

BETWEEN: REDDY & ROSSY HUNGTALI
Claimants

AND: EDWIN BERRY KALO
First Defendant

AND: PAKO BERRY KALO
Second Defendant

AND: WILLIE KALO
Third Defendant

Date of Hearing:

4th day of February, 2024

Before:

Justice W. K. Hastings

Distribution:

Mr. W. Kapalu for the Claimants

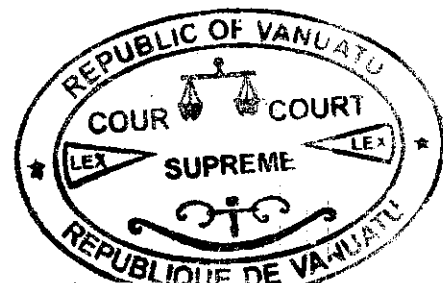
**Ms. M. Manuariki for the First, Second and Third Defendants- via
teleconference**

DECISION

1. This is an application to strike out a claim for damages brought under the Fatal Accidents Act 1976 (UK). By virtue of Article 95 of the Vanuatu Constitution, this legislation has effect in Vanuatu.
2. The Claimants oppose the application.

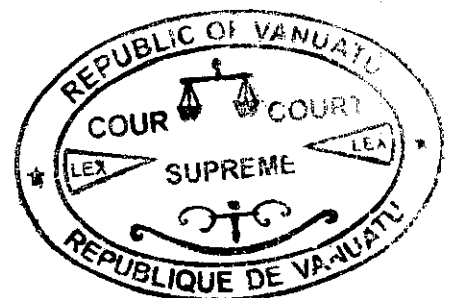
Background

3. Tommy Hungtali bled to death from a shotgun wound to his leg on the night of 29 October 2022.
4. The person who killed Tommy Hungtali was Edwin Berry Kalo. He pleaded guilty to intentional homicide contrary to s 106(1)(a) of the Penal Code and was sentenced to 6 ½ years' imprisonment on 24 February 2023.
5. The claim in these proceedings alleges that Tommy Hungtali, Edwin Kalo (the First Defendant), Pako Kalo (the Second Defendant) and Tommy Warek were drinking a yeast-based alcoholic drink at



Willie Kalo's (the Third Defendant's) farm in Santo. Pako Kalo left the farm and went to Luganville. The drinking at the farm continued. Edwin Kalo took issue with Tommy Hungtali's behaviour and at 9pm retrieved a shotgun owned by Willie Kalo from the farmhouse. He shot Tommy Hungtali in the leg.

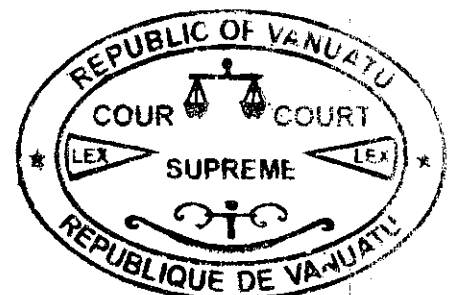
6. The claim alleges Edwin Kalo did not treat the injury (this is disputed) and instead took Tommy Warek with him to search for cellphone coverage, leaving Tommy Hungtali bleeding on the grass where he was shot. At 10pm, the claim alleges that Edwin Kalo called a paramedic and asked for an ambulance. When he was told it would cost VT 12,000, the claim alleges that Edwin Kalo declined the ambulance because it was too expensive.
7. The claim alleges that Edwin Kalo and Tommy Warek phoned Pako Kalo to tell him what happened. Pako Kalo arrived back at the farmhouse at 2am on 30 October 2022 with his 3 sisters and a police officer. They took Tommy Hungtali by truck to Luganville Hospital where he was pronounced dead.
8. The Claimants seek an unspecified amount in damages against the Defendants on a number of grounds. These grounds include leaving the deceased bleeding on the grass for an hour while they looked for cellphone reception; refusing an ambulance because it was too expensive; failing to notify the Claimants First that their son was injured and then that he was dead; the pain and suffering of the deceased between the time he was shot and the time he died; funeral costs; the loss of expectation of life and the loss of reasonable prospect of contribution; and the mental anguish suffered by the Claimants.
9. Each of the Defendants has filed a defence. The First Defendant states that the deceased was becoming aggressive and damaging dishes as a result of having become intoxicated on a yeast-based home brew drink. He denies shooting directly at the deceased, but admits shooting at the ground close to the deceased. He states in his defence that "*the killing was not intentional.*" The sentencing judge queried whether the First Defendant was actually defending the charge, but his counsel said her instructions were clear that he wished to plead guilty to the charge as laid. The First Defendant takes issue with the claim that he did not treat the deceased's injuries before searching for cellphone coverage. There is nothing else in the defence that directly addresses the issue of liability and damages, except a statement that the Claimants are not entitled to the relief sought.
10. The Second Defendant in his defence states that he has no knowledge of the events leading up to the shooting because he was not there. He asks that the claim be dismissed as it reveals no cause of action.
11. The Third Defendant takes issue with the allegation that, knowing the deceased was dead, he waited until 8am before he sent someone to tell the deceased's parents. He also asks that the claim be dismissed because it reveals no cause of action.



12. The Defendants filed an amended application to strike out the claim on 1 March 2024 on the grounds that it does not disclose a cause of action, it is not properly pleaded, the Claimants have not provided evidence that they are the deceased's parents.

Discussion

13. I will deal with the last point first, that there is no evidence that the Claimants are Tommy Hungtali's parents. Mr Kapalu filed a memorandum on 8 March 2024 on which he said he is waiting on his clients to send him Tommy Hungtali's birth certificate. He also said Tommy Hungtali's death certificate annexed to the sworn statement of Reddy Hungtali filed on 29 September 2023 shows his surname to be the same as the Claimants' surname. Reddy Hungtali deposes in that sworn statement that he is Tommy Hungtali's father. Under r.11.7(1) of the Civil Procedure Rules 2002, that sworn statement is evidence in this proceeding and the deponent may be cross-examined on its contents at trial. I will proceed on the basis that that evidence is sufficient for this strike-out application, and that the Claimants are Tommy Hungtali's parents.
14. Under s 2(2)(b) of the Fatal Accidents Act 1976 (UK), any of the deceased's dependants may bring an action under that Act. "*Dependant*" is defined in s 1(3)(b) to include the deceased's parents.
15. Striking out any statement of a case is a "*draconian remedy*" (*Asiansky Television plc v Bayer Rosen* [2001] EWCA Civ 1792). Although striking out a claim is not inherently contrary to the Constitution's guarantee of protection of the law, and equal treatment under the law or administrative action, in Article 5, the Court must nevertheless be cautious to ensure its exercise of discretion to strike out a claim does not violate those guarantees. A claim will not be suitable for striking out if it raises a serious factual issue which can only be properly determined by hearing oral evidence (*Bridgeman v McAlpine-Brown* [2000] LTL January 19, CA). Nor should a claim be struck out unless the Court is certain that the claim is bound to fail (*Hughes v Colin Richards & Co* [2004 EWCA Civ 266]). In short, if a pleading raises a serious contested issue, then it should not be struck out and the issue should be determined after trial.
16. I turn now to whether or not the claim discloses a cause of action that requires trial of a serious factual issue.
17. The claim is brought under the Fatal Accidents Act 1976 (UK). The Act is one of a series of Acts dating back to 1846 which sought to remedy two common law principles. The first is *actio personalis moritur cum personae* – a personal action dies with the person. The second is that the killing of human being is not a ground for an action for damages. As a result of these principles, when a person died either instantly or as a result of the wrongful act or omission of another, the wrongdoer could not be held liable to the deceased's estate for damages he sustained before death, for damages to his estate due to the loss of his life, or for damages to third parties (in this case the deceased's parents) who had an interest in his life for damages for their losses resulting from his death. A good summary of the origin and development of these common law principles can be found in T A Smedley, "Wrongful death - bases of the common law rules" 13 *Vanderbilt Law Review* 605.



18. The Fatal Accidents Act 1976 (UK) abrogates these common law principles by creating a statutory right of suit. This claim is brought under s 1 which provides as follows:

1. (1) If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.

(2) Every such action shall be for the benefit of the dependants of the person ("the deceased ") whose death has been so caused.

19. There can be little doubt that Tommy Hungtali's death was caused by a wrongful act, that act being Edwin Kalo's action in pointing and firing a loaded shotgun at the deceased. Whether the deceased would have been entitled as the person injured to maintain an action and recover damages against each of the defendants for their actions which contributed to the deceased's injuries and death are triable issues by virtue of s 1 of the Fatal Accidents Act 1976 (UK), as is the amount of damages available which, by virtue of s 3(3), include funeral expenses.

20. The claim discloses causes of action that require a trial of serious factual issues.

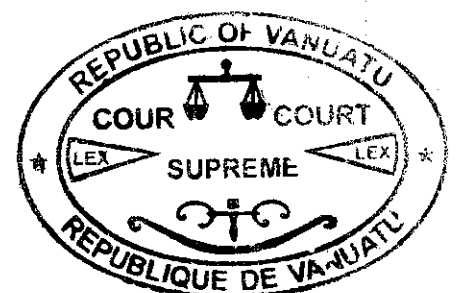
21. I turn now to the pleadings. I agree with Ms Manuariki that the pleadings are not perfect. It has been the practice in Vanuatu that claims under the Fatal Accidents Act 1976 (UK) are accompanied with claims under the Law Reform (Miscellaneous Provisions) Act 1934 (UK). That Act is also in effect in Vanuatu by virtue of Article 95 of the Constitution. Section 1(1) of the latter Act provides:

on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate.

22. Section 1(5) of the Law Reform (Miscellaneous Provisions) Act 1934 (UK) states:

The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts . . .

23. The intention of the Law Reform (Miscellaneous Provisions) Act 1934 (UK) then is to widen the ambit of the Fatal Accidents Acts, although s 1(2)(a) the Law Reform (Miscellaneous Provisions) Act 1934 (UK) expressly states that exemplary damages are not recoverable.



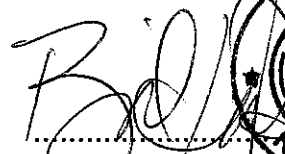
24. By way of example, Justice Geoghegan awarded damages for the loss of a reasonable prospect of the deceased contributing to the family for a period of years as well funeral expenses under the Fatal Accidents Act 1976 (UK), and damages for pain and suffering of the deceased between the time of his injury and the time of his death, and for loss of expectation of the deceased's life, under the Law Reform (Miscellaneous Provisions) Act 1934 (UK), in *Wilbur v Wotu* [2017] VUSC 171. See also similar awards under both statutes in *Esley v Toara* [2000] VUSC 78. I note as well, that notwithstanding s 1(2)(a) of the Law Reform (Miscellaneous Provisions) Act 1934 (UK), exemplary damages were awarded in *Wilbur*, and by Justice Weir in *Iokhauto v South Island Shipping Cooperative Limited* [2011] VUSC 343.
25. The claim discloses a cause of action, but it can be better pleaded for consistency with causes of action pleaded in earlier cases. The Claimants have liberty to seek leave to further amend the amended claim if they wish, to clarify the statutory provisions on which they rely, the basis of the damages they seek, and the quantum of damages they seek. The Defendants have liberty to seek, if they wish, leave to amend their pleadings in response.

Result

26. The application to strike out the claim is declined. This matter will proceed to trial.
27. Costs in the cause.
28. The next conference will be on **7 June 2024 at 11.30am**.

DATED at Port Vila this 30th day of May, 2024

BY THE COURT


Justice W. K. Hastings

