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**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Civil Case No.178 of 2010

BETWEEN: WILLIE IOKHAUTO
Claimant

**AND: SOUTH ISLAND SHIPPING
COOPERATIVE LIMITED**

First Defendant

AND: VANUATU GOVERNMENT
Second Defendant

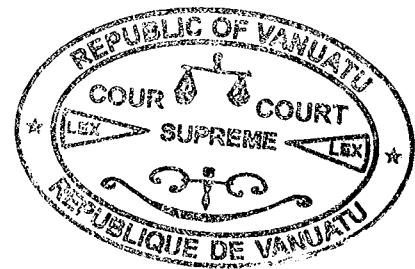


Coram: J. Weir

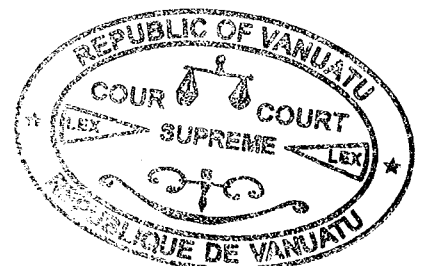
**Counsel: Mr. D. Yawha for the Claimant
Mr. J. Kilu for the defendant
Attorney General for the Second Defendant**

JUDGMENT AS TO QUANTUM

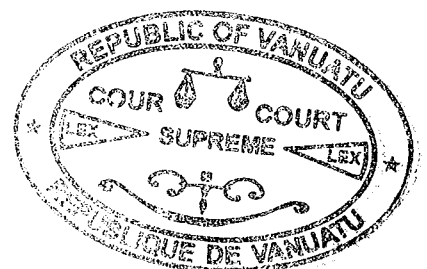
1. In November 2010 the Claimant filed proceedings against the defendant alleging negligence and seeking, without particulars, judgment for VT60 million. The Vanuatu Government was added as 2nd defendant.
2. The case arose as a result of the death at sea of the Claimants wife and two young children who were swept overboard from a vessel owned by the defendant known as The Southern Star. The Claimant alleged that the defendant had been negligent in allowing the vessel to put to sea in rough weather conditions when it was overloaded.
3. At the time of death, the claimants wife was aged 43, the daughter was aged 5, and his son was aged 3.



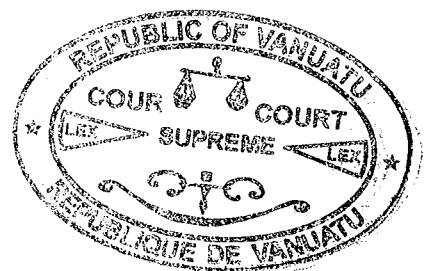
4. The defendant originally filed a statement of defence, cross claim and counterclaim on 7th December 2010 against the Claimant and the 2nd defendant.
5. On the 20th December 2010, the second defendant filed a sworn statement in response. This statement was made by Mr. Guy Benard who at the relevant time was employed by the Vanuatu Maritime Authority (VMA) as Technical advisor, Surveyor and Deputy Commissioner.
5. Mr. Benard, in his sworn statement established the following facts.
 - (i) That the Southern Star sailed from Port Vila to Tanna on the 4th October 2007 despite being subject to a Notice not to Sail issued by Mr. Benard on behalf of the VMA and served on a crew member on the 4th October 2007.
 - (ii) The reasons for the notice being issued were, amongst others, that safety deficiencies referred to in an earlier letter dated 13th September had not been addressed. These were; that the vessel was heavily overloaded with cargo and had a negative trim, and breach of order no.17 of the 2004 Shipping Act.
 - (iii) The Notice Not to Sale also instructed the 1st defendant via its agent to unload the vessel and stay alongside the wharf until further notice.
 - (iv) The person who actually captained the vessel on its sailing was in fact the cargo officer who had no valid license.
 - (v) The vessel was only authorized to carry 72 persons on board inclusive of crew, whereas in fact on the 4th October the vessel had 272 passengers on board exclusive of crew.



- (vi) The sailing of the vessel in such circumstances was ordered by Mr. Malachi Sakau, Chairman of the 1st defendant, despite being approached personally by Mr. Benard and despite him being fully aware of all the surrounding facts.
6. Despite several directions by this Court for the 1st defendant to file and serve a sworn statement in response to this detailed and damning statement by Mr. Benard, no such statement was forthcoming.
7. As a result of those defaults, on the 13th May 2011, by consent, the 1st defendant's statement of defence was struck out, and judgment was entered for the Claimant against the 1st defendant for liability only. The claim against the 2nd defendant was also struck out on that date.
8. The case was adjourned to Monday 20th June for submissions on Quantum.
9. The Submission Of Counsel For The Claimant On Quantum
Compensation is sought under 4 separate Heads.
- i) The Fatal Accident Act 1976
 - ii) The Law Reform (miscellaneous Provisions) Act 1934
 - iii) Punitive, or exemplary damages
 - iv) Funeral and other expenses
10. Counsel for the Claimant presented 2 authorities in support of the quantum aspect of this claim which counsel for the defendant accepted as the relevant precedents. They are:
- William v. Obed – [1981] VUSC1
Esley v. Toara - [2000] VUSC 78
11. Counsel for the defendant deals with each head of claim in turn and submits that as no precedent has been cited for punitive damages, no award should be made.



12. No evidence has been presented as to the actual incomes by the claimant and his wife, or of average incomes earned by people in a similar socioeconomic bracket in Tanna or for that matter anywhere in Vanuatu.
13. Similarly no evidence has been presented in relation to the average life expectancy of a male or female from Tanna or Vanuatu.
14. (i) **THE FATAL ACCIDENT ACT**
- The claim under this head is for anticipation of the future services and help or pecuniary aid in the future by the deceased.
15. In dealing with the assessment of damages under this head I have relied on two separate sources of information.
- (i) The Vanuatu Main Report on the Household Income and Expenditure Survey 2006. (the most recent report available)
- (ii) World Health Organisation Data on Vanuatu Life expectancy ([w.w.w. worldlifeexpectancy.com](http://www.worldlifeexpectancy.com))
16. The Vanuatu main Report on the Household Income and Expenditure Survey 2006 established that the average monthly income of a 2 member household in the Province of Tafea was VT40,700 per month or 488,400 per annum. I round that up to VT500,000 per annum to take account of inflationary trends. 50% of that, representing the wife's share would amount to VT250,000 per annum.
17. According to the World Health Organization data, in 2009, in Vanuatu, the Average life expectancy of a male is 62.4 years. The Average life expectancy of a female is 65.7 years. The overall average is 64 years.



The Claimant Wife

18. I intend to adopt the overall average of 64 years as being the appropriate yardstick for calculating compensation under this head for the wife. On this basis a reasonable calculation for entitlement would be VT250,000 for 20 years, making a total of VT5,000,000.00.
19. The children aged 5 years (female) and 3 years (male)

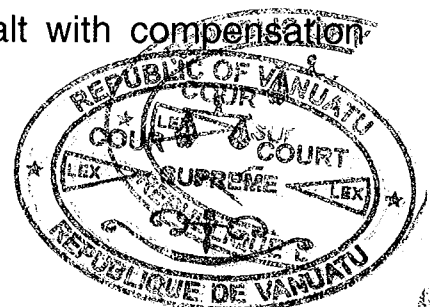
I have received assistance in respect of these 2 young children from Cooke C. J. who in *William v. Obed* referred to *Barnett v. John & Others* [1921] 2KB 461 and adopted the approach taken by *Mc Cardie J.*

In that case *Mc Cardie J.* analyzed a number of cases involving damages claims for children killed as a result of negligence.

"I think that the only way to distinguish between the cases where the plaintiff has failed from the cases where he has succeeded is to say that in the former there is a mere speculative possibility of benefit, whereas in the latter there is a reasonable probability of pecuniary advantage"

20. In the case before him, the boy was aged nine, but Cooke C.J. found that there was no evidence before him that he had helped his father, the claimant in any way. He therefore held that the action for damages failed under that head.
21. In this case, the children were only aged three and five respectively and there is no evidence before me that they helped their father in anyway. Nor could they be expected to at such a young age. The claim for the children under this head must fail.
22. (ii) **THE LAW REFORM ACT**

Both the cases referred to me dealt with compensation under this head.



In William v. Obed (Supra) the Court focused on the value of loss of expectation of life of the deceased boy and awarded a sum in the amount of VT185,000.

In Esley v. Toara (Supra) some 20 years later, the court considered along with this criteria, a further matter, namely damages for pain and suffering caused by the defendants act between commission of the act and death.

The court made no finding under this head but increased the overall award made in William v. Obed to VT500,000.00.

Counsel for the claimant seeks an award of VT500,000 for pain and suffering for the loss of the entire family.

23. In my view, based on the authorities available to me, the most appropriate course is to make a global award which covers both heads of damages, as both factors would apply to the 2 young children in the circumstances of their death.
24. The death of the Claimants wife and 2 young children in what must have been terrifying circumstances for them was tragic. The mother could be described as being in the prime of her life, the children were only at the beginning of their life.
25. In my view a further allowance must be made for inflation since Elsey v. Toara which was 10 years ago. That was the view of Touhy J. in Alphonse v. Tasso [2007] VUSC 54 – paragraph 51, and I adopt that approach in broad terms.
I can see no reason why an award under this head should not deal with each person, rather than lumping them together as a family.

I therefore fix the amount of compensation under this head at VT600,000 for each of the deceased making a total of VT1.8 million.



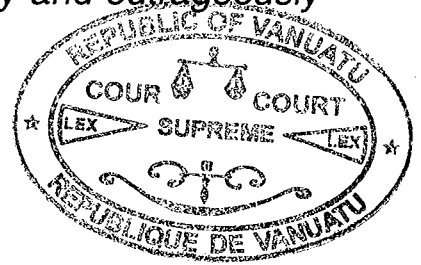
(iii) PUNITIVE OR EXEMPLARY DAMAGES

26. Counsel for the Claimant seeks the sum of VT20,150,000 by way of punitive damages without providing any rationale for calculating this figure, or referring to any authorities.
27. Counsel for the defendant correctly points out that the claim for damages under this head was not specifically pleaded but incorrectly submits that the courts in Vanuatu have not awarded punitive damages in the past.
28. Exemplary damages first appears to have been dealt with by the Court of Appeal in Freddy Harrisen v. J.P.Holloway [1984] 1VLR 148 at isi. Where the Court said

“Exemplary damages may perhaps be awarded where there is some deliberate oppression, where a tort is committed somewhat flagrantly, where warnings against repetition of such conduct have been given. Factors of that nature are not apparent in this case”

29. This head of damages was further considered by the Court of Appeal in Moli v. Heston [2001] VUCA 3, where the court made an award of VT 2 million under this head having listed 4 factors in relation to a defamatory publication.
30. An award of exemplary damages was further considered by the Court of Appeal in Andikar v. Siro [2008] VUCA.1. This case dealt with Trespass to land and the Court declined to make any award. It said:

*“Even if we assume that **exemplary damages** are available in the more general circumstances permitted in New Zealand (see Taylor v. Beere [1982] 1 NZLR 81) and Australia (see Lamb v. Cotogno (187) 164 C.L.R.1) than in the United Kingdom (compare Rookes v. Barnard [1964] AC 1129), we do not consider that the evidence was sufficient to show the three Andikar parties acted so deliberately and outrageously*



in relation to the rights of Tom Siro as to justify an award of such damages”

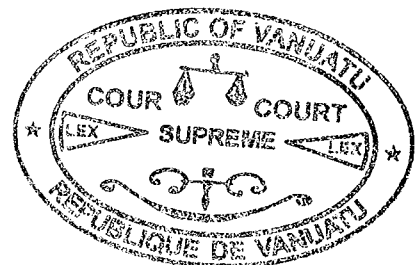
31. At paragraph 22 of his sworn statement, Mr. Benard described the whole story of the incident as “sordid”. He then went on to list 6 conclusions which he had reached from his own investigations. While the first two might be described as speculative, the remaining four conclusions appear to be based on information available to Mr. Benard and not challenged by the defendant.

Furthermore his findings outlined at paragraphs 7, 8 and 9 of his sworn statement were not questioned.

32. This behavior by the defendant company via its management in ordering the Southern Star to sail despite the notice not to Sail and the protestations by Mr. Benard was contumacious. To put to sea in bad weather conditions when the vessel was grossly overloaded with passengers as well as cargo was flagrantly and grossly negligent. It is also noteworthy that the defendant company has avoided any censure whatsoever as has the captain of the vessel and the chief executive of the company at the time.
33. Having regard to those findings, in my view this is a case where an award of exemplary damages should be made. I bear in mind, however, that the purpose of such an award is as a mark of public censure against egregious misconduct, rather than being compensatory. I have no information before me about the financial position of the company. On the other hand, there is nothing to suggest that the company is impecunious. I fix damages under this head at VT five million.

(iv) FUNERAL & OTHER EXPENSES

34. The Applicant claims VT300,000 without any evidence of actual outgoings, although the submission is that this award could include his legal expenses. That is not appropriate. I set these costs at VT200,000.



35. The total award therefore is as follows –

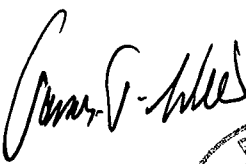
Fatal Accidents Act	-	VT5,000,000.00
Law Reform (miscellaneous Act)	-	VT1,800,000.00
Exemplary damages	-	VT5,000,000.00
Funeral & Other expenses	-	VT 200,000.00

I direct that the sum, when recovered is to be delivered to the Claimant without deduction of legal expenses in respect of this claim.

In so far as legal expenses are concerned, in my view this is an appropriate case for an indemnity award of costs. Those costs are to be agreed or failing agreement to be taxed.

DATED at Port Vila this 01st day of July, 2011.

BY THE COURT


J. WEIR
 Judge

