

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

Civil Case No. 15/71

BETWEEN: JOHN TARIA
Claimant

AND: JOHN KENNEDY
Defendant

Coram: Mr Justice Oliver A. Saksak

Counsel: Roger Tevi for Claimant
No appearance by Defendant (Robin Tom Kapapa)

Date: 6th May 2016

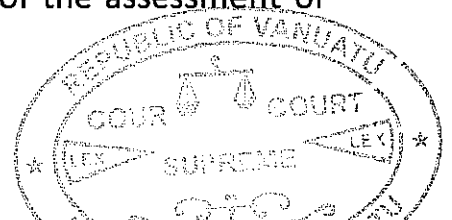
JUDGMENT

Introduction

1. This is a reserved judgment as to damages.
2. On 8th September 2015 the Court entered Judgment on liability against the defendant for not having delivered a defence and/or a response to the claimant's claims filed on 21st April 2015 for –
 - a) Damages to be assessed
 - b) Filing and services fees – VT 25,000, and
 - c) Costs.

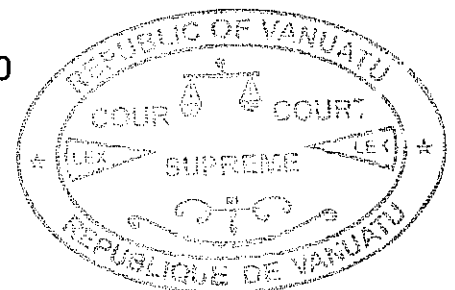
Background

3. The Court issued directions on the same date requiring the claimant to file submissions and sworn statements in support of the assessment of

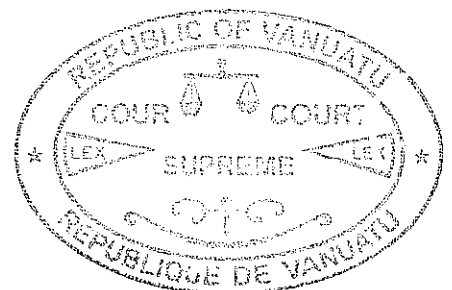


damages. The Claimant filed a sworn statement by Elvina Baniala on 17th September 2015. He filed a further sworn statement on 7th October 2015 together with his written submissions.

4. The defendant was served but despite service he never caused any appearance except on 29th June 2015 when Robin Kapapa appeared on the defendant's behalf. Clear directions were issued by the court that day but it is apparent the defendant never complied with those directions that required him to file and serve a defence and a counter-claim within 7 days (from 29th June 2015).
5. The defendant's failure and/or omission has resulted in the Court entering Judgment on liability against the defendant on 8 September, 2015. The Court required submissions from the Claimant to be filed within 14 days by 23 September, 2015, with relevant evidence in support. On 24 September 2015 the Claimant filed a sworn statement by Jeffery Tolang in support of the assessment of damages. On 10 October 2015 the claimant filed a further sworn statement. On 7 October 2015 the claimant filed his closing submissions. Based on those submissions the Claimant now claims the total sum of VT44,800,000 in common law damages made up as follows:-
 - i. Punitive damages – VT 7,500,000
 - ii. Special damages – VT 5,000,000
 - iii. General damages:-
 - Loss of future earnings – VT 15,800,000
 - Pain & suffering – VT4,500,000
 - Loss of amenities of life – VT 12,000,000



6. On the submissions of the Claimant the Court formulated its judgment and issued a notice of delivery of judgment on 18 March 2016 returnable on 21 March 2016 at 10 o'clock a.m.
7. It was on that date that Mr Kapapa attended and informed the court as to the defendant's instruction to file an application to seek orders setting aside the default judgment. Mr Kapapa informed the Court that liability was not challenged but only the quantum of damages claimed.
8. Mr Tevi objected strenuously to the request for an adjournment on grounds that the defendant had failed to comply with the Court's directions to file and serve a defence and sworn statements issued on 29 June 2015.
9. With some degree of hesitation I ultimately allowed an adjournment and ordered that the defendant pay the claimant's wasted costs of VT10,000. Mr Kapapa accepted the proposition of the Court by undertaking to pay VT10,000 within 7 days, and to file and serve written submissions within 14 days from that date.
10. Under those circumstances the Court with held its original judgment pending the defendant filing his written submissions which he did on 6th April 2016. Together with his written submissions and to the Court's surprise the defendant also filed a defence and his own sworn statement. No application to set aside the default judgment was filed by the defendant as indicated by Counsel. So much for the background circumstances.



Facts

11. The Claimant worked for the defendant as a foreman. The defendant operated a Construction and Joinery Company known as 3JS. On 19th December 2014 the Claimant was operating three huge machines at his work place. He worked alone under heavy pressure from the defendant that he had to complete all orders before Christmas holidays in 2014. While operating one machine he accidentally injured his right hand and lost his three fingers as a result. He had worked for a period of 1 year and 5 months. He suffered a lot of pain as a result.

Evidence

12. The claimant's evidence is that he was earning a monthly salary of VT 30,000. He lost his job and his salaries. He worked from 7:30am to 4:30pm on Mondays to Fridays. He lost his hobbies such as playing volleyball, playing the Guitar and Keyboard. In previous years he had been attending intensive youth programs in Fiji and is unable to continue with this program after the accident. He has lost the use of his computer or a laptop. Back on his Island of Pentecost he was a good fisherman earning incomes from fishing but he is unable to do this now. In 2012 he won a scholarship to Indonesia to study Arts and Culture for a period of 4 months but he has lost that opportunity as he now uses only 2 fingers of his right hand. He suffered a great deal as a result of the accident. He lost consciousness on two separate occasions at the hospital causing him to fall. He is a 30 year old person with a life expectancy of 60 years. He has lost 90% of the use of his right hand.



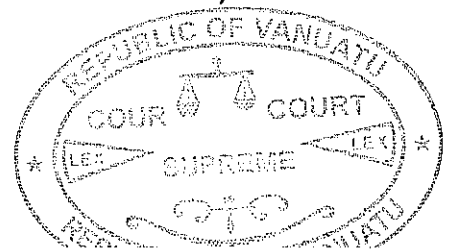
13. The claimant's girlfriend Elvina Baniala filed sworn evidence on 17 September 2015 to confirm the injuries to the claimant's fingers and the pain and suffering he went through and the difficulties the claimant faced at the time and the claimant's inability to use his right-hand to full capacity.

14. Jeffery Tolang a close neighbour of the claimant filed sworn evidence on 24 September 2015 in support of the claimant's injuries immediately after his discharge from hospital. He confirmed the very limited use of his right hand especially when holding or using a knife, the knife would slip off the claimant's grip with only 2 fingers. The witness said that as a skilful artist in joinery the claimant had basically ended his career with his injuries to his right hand and fingers.

Submissions

15. The claimant relies on the case authorities of Tchivi .v. Lapi [2014] VUSC 188, Obed .v. Kalo [2008] VUSC 47, Shem .v. North Efate Timber Ltd [2008] VUSC 48 and Garu .v. Leong [2013] VUSC 222 in support of his claims for damages to claim the sum of VT 44,800,000 from the defendant. This amount is however reduced to VT 24,000,000 in the claimant's submissions filed in reply to the defendant's submissions dated 15 April 2016. Counsel submitted in reply that the belated defence of the defendant should be rejected.

16. The defendant denied that he was negligent but admits liability strictly and submitted that the claimant was only entitled to VT 500,000 for



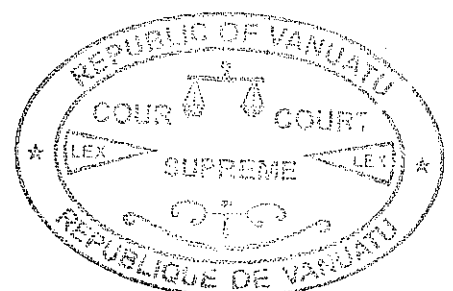
punitive damages (VT 200,000), special damages (VT 200,000) and general damages (VT 1,000) and no more. He asserted in his evidence by sworn statement dated 6 April 2016 that he paid all the claimant's hospital costs including all wages for December 2014.

Discussions

17. I consider first the belated defence of the defendant. I accept the claimant's argument that the defence should be rejected. He admitted liability and that is the end of that issue. To then turn around especially after default judgment had been entered and the Court being ready to deliver its judgment, the defendant then filed a defence, it was a gross abuse of the Court process. The Court therefore declines to take account of that defence and dismisses it appropriately.

18. Second, the defendant's submissions that the claimant is only entitled to VT 500,000 as damages for this injuries. In comparison to the case authorities cited, this figure is far too low and is therefore rejected by the Court.

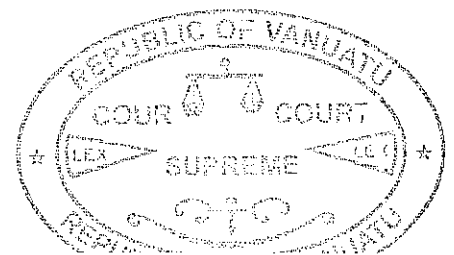
19. Third, the Court considers the claimant's claim for special damages. The claimant's evidence shows he earned VT 30,000 per month. And he claims for 10 months he has been without salaries. That is the period from January to October 2015. The claimant is entitled to his salary for that period. The case of Kalo Obed .v. Kalo gives support to this award.



20. Fourth, the Claimant claims for VT 7,000,000 as punitive damages. Clearly there is evidence of negligence by the defendant when he lacked the necessary man power or resources to work 3 huge machines, and lack of provision of protective gear and lack of sufficient management and control of work. Further he displayed a lack of responsibility when he failed to visit his employee at the hospital during his time of hospitalisation. However it is not necessary for the Court to award separate damages for this head of claim. This would be sufficiently covered or included in the head of damages for pain and suffering.

21. Fifth, there is the claim for loss of future earnings in the sum of VT 15,800,000. This claimant is 30 years old. There is no evidence that he was formally terminated from employment at any time after the accident. But for the accident, he would have continued in gainful employment until retirement. His retiring age under the Employment Act is 55 years. On that basis he has a balance of 25 years. His monthly income was VT 30,000. Multiplying this amount by 25 years, his loss of future earnings would be VT 9,000,000. I consider that the claimant is entitled to 25% of this amount as fair and reasonable amount and accordingly award VT 2,250,000 to the claimant as his loss of future earnings.

22. Fourth, there is a claim for pain and suffering for the sum of VT 4,500,000. The claimant relied on Tchivi .v. Lapi [2014] VUSC 188 and on Garu .v. Leong [2013] VUSC 222. Tchivi's case was a domestic violence case. The victim lost the use of both right and left hand. There



was no separate award for pain and suffering. She was awarded only general damages in the sum of VT 9,350,000, and special damages. Garu's case was a collision whereby a car crashed into her workplace causing her serious injuries on her right lower leg for which she was hospitalised for 6 weeks. By comparison the claimant in this case passed out twice on separate occasions in hospital over the pains of his lost and injured fingers. During his hospitalisation the defendant visited him only once, a clear indication that the defendant lacked any sense of care and responsibility while he benefitted from his skills being the only employee handling his three huge machines. In my opinion the sum of VT 3,000,000 must be accepted for pain and suffering to include the punitive aspect of the defendant for his neglect of duty and care.

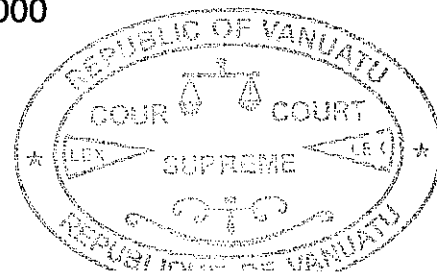
23. Finally the claimant's claims for loss of amenities of life at VT 12,000,000. His unchallenged evidence is that he cannot now play volleyball, go fishing, plays the guitar or keyboards, paint as an artist, and is restricted on the use of his computer or laptop. He has lost the use of 90% of his right hand. And he is a right-handed person. Whilst VT 12,000,000 is on the high side, the figure of VT 800,000 would be a fair and reasonable amount of damages for a single person of 30 years old. Accordingly the sum of VT 800,000 is awarded as damages for loss of amenities of life.

Summary

24. In summary the Court awards the following damages to the claimant –

(a) Special damages

VT 300,000



(b) General Damages :-

(i)	Loss of future earnings	VT 2,250,000
(ii)	Pain and Suffering	VT 3,000,000
(iii)	Loss of amenities of life	VT 800,000
	SUB TOTAL	VT 6,050,000
(iv)	Interests at 5% per annum +	<u>VT 277,000</u>
	TOTAL	<u>VT 6,327,000</u>

Conclusion


25. The claimant is entitled to judgment as to total damages in the sum of VT 6,327,000 to be recovered against the defendant.

26. The claimant is entitled to interests of 5% per annum on VT 5,550,000 from 19 December 2014 to the date of judgment in the sum of VT 277,500.

27. The claimant is entitled to his costs of and incidental to the action on the standard basis as agreed or be taxed.

DATED at Port Vila this 6th day of May 2016

BY THE COURT


OLIVER A. SAKSAK

Judge.

