary for Vanuatu to operate as a nation, until such time as Parliament

got around to drafting its own legislation in its own good time. Furthermore, I cannot accept as did the learned Senior Magistrate, the submissions of counsel that when Vanuatu brought in a Matrimonial causes Act, it merely copied the English Act of 1965 (or 1950). If one looks at the Vanuatu Matrimonial Causes Act 1986, it could not be more different to any of the previous English Acts that had applied in England and Vanuatu. It is my view that the Vanuatu Parliament did intend to create and created very much a Matrimonial Causes Act of its own for Vanuatu. The only similarity was that it also did so in the English language. Therefore let us apply the test in Meydon's case referred to above and as approved by the learned senior magistrate and in the manner prescribed by the Interpretation Act CAP 132 section 8 as referred to above with ***"... such fair and liberal construction and interpretation ..."***. It is correct as stated by the learned magistrate, that an Act must be interpreted by the Court *"according to the intent of them that made it"*, but the intention must be deduced from the language used see **Capper v Baldwin** [1965] 2 Q.B. 53, 61. Donaldson J put it another way in **Corocraft v Pan-Am** [1969] 1 A.C. 616, 638; *"The duty of the courts is to ascertain and give effect to the will of Parliament as expressed in its enactments"*. If I may draw from an Australian source that comes to the same conclusion, I would respectfully cite with approval the words of O'Connor J in the case of **Tasmania v Commonwealth** (1904) 1 C.L.R. 329, 358; on a question as to the meaning of the Constitution of the Australian Commonwealth: *"I do not think that it can be too strongly stated that our duty in interpreting a statute is to declare and administer the law according to the intention expressed in the statute itself ... ."* It is best to remember the old rule declared by the judges in advising the House of Lords in **the Sussex Peerage Claim (1844) 11 Cl. & F 85, 143:** "If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the law giver". It is also an important rule of interpretation that the intention of the legislator must not be speculated upon. Lord Simonds put it this way in **Magor and St Mellons R.D.C. v Newport Corpn. [1952] A.C. 189,191** *"A general proposition that it is the duty of the Court to find out the intention of Parliament ... cannot by any means be supported"*. Some 50 years before in the case of **Salomon v A. Salomon & Co Ltd** [1897] A.C. 22, Lord Watson had said: *"'Intention of the legislature' is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a Court of law or equity, what the legislature intended to be done or not to be done* ***can only be legitimately ascertained from what it has chosen to enact,*** *either in express words or by reasonable and necessary implication."* In the New Zealand case of **Pitches v Kenny** (1903) 22 N.Z.L.R. 818, 819, Williams J expressed the rule thus: *"The object of an Act and its intent, meaning and spirit can only be ascertained from the term of the Act itself"*. Therefore, the duty of the Court is to give to the word whose meaning is to be ascertained, its natural and ordinary meaning in the context in which it occurs, without going through a process akin to speculation. Section 17 of the Matrimonial Causes Act states: ***"A petitioner may on a petition for divorce claim damages from any person on the ground of adultery with the respondent"***. The word of the Act could not be more straight forward or clearer. What it does is to permit those who petition for divorce on the grounds of adultery to claim damages. It does not enjoin the Court to award those damages on any particular basis. Damages may be defined simply as

follows: *"the pecuniary compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another, whether that act or default is a breach of contract or a tort; or, put more shortly, damages are the recompense given by process of law to a person for the wrong that another has done to him".* See: Halsbury's laws of England 3rd Edition 216. It may be worth looking at the types of damages opened to the Courts to award generally. Generally speaking 'damages' fall into two categories. The first is **compensatory damages**. The second is **exemplary damages**.

COMPENSATORY DAMAGES: may be **'real'** or **'nominal'**. Those awards of pecuniary compensation, sometime referred to as **'real damages'** falls into two categories: i) **general damage** which are those kinds of damages awarded for compensation for the general damage caused and which the law presumes to have occurred when a contract is broken or a tort is committed to flow from the wrong complained of and to be its natural or probable consequence. The quantification of such damage in term of money is a matter for the judge to determine in each case. In many cases no precise measure can be indicated. It may often include compensation for damage which is incapable of exact allegation, proof or evaluation in terms of money. They may be substantial or small according to circumstances, and where no real damage has been suffered may be a trifling amount. An example of such damage is the kind of damages awarded for personal injuries and falls generally in the category of unliquidated damages and ii) **special damage** this denotes the actual and particular loss sustained. It is not something presumed by law to be the natural and probable or direct consequence of the act or omission complained of but which flows from the act complained of and are not too remote. This type of damage too is often claimed in actions for personal injuries where, for instance, complications arise as a result of the direct injury suffered. This type of damage must be claimed specifically and proved strictly. They fall generally in the form of liquidated damages. **Nominal damages** arise where the plaintiff whose rights have been infringed has not in fact sustained any actual damage therefrom, or fails to prove that he has or although he has in fact suffered actual damage, the damage arises not from the defendant's wrongful act, but his own, or the plaintiff is not concerned to raise actual loss but brings his action in order to establish a right, the damage that he is entitled to in those circumstances is called **nominal damages.** Nominal damages have been defined as a sum of money that may be spoken of but that has no existence in point of quantity, or a mere peg on which to hang costs. In practice, however, a small sum of money is awarded. Nominal damages cannot be awarded in cases where proof of actual damage is of the essence of the action. In such cases if the damages are not proved the action must fail. The general principal that applies in compensatory damages is 'restitutio in integrum'. In other words the law tries to compensate the plaintiff in such a way that he is returned as far as possible to the situation in which he was before the wrongful act that was committed against him, that is in so far as money can do so.

EXEMPLARY DAMAGES: are damages that are awarded not merely to recompense the plaintiff for the loss that he has sustained by reason of the defendant's wrongful act, but to punish the defendant in an exemplary manner and vindicate the distinction between a wilful and an innocent wrongdoer. Therefore where the wounded feeling and injured pride of a plaintiff, or the misconduct of a defendant may be taken into consideration, the principle of restitutio in integrum no longer applies and

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exemplary damages may be awarded. Such damages are said to be at 'large'. This type of damage has been variously referred to as 'vindictive', penal, punitive, aggravated, or retributory. Because of the rule by which the damages for breach of contract are assessed, exemplary damages cannot be awarded in actions for breach of contract. The converse is true in tort and exemplary damages is commonly awarded in tortious actions. For example in actions for: assault, conversion, trespass, negligence, nuisance, libel, slander, seduction, etc. **But in order to justify the award of exemplary damages, it is not sufficient to show merely that the defendant has committed a wrongful act. The conduct of the defendant must be high handed, insolent, vindictive, or malicious, showing contempt of the plaintiff's right, or disregarding every principle which actuates the conduct of common decency. In particular, the defendant's persistence in the act with knowledge, and the language accompanying it, as well as his conduct at the trial of the action itself, are elements to be considered.** A plaintiff who has provoked the defendant's conduct or condoned it, will not be entitled to exemplary damages.

I have endeavoured above to set out the general principles of damages, which I have condensed as far as possible from the principles stated in Halsbury Laws of England 3rd edition at 383 to 391. It must not be forgotten that in English Divorce law, damages for adultery were compensatory and not punitive. The reason for this is mostly historical and the leading English case on the subject is Butterworth v Butterworth and Englefield [1920] P. 126. Again in order to understand the reasons for which damages for adultery in the English Courts were awarded on the basis of compensatory damages rather then exemplary damages, one must look at the English divorce Acts themselves, which gave the Divorce Courts in England the powers to award damages for adultery, and compare the same with the Vanuatu Act which gives our Divorce Courts the powers to award damages for adultery, in order to determine if those awards for damages must of necessity be on the same basis in Vanuatu. There were three main English divorce Acts prior to 1973, in which damages were made recoverable for adultery. They were the 1857, 1950 and 1965 Matrimonial Causes Act. All three in their own time had applied in the New Hebrides to English nationals and optants. But the only Act that has also applied in Vanuatu by virtue of Article 95 of the Constitution, is the Matrimonial Causes Act 1973, by which time damages for adultery had been done away with altogether. So that at the time that the 1986 Vanuatu Matrimonial Causes Act [CAP 192] was enacted, damages for adultery was no longer applicable for divorces in Vanuatu. The 1986 Act was reintroducing this element in the law of Vanuatu. So on what basis therefore were those 'reintroduced' rights to damages to be awarded. It is therefore, in this context, very important to remember in what terms it was reintroduced. **Section 17(1) of the Act states: "A petitioner may on a petition for divorce claim damages from any person on the ground of adultery with the respondent".** As one can observe, the ground on which damages can be claimed is the adultery itself. The claim is opened to both wife petitioners and husband petitioners, unlike English law. The manner and basis on which such claims are to be tried here are not specified in the Vanuatu Act, unlike the English Act. Now if I may turn to the three English Matrimonial Causes Acts I referred to above, the claim for damages for adultery were in all three drafted in almost identical language, in sections 33 of the 1857 Act, 30 of 1950 Act and 41 of 1965 Act respectively. I therefore merely quote from the 1965 Act at Section 41: (1) "A husband may, on a petition for divorce or for judicial separation or for damages only,

claim damages from any person on the ground of adultery with the wife of the petitioner. (2) A claim for damages on the grounds of adultery shall, subject to the provisions of any enactment relating to trial by jury in the court, **be tried on the same principles and in the same manner as actions for criminal conversation were immediately before the commencement of the Matrimonial Causes Act, 1857,** and the provisions of this Act with reference to the hearing and decisions of petitions shall so far as may be necessary apply to the hearing and decision of petitions on which damages are claimed".

The differences between the English Acts and the Vanuatu Act are obvious. Under the English Acts, damages were tried and awarded in the same manner as they had been in the tort of 'criminal conversation' before the divorce Act 1857 became law, which by section 59 was in form abolished. Actions for criminal conversations were founded on the tort of 'alienation of affections' which signifies adultery in the form of a tort. The act that was violated by the tortfeasor was the husband's prerogative to exclusive sexual intercourse with his wife which the law granted as a necessary consequence of the marriage relation. It is interesting to note that the tort was towards the husband alone. The wife had no such rights and was, it seems, not entitled to the exclusivity of sexual relationship with her husband. That made little sense since the wife could divorce her husband under the Act on the ground of adultery. Nevertheless, she was precluded from claiming damages. Does it not show clearly that the legislators of Vanuatu deliberately departed from the manner in which damages were awarded under the English Acts, bearing in mind that it also extended equal rights to the wife. The tort was effectively abolished by the 1857 Matrimonial Causes Act, which in turn gave a statutory right to damages to the husband for his wife's adultery, but preserved the manner in which it was to be tried and the basis on which it was to be awarded as if it had been under the tort itself. I note immediately that this historical tortious basis for the award of damages in claims for damages for adultery was not preserved in the Vanuatu law. Therefore in order to discover the basis and reasons for the manner of such awards in English law, one has to consider what form such actions took prior to 1857 in actions for criminal conversations. But what is plain, is that the element of 'the action for criminal conversations' if I may call it that, was not preserved in the Vanuatu Matrimonial Causes Act, as the Vanuatu Act remains silent on that aspect. If the Vanuatu Act was merely copying the English Acts, and intended the awards of damages to be on the same basis, it is surprising that it should have remained silent on such a point. The more so when one considers that the Vanuatu Act, like the English Acts, provide that the Court should have power to direct in what manner such damages should be paid or applied. Would this not tend to suggest that the Vanuatu legislators were aware of the old English laws that, after all, had applied in Vanuatu some time before independence and were aware of the manner in which damages were thereunder awarded, but chose deliberately not to follow the same manner of awarding damages? Following the principles of interpretations set out above, is not one inexorably drawn to that conclusion! As I said above, the leading English case on the matter is Butterworth v Butterworth and Englefield. If I may respectfully say so, I am greatly assisted by the careful analysis of the law of divorce in that case by McCardie J as it related to the award of damages for adultery in English Divorce Courts. If I may be so bold, I will adopt the learned judge's words in that case as if they were my own, but it may well be that at the end I may come to a different conclusion, not because I doubt the wisdom of the reasoning of this learned and eminent judge, but because our

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legislation is different and our legislators may well have intended different results. The common law action which lay for knowingly seducing away a wife from cohabitation with the husband, or for harbouring a wife after notice that she had left her husband without his consent must be carefully distinguished from the action that lay for criminal conversation. It is essential in such actions to allege that a defendant knew that the woman was married. That was because historically such actions were founded not in trespass but in case and that in torts based on 'actions on the case' proof of damage is required as a necessary ingredient in the right of action; see: **Winsmore v Greenbank (1745) Willes, 577.** These cases were wholly distinct from claims for damages for criminal conversation. The right of action for criminal conversation did not exist in the wife see: Lynch v Knight (1861) 9 H.L.C. 577, in which Lord Wensleydale expressly held that no such right of action existed in the wife, although the opinions of Lord Campbell and Lord Cranworth may tend to the contrary view. The action for criminal conversation was based on the mere act of adultery. Once the act was proved the husband could bring an action for damages. Enticing away the wife or harbouring her operated as mere matters of aggravation. It was not necessary in such an action to allege and prove that the defendant knew that the woman was married. This action of criminal conversation was as a general rule framed in trespass and the misconduct was alleged to have been committed vi et armis. But although technically laid in trespass the action in substance was one upon the case. It possessed all the essential ingredients of the latter class of action. The point is important when one considers on what basis damages is to be awarded. On the basis of what I have said above on the awards of damages, if the action is in trespass then nominal damages at least should be awarded. **But if the claim is one in the case, i.e. for damage actually sustained** then the court is not bound to award any damages at all unless actual damage be proved. It seemed from all the authorities that the action was finally not treated as an action in trespass but as an action in case. For "the gist of actions of this sort is the loss to the husband of the comfort and society of the wife." The action for criminal conversation presented unique features. It existed only in the husband and upon the wording of section 41 of the Act of 1965 it is obvious that it is the husband only and not the wife who can insert a claim for damages in the petition. That is in marked difference with the Vanuatu Act section 17, where it is either. The common law action for criminal conversation seems to have been founded on the notions of property in the wife. It is also notable that actions for damages for adultery is peculiar to Anglo-Saxon countries or should I say the common law jurisdictions. It is unknown in French Law. Therefore as pointed out, the action under section 41 required that claims for damages be tried on the same principles and subject to the same rules as an action for criminal conversation. That action became eventually, in substance, an action on the case. It was not a strict action in trespass, therefore damages had to be proved or it was opened to find that no damage was suffered at all. "If then the jury could before 1857 refuse to award damages in an action for criminal conversation, it follows that they possessed the same right when acting in the Divorce Court after 1857, in a petition for compensation for adultery". It is clear from the authorities reviewed by McCardie J in Butterworth v Butterworth and Englefield that that proposition of the learned judge in that case is indeed, if I may respectfully say so, correct. The reason why the damages awarded under the English Matrimonial Causes Acts were held to be compensatory as opposed to exemplary, was because of the historical background on which it was founded as preserved in the English Acts themselves as shown by section 41 above. Initially, and certainly Blackstone thought

so, in criminal conversation cases "the damages recovered are usually very large and exemplary": Commentaries, iii., 139. But apparently the action for criminal conversation became conspicuously sui generis, and grew to be subject to particular rules as to damages, distinguishing it from other actions of tort. In Tidd's Practice (1828) 9th ed., vol. ii., S; 883, it is said: "Circumstances of aggravation of the injury may therefore operate as an inducement to the jury to give large damages". McCardie J in Butterworth above says at p 138 "I can find no case in which the judge told the jury that they might give exemplary or punitive damages in a case for criminal conversation ..... It thus appears that, for reasons which I cannot understand, an action for criminal conversation was, at the time when the Matrimonial Causes Act, 1857, became law, apparently regarded as an action in which exemplary or punitive damages were not to be given..... I must therefore take it now to be the settled rule of this Court..... that compensatory damages only can be given, and that exemplary or punitive damages are not possible". It is clear, therefore, that the wealth of authority leading to that conclusion, was that the actions under the English Matrimonial Cause Acts were awarded on the basis that such actions were based on the old criminal conversation type of actions. This is clearly not the case in the Vanuatu legislation. Nothing in our legislation suggests that claims for damages based on adultery in Vanuatu should be tried as if they were actions for criminal conversation, and as I have endeavoured to point out, the language and historical background of our Matrimonial Act suggests quite the opposite. None of the historical background of the English Acts form part of the Vanuatu Act, in which it seems the legislators deliberately decided on an other course. Even McCardie J himself expressed surprise in the historical development of the action for criminal conversation *"for reasons that I cannot understand, an action for criminal conversation was, at the time that the Matrimonial Act, 1857, became law, apparently regarded as an action in which exemplary or punitive damages were not to be given"*. We are therefore, for the reasons that I have set out above not tied to any of that historical background and not bound by any of the decisions surrounding the 1965 Act. There is, as I said before, no similarity between our legislation and the previous English legislation. It seems that there is nothing that prevents our Divorce Courts from awarding exemplary damages in divorce cases. But it is important that I should give here some guidance as to the approach to be adopted and manner in which awards for damages should be made in our Divorce Courts. I noticed that in this particular case, it was the petitioner herself who claimed a specific amount of damages. She claimed 100,000 vatu. This appeared to be a liquidated sum. It is unlikely that exemplary damages could be claimed in this way. This is more appropriate in cases of special damages. In the case of general damage or exemplary damage, it is for the Court to determine the amount after hearing evidence on the matter. In those circumstances damages are at large and no figure can be set upon it by the party concerned. As I said above concerning exemplary damages: **"in order to justify the award of exemplary damages, it is not sufficient to show merely that the defendant has committed a wrongful act. The conduct of the defendant must be high handed, insolent, vindictive, or malicious, showing contempt of the plaintiff's right, or disregarding every principle which actuates the conduct of common decency. In particular, the defendant's persistence in the act with knowledge, and the language accompanying it, as well as his conduct at the trial of the action itself, are elements to be considered".** It is also important to bear in mind that plaintiff or petitioner who has provoked the defendant's or respondent's conduct or condoned it, will not be entitled to exemplary damages. So

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also is the conduct of the corespondent an important matter. I draw an inference here from the well-known passage in Buller's Nisi Prius (1817), 7th ed., p 26 (a) and (b). He says: "As to adultery the action lies for the injury done to the husband [the petitioner] in alienating his wife's [the partner's] affection, destroying the comfort he [or she] had from her [or his] company and raising children for him [or her] to support and provide for. And as the injury is great so the damages given are commonly very considerable. But they are properly increased or diminished by the particular circumstances of each case; the rank and quality of the plaintiff [petitioner], the condition of the defendant [co-respondent], his [or her] being a friend, relation, or dependant of the plaintiff [petitioner] or being a man [or woman] of substance, proof of the plaintiff [petitioner] and his wife [or husband] having lived comfortably together before her acquaintance with the defendant [co-respondent] and her [or he] having always borne a good character till then, and proof of a settlement or provision for the children of the marriage, are all proper circumstances of aggravation." In nearly all decisions the conduct of the adulterer [or adulteress] has been regarded as important. It is in my view important to consider the conduct of the corespondent. It is important on the question of damages and of cost to ascertain whether or not the co-respondent knew that the man or woman with whom the adultery was committed was married or not. It may be that the injury to the innocent partner would be the same whether the co-respondent knew or did not know that the respondent was married. But if the conduct of the co-respondent is important, then it ought to follow as a matter of juristic logic that the damages should vary with the conduct. Thus if the co-respondent's conduct be marked by treachery, wantonness, cruelty, or gross depravity, the damages should be so much the more than if the co-respondent's conduct be free from such circumstances of aggravation. There is no reason that I can see why damages awarded in Vanuatu under the Matrimonial Causes Act 1986 [CAP 192] should not vary with the impropriety and gravity of the misconduct. Special damages may also be pleaded and in that event they have to be proved strictly in the way that they are in say, cases of personal injuries. Such things as the pecuniary value of the spouse, may properly be taken into consideration. In these modern days where both spouses often work, the value of the spouses to each other in sharing the financial burdens of a modern household are only too clear. The fortune if any of the respondent. I do not see why the principles laid down in Evans v Evans and Platts [1899] P. 195, should not be extended to apply to both male and female petitioner. Keyse v Keyse and Maxwell per Lord Hannen; "Her assistance in her husband's business, or her [or his] capacity as a housekeeper and her ability generally in the home". When a family unit is broken up, one has to bear in mind that it entails considerable financial upheavals in the domestic lives of the parties. Is this not something that ought to be born in mind when assessing damages. The other matter one ought to bear in mind is the proper compensation for the injury to the petitioner's feelings, and the serious hurt to the matrimonial and family life. The old English authorities do recognise (though it of course refers to the husband only) that the blow to the petitioner and the shock to his feelings clearly depend to a large extent on the conduct of the co-respondent. It follows therefore that any feature of treachery, any grossness of betrayal, any wantonness of insult and the like circumstances may add deeply to the petitioner's sense of injury and wrong, and, therefore, call for a larger measure of compensation. This also accounts to a large extent for the importance attached to the question whether or not the co-respondent knew that the respondent was married. Therefore it will be seen that the general conduct of the adulterers is

important and relevant only so far as it bears (a) on the value of the respondent; and (b) on the extent to which the feelings and pride of the petitioner have been injured by it. It is important to note that the Court is not there to punish mere immorality. We are not concerned with the moral aspect of the adulterers The conduct of the petitioner must also be taken into consideration when assessing damages. In assessing damages it is essential that the whole character and conduct and affection of the petitioner should be tested. These matters bear directly not only on the value of the petitioner as a spouse, but also on the question of any shock to feelings which may assert to have been caused by the adulterer. The character and conduct of the petitioner are as fully in issue as is the character and conduct of the respondent. Hence the importance of careful investigation whenever a claim for damages is made. It may be that the behaviour of the petitioner within the marriage, the harshness of language or negligence or cruelty in marriage of the petitioner towards the respondent may have destroyed the affection of the one for the other or sapped at the matrimonial fidelity of the respondent. I now turn to the question of whether or not the Court is entitled to consider the fortune of the adulterer in assessing damages. There are two ways in which this is relevant. Firstly, the manner in which a wealthy seducer has used his fortune to obtain the object of his seduction, may be relevant to the hurt feeling of the petitioner. The manner in which the adulterer has used his fortune may greatly accentuate the outrage to the feelings of the petitioner and family pride. It is part of the conduct of the adulterer which the Court can legitimately take into account in assessing damages. But I do not feel that the adulterer's fortune should play any direct role other then that. For instance, once a proper figure has been settled upon as appropriate damages, be it compensatory or exemplary, it should not be increased or decreased by the poverty or wealth of the adulterer. General evidence of the wealth of the adulterer can be admitted to the extent that it may bear directly on the circumstances of the seduction and the consequent injury to the petitioner's feelings. Although this may seem to fly in the face of the purpose of exemplary damages in the punitive sense, I still feel that once a correct amount has been settled upon as damages in a particular case, it should not be increased because of the wealth of the co-respondent. There is also another matter that I wish to touch upon, that is the aspect of damages that may be awarded against an innocent adulterer. In other words the amount that should be paid by a co-respondent who was not aware that the person with whom he had a relationship was a married person. In that event the hurt feelings of the innocent petitioner would be the same whether the co-respondent knew or did not know. But since we are here talking about exemplary damages i.e. punitive damages, it would seem to me that it would be wrong to make such an order against an innocent third party. But unlike English decisions on the matter, I see no reason why the onus of proving, as a matter of mitigation, that he did not know that the respondent was married should not rest on the co-respondent. In that event the Court if it does find that the co-respondent was indeed an innocent third party, should award only nominal damages against the co-respondent. The Court is not a Court of morality and punishment should not be awarded to punish mere immorality. But when it comes to costs, I see no reason why the ordinary rules as to costs should not be followed, namely that the petitioner who has successfully proved an allegation of adultery with the co-respondent should not recover those costs against the co-respondent. I am fully aware that this is not in line with English authorities on the matter, but our Courts are not bound by English decisions. As a matter of juristic logic I see no reason why the co-respondent should not be made to pay for the cost of the divorce.

Now dealing with the facts of this case itself, the learned senior magistrate awarded damages of 100,000 vatu. That was the amount actually prayed for by the petitioner. He suggested in his judgement that that award was in his view the correct amount and not excessive in the circumstances of the case. It may be that the figure that he has arrived at is indeed the correct figure when it comes to assess the damages caused as a result of the hurt feelings of the wife and the damage done to her marriage and the loss of her husband. But it seems to me that that figure was arrived at without any investigation or inquiry into the divorce itself. No evidence was heard on the matter. I see no reasons why exemplary damages should not be awarded in an appropriate case, but as I said above: **"in order to justify the award of exemplary damages, it is not sufficient to show merely that the defendant has committed a wrongful act. The conduct of the defendant must be high handed, insolent, vindictive, or malicious, showing contempt of the plaintiff's right, or disregarding every principle which actuates the conduct of common decency. In particular, the defendant's persistence in the act with knowledge, and the language accompanying it, as well as his conduct at the trial of the action itself, are elements to be considered".** Our Divorce Courts are not Courts of morality, but Courts of law. It does not follow therefore that in every case where adultery is relied upon as a ground of divorce and succeeds, that awards of exemplary damages will follow. Damages have to be proved on the grounds enunciated above. Put another way: exemplary damages are only warranted in the event of exemplary and gross misbehaviour. All the facts on both side must be gone into, including any mitigating circumstances that there may be. Furthermore, in the present case, the co-respondent, it seems, was not afforded any opportunity of mitigating her damages. I do not wish it to be thought that by this decision I am making any criticism whatsoever of the learned Senior Magistrate (as he then was). I am only too painfully aware of the difficult issues raised in this case. But because there has been, on the face of it, no inquiry or evidence regarding damages, on that ground and no other, I set aside the award. If the petitioner wishes to pursue her claim, then the matter ought to be relisted before the Magistrates' Court and the inquiry as to damages gone into fully and carefully. If she wishes to claim any special damages, then those must be pleaded and proved strictly. If this is a case that warrants exemplary damages, then evidence must be heard about it. Affording both sides the opportunity to call evidence proving or disproving the conduct that may or not warrant the award of exemplary damages.

Delivered this 17 day of June 1996.

CHARLES VAUDIN d'IMECOURT
Chief Justice

REPUBLIC OF VANUATU
COUR SUPREME COURT
LEX LEX
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