

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

**Civil Case No.64 of 2008**

**BETWEEN: CHRISTOPHER KARIE**

**Claimant**

**AND: TOYOTA TSUSHO ( VANUATU )  
LIMITED trading as ASCO MOTOS**

**Defendant**

*Coram: V. Lunabek CJ*

*Counsel: Mr Edward Nalyal for Claimant*

*Mr Mark Hurley for the Defendant*

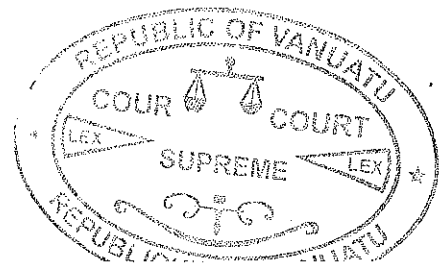
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**JUDGMENT**

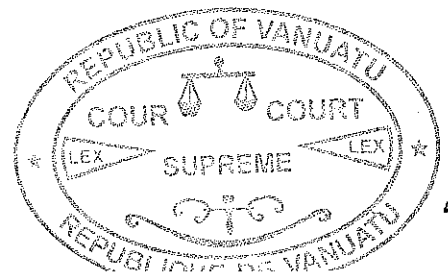
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**INTRODUCTION**

1. On the evening of the 2<sup>nd</sup> March 2007, Mr. Tara Kalmet took his motor vehicle ( a Toyota Hylux) to the Defendant's workshop to have four new tires fitted. The tires were fitted. Later that evening Mr. Kalmet was driving the Toyota. Mr. Karie was a passenger. Suddenly, the vehicle went out of control and off the road. Both men were injured.
2. Mr. Kalmet sued the defendant company for negligently fitting the four new tyres to his Toyota. They settled his claim for damages. Mr. Karie who suffered damage to his spleen in the accident now sues the defendant seeking damages for personal injury.



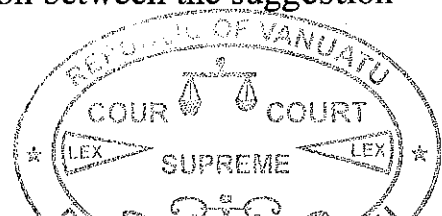
3. The defendant admits that it negligently fitted the tyres to the vehicle which resulted in the accident.
4. There are therefore two issues to be decided by the Court given liability is admitted. They are set out below:
  - (a) What is the quantum of damages to be awarded to the claimant?
  - (b) Should there be any discount for the damages by reason of contributory negligence by the claimant?
5. The allegations of contributing negligence are:
  - (a) The Claimant's injuries were in part contributed to by his failure to wear a seatbelt at the time of the accident.
  - (b) The Claimant knew that the driver of the vehicle Mr. Kalmet was under the influence of alcohol when driving the vehicle but agreed to be a passenger in the vehicle.
6. If I conclude there was contributory negligence then I must assess the reduction to be applied to damages that I award.
7. The Claimant seeks the following damages:
  - a) For a ruptured spleen, internal bleeding and severe pain, VT 2.000.000
  - b) For a spleen removal VT2.000.000
  - c) For a permanent scar due to the spleen removal VT 2.000.000
  - d) As a result of the injuries restricted activities including restricted ability to earn an income, reduced effectiveness of the immune system and susceptibility to disease VT 13.000.000



- e) The requirement to continue to use protective medication during his lifetime VT 5.000.000
  - f) Post traumatic stress VT 3.5 million vatu
  - g) Pain and suffering VT 3.000.000
  - h) Special damages including loss of income and the cost of medicine VT 150.000
8. The Defendants submit that proper award would be approximately VT 1.6 million less 30% contribution for the Claimant's negligence.

**BACKGROUNDS**

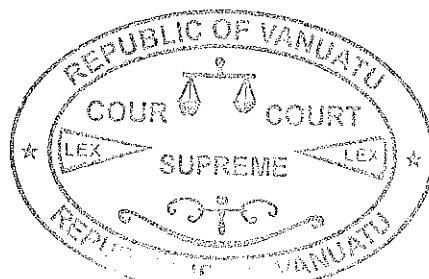
9. First I consider the relevant facts relating to the contributory negligence claims relating to the seat belt and the drivers intoxication. The Claimant disputes that the Toyota vehicle had seat belts fitted. I am satisfied on the evidence that there were seat belts in the Toyota . At the time of the accident this was a relatively new vehicle. It is highly likely that seat belts had been fitted. In his pleadings Mr. Karie did not deny that the vehicle had been fitted with seat belts. Evidence from Dr Dillon who completed a report about Mr. Karie's injuries were clear that in his interview with Mr. Karie, Mr. Karie accepted that he had not been wearing a seatbelt at the time of the accident. Mr. Karie did not then suggest that there was no seatbelt in the vehicle.
10. The second issue to be resolved arises from the suggestion that Mr. Karie knew that Mr. Kalmet was affected by alcohol when Mr. Karie got into Mr. Kalmet's car. There is evidence that Mr. Kalmet had drunk alcohol during the course of the day immediately before the accident. He may have consumed alcohol the day before the accident. The evidence suggested that over a period of about two and a half to 3 hours immediately prior to the accident Mr. Kalmet probably consumed 2 to 3 cans of beer.
11. This evidence together with the other evidence that over the previous day Mr. Kalmet had consumed some wine and beer does not convince me somehow that Mr. Karie contributed to the circumstances of the accident or to his injuries by negligently agreeing to be driven by Mr. Kalmet. More fundamentally there is no causal connection between the suggestion



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that Mr. Kalmet consumed alcohol and the accident itself. The evidence accepted here is that the accident was caused by the negligent failure of the Defendants to properly reattached the tyres of Mr. Kalmet's vehicle. There is no evidence that Mr. Kalmet's intoxication, if he has been intoxicated, contributed at all to the accident. I will return to the question of contributory negligence at the end of this judgment.

12. I return to the facts of the accident. After Mr. Kalmet's car left the road both men were injured. Mr. Karie was the first person on the scene after the accident. He assisted Mr. Kalmet and Mr. Karie from the car. They were eventually taken to hospital.
13. A comprehensive report has been provided by Dr. Dillon setting out the background circumstances of these events, the injuries suffered by Mr. Karie, the treatment undertaken and other information regarding Mr. Karie's prognosis.
14. After Mr. Karie was admitted for observation at the hospital an ultrasound check showed he had suffered a ruptured spleen. The following morning his spleen was removed. He spent four days recovering before being discharged from hospital.
15. Dr. Dillon noted that on a return visit to the hospital Mr. Karie still had significant soreness over his mid and lower back. Mr. Karie was taking pain relief approximately four times on average a week. Mr. Karie had had malaria approximately ten times previously. Because Mr. Karie lived in Vanuatu and his malaria infections the result of the removal of his spleen meant he would require drugs to guard against bacterial pain and malarial infections for his life. In addition Dr Dillon advised Mr. Karie to have comprehensive immunizations and maintain them.
16. Dr. Dillon considered that Mr. Karie's health could be regarded as being permanently impaired because of the lifelong risk of contracting a severe potentially lethal overwhelming infection. Dr Dillon said the calculated lifetime risk of serious infection for those who have had a splenectomy is 5% in a temperate climate. The risk is significantly greater in a tropical climate like Vanuatu.

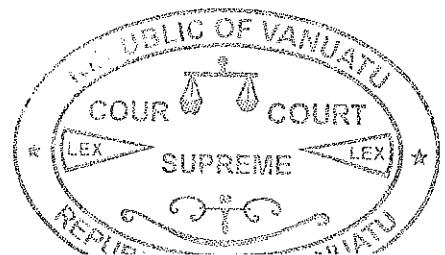


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17. Dr. Dillon noted that Mr. Karie's complaint of pains in his arms and legs was typical of the type of injury that Mr. Karie had received. He was an unrestrained occupant in a vehicle involved in an accident and had come into forcible contact with hard surfaces in the vehicle. Otherwise Dr Dillon said that Mr. Karie presented as a fit young man with no overt signs of permanent impairment. He had an abdominal scar as the only sign of his surgical treatment.
18. In addition to the increased lifetime risk of serious infection, Dr Dillon considered that there were two other potential additional costs faced by Mr. Karie. Firstly he would incur the cost of appropriate medication for immunization and antibiotics for protective treatment and for the treatment of specific infections. In addition Dr. Dillon considered there should be provision for the cost of hospital admission for the treatment of at least one episode of severe infection during Mr. Karie's lifetime.

#### CLAIMANT'S CLAIM FOR DAMAGES

19. I turn now therefore to Mr. Karie's claim for damages. In the absence of specific guidance from the Vanuatu Court of Appeal as to the assessment of general damages in personal injury claims I adopt the approach of former Chief Justice D'Imacourt in *Solzer v. Garae* [1989 – 1994] 2 VANLR 528. This approach has more recently been adopted by Tuohy J in a number of cases when he has had to assess personal injury general damages.
20. The United Kingdom Judicial Board of Studies Guidelines for Assessment of General Damages in personal injury cases ( 9<sup>th</sup> edition 2008) provides, with respect to a loss of spleen, where there is risk to damage to the immune system a range of £13.250 to £16750 in damages. Where the immune system danger is not present, the general damages appropriately paid is in a region of £2.750 to £5.500.
21. Given the evidence of Dr Dillon and Mr. Karie's evidence about his previous malarial attacks, there is no doubt that he is vulnerable to internal infections and disorders relating to the immune system. He would therefore, based on the United Kingdom Guidelines, be in the highest of the damages range namely £16,750.



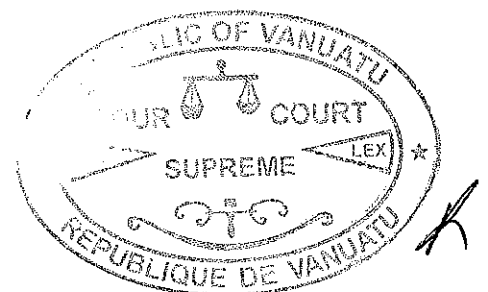
22. At the time these proceedings were heard in the Supreme Court the appropriate conversion rate from United Kingdom Pounds to Vatu was approximately 170. The sum of £16.750 converts therefore to VT2.847.500. Applying the 50% reduction in the Solzer case the damages would be VT1.4 Million.
23. In assessing the amount for general damages I also need to take into account not only the operation itself but the pain and suffering and the loss of amenities of life both past and into the future suffered by the claimant. Here as I have noted Mr. Karie has particular vulnerabilities given his past malarial infections and the significant possibilities of a further very serious future infection. This is especially important in tropical countries. I assess the general damages at VT 2.000.000.

#### **PAST AND FUTURE ASSISTANCE**

24. Dr. Dillon has made it clear that there is likelihood of at least one hospital admission for serious infection during the course of Mr. Karie's life arising from the removal of his spleen and his vulnerability to infection. This is properly the subject of a separate award of specific damages. It is difficult to estimate an amount of specific damages which will reimburse Mr. Karie for the cost of his hospital admission. A number of the variables are unknown.
25. I set this amount however at VT 200.000.
26. In addition I need to assess Mr. Karie's future pharmaceutical needs. Here they include both regular pain killers as well as protective antibiotics. I assess this at VT 100.000.

#### **LOSS OF PAST INCOME**

27. It is common ground that Mr. Karie has lost income as a result of hospital visits after the date of these proceedings. He is entitled to reimbursement of VT 37.348 as a special damages award for this loss of income.



### LOSS OF FUTURE EARNING CAPACITY

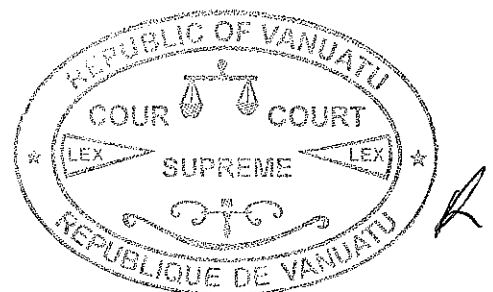
28. Prior to trial Mr. Karie had been working at his father's chicken farm. Subsequently he went to work for Air Vanuatu as a check-in operator. He worked there for some years but eventually resigned. He said in evidence he resigned not because of his physical condition but because he found he could not support his family on the income he received.
29. Mr. Karie however has identified a number of days sick leave in his special damages claim. His injuries were therefore affecting his work. However I cannot say that there is adequate proof that Mr. Karie will suffer loss of future earning capacity. I therefore make no order under this head of damages.

### OTHER CLAIMS

30. Mr. Karie included a large number of additional damages claims in his statement of claim. Many of them were in fact claims for the same damage. Many were not supported by any evidence. None were supported by any comparative analysis of similar cases in Vanuatu or in similar jurisdictions. Most were in fact covered by the general damages award.
31. In those circumstances I reject the other claims for damages by Mr. Karrie.

### SUMMARY OF DAMAGES

32. Mr. Karie is therefore entitled to the following damages from the defendant for the personal injury suffered by the negligence of the defendant.
- (a) General Damages of VT 2 million
  - (b) Special damages
    - (i) Future hospital admission costs VT 200,000
    - (ii) Pharmaceutical needs VT 100,000
    - (iii) Reimbursement of last wages VT 37 348



The total special damages are Vt337,348. The total damages are Vt2,337,348.

**CONTRIBUTORY NEGLIGENCE**

33. I accept Mr. Karie's failure to wear a seat belt contributed to his injuries. I am not satisfied Mr. Karie's knowledge of his drivers state of intoxication contributed to his loss. It is difficult to assess what injuries may have been prevented if Mr. Karie was wearing a seat belt. But it is reasonable to conclude that his impact injuries in the accident are likely to have been less if he had been wearing a seat belt.

I reduce the claimant's claim by 20% to reflect Mr. Karie's contributory negligence as a result of his failure to wear his seat belt. I am satisfied there was no other contributory negligence.

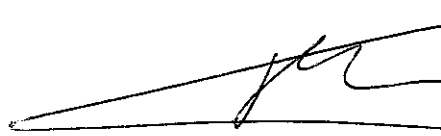
34. The total damages of VT 2,337 348 will therefore be reduced by VT 467 468 to VT 1,869 880.

**COSTS**

The claimant is entitled to costs against the defendant reduced to reflect successful contributory negligence claim. The claimant will file a memorandum on costs within 14 days from the date of this judgment and the defendant will respond within a further 14 days.

**DATED at Port Vila this 10<sup>th</sup> day of December 2014**

**BY THE COURT**

  
**Vincent LUNABEK**  
**Chief Justice**

