IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 19/967 CoA/CIVA

BETWEEN: **Malachai Tarave Junior**
Appellant

AND: **Government of the Republic of Vanuatu**
Respondent

Date of Hearing:	15 July 2019
Before:	Justice J. Mansfield
	Justice O. Saksak
	Justice D. Aru
	Justice G.A. Andrée Wiltens
	Justice S. D. Felix
In Attendance:	Mr E. Molbaleh for the Appellant
	Ms A. Bani for the Respondent
Date of Decision:	19 July 2019

JUDGMENT

Introduction

1. This appeal concerns the amount of damages awarded to Malachai Tarave Junior (the appellant) in his claim against the Government of the Republic of Vanuatu (the State) for the negligent driving of a police officer on 22 May 2015 when a car ran over his right foot. The damages awarded were VT 1, 500,000 made up of past and future pain and suffering VT 500,000, and loss of amenities and enjoyment of life VT 1,000,000 plus interest at 5% from 18 August 2017 to judgment, and costs. He says the amount awarded to him for damages was not enough.

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL

2. There is also a cross-appeal by the State. It says that the incident in which the appellant was injured was not caused by the driving of a police officer, as was alleged, but apparently by some other driver. If that is correct, the State says that the judgment against it should be set aside and the claim dismissed.

The Cross-Appeal

3. There is no dispute that at about 9 pm on Friday 22 May 2015, outside the All in One (AIO) shop building at Tebakor main road the appellant sustained a crush injury to the top part of his right foot when a car ran over his foot.

4. The AIO store is situated at Tebakor next to the Evangel Temple Assemblies of God Church. There is a narrow road or passage way through which people living in the area behind the AIO shop walk and drive to and from the front of the shop and the Tebakor main road. There is a fence that stands between the narrow road and the yard next door to it.

5. The appellant's evidence was that he was walking from his house to the AIO shop when a police truck came very fast at a sharp corner of the building on that narrow road and ran over his right foot. His statement read:

> *"I recognise that it was a Police truck because it had cage on it and I recognised the normal design on the Police Truck and I see that there were Police Officers in that truck as well driven by another Police Officer who wore Police Uniform and of course Police Officers in the truck wore Police Uniform too".*

6. The State did not dispute that the appellant had been the victim of an accident on that evening. Its case was that it was not a police vehicle which caused the harm. There were two additional witnesses called by the appellant to support his version of events, in particular identifying the vehicle which ran over his foot as being a police truck. The State called a number of witnesses to identify the call outs for police in that area on that evening, the drivers and others in police vehicles who had responded to those call outs, and other police officers who might have had some knowledge of such an incident.

7. The trial Judge recorded that evidence accurately and summarised at [30] and [31] in the following terms:-

> *"From the foregoing description of the witnesses evidence the following picture emerges of the claimant's case:*

- *The claimant's accident occurred at about 9pm on the night of 22 May 2015;*
- *A twin cab police truck with a cage at the rear ran over the claimant's right foot in the narrow lane beside the AIO store building;*
- *2 eye witnesses saw the accident with the help of the police vehicle's headlights and light from an electric lamp-post light across the street;*
- *The police truck collided with a fence post after running over the claimant's foot;*
- *There were uniformed police officers in the police truck at the time, besides the driver;*

REPUBLIC OF VANUATU COURT OF APPEAL COUR

- *The claimant and William Wily gave statements to the police about the incident;*
- *An official, stamped police request for medical report Form was raised in respect of the claimant, on 26 May 2015;*
- *During the evening of 22 May 2015 and the early morning of 23 May 2015 there were several police vehicle patrols in the Tebakor area within the vicinity where the AIO store building is situated.*

In similar vein the defence case may be summarized as follows:

- *On 22 May 2015 at 8.50pm Constable Sylvania Tabi received a report of Disorderly behavior at Tebakor area which he entered into the Occurrence Book as **Report No. 3212**;*

- *On 22 May 2015 at 2057hrs (8.57pm) Constable Rodney Taivakalo responded to **Report No. 3212** at the jamblong tree on the road between Cellovilla and the Apostolic Church leading to Malapoa College at Tebakor area;*

- *On 22 May 2015 at 2346hrs (11.46pm) Constable Patrick Bangsa received a **Report No. 3212** from Mahit Willie who was brought to the Police Station in a police patrol truck after he was assaulted on the Tebakor main road. The complainant was advised to "... kam lodgem wan assault report after medical check-up". Constable Steve Tete confirmed seeing Mahit Willie being assaulted under the Christmas tree at Manples, Tebakor while he was on vehicle patrol and bringing him to the Police Station to make his report;*

- *On 23 May 2015 at 0125hrs (1.25am) Constable Patrick Bangsa received a call from the security at AIO store that a fight was in progress in front of the store and he sought police assistance. Constable Bangsa entered the details in **Report No. 3222** in the Occurrence Book and the TRG patrol was informed.*

- *Two (2) "TRG" patrol vehicles were dispatched to the scene of **Report No. 3222** in front of the AIO store at Tebakor area. On arrival, the suspects escaped down a side alley beside the AIO store building and disappeared into the dark at the back of the building;*

- *Constable Terry Malapa drove a Hyundai police bus carrying other police officers to AIO store and Constable Steve Tete alone, drove a police twin cab truck with a cage at the rear. Neither driver drove his vehicle into the narrow lane or alley beside the AIO store building down which the suspects escaped."*

8. We note that the reference to the police call out at 11:46 pm should be (as it clearly is from the recital of the evidence) record number 3218.

9. The primary judge properly identified that the disputed facts upon which he had to make a finding were whether the vehicle which ran over the appellant's foot was a twin cab police truck with a cage at the back, and with other uniformed police officers seen inside at that time or whether that was not proven on the balance of probabilities.

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL

10. Understandably, the trial Judge then discounted the possibility that the police vehicles which attended report number 3222 at about 1:25 am in the morning could have been involved in the incident that the appellant reported partly because of the time and partly because of the nature of the vehicles then involved. Similarly, the trial Judge discounted the possibility that the police vehicles involved in responding to the occurrence which is the subject of report number 3218 could also be excluded.

11. The primary Judge then made a series of specific findings about the police vehicle that responded to incident number 3212. It is important to record that findings specifically:-

> *"44. Indeed assuming the claimant's timing is correct (**ie.** 9 – 10pm) the only police vehicle that could possibly have run over his foot was the vehicle driven by **Constable Rodney Taivakalo** who confirmed driving a "police cage truck" registration No. 1301 accompanied by 2 other police officers to attend. **Report No. 3212** which was received at 8.50pm from Daisy Kalo (who was not called as a witness) complaining about drunken men making excessive noise and breaking bottles on the road at Tebakor."*

12. He noted that that incident occurred on a different road and some different distance on the AIO store. He noted that the driver of that vehicle Constable Taivakolo twice denied going to the AIO store at Tebakor while attending to that incident, and had confirmed that a dirt road which was followed in pursuit of the suspect involved in that incident *"....went up to the other side of Malapoa Estate"*, but acknowledged that he was not aware whether that road ultimately ended up at the AIO store.

13. The trial Judge then made some specific findings on credit. He had no hesitation in accepting the evidence of Constable Taivakolo. He accepted the evidence of the police officers about the recording of events in the police occurrence book and its reliability. He accepts that the evidence of officers who made recordings in the occurrence book that there is no record of a report or complaint from the appellant or on his behalf that evening.

14. The trial Judge then addressed whether, in the face of his findings, the appellant had proved his claim. He referred to the evidence of the appellant and his two eye witnesses. Notwithstanding, some minor differences and in consistencies in their evidence, he found the appellant's case proved on the balance of probabilities. He said:-

> *"[52] I say that because it was never seriously suggested that the claimant and his eye witnesses, who come from an 'anti-police' area, could be or were mistaken or unfamiliar with the sight of a police vehicle or were lying or untruthful in their description of what they saw happen to the claimant's foot on the night..."* The trial Judge also accepted that the eye witnesses evidence is consistent with and confirmed as to the cause and timing of the event.

15. Consequently, the trial Judge entered judgment against the State for damages which he later assessed.

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL

16. It is difficult to reconcile the findings about the evidence called by the State, in particular of Constable Taivakolo, with the conclusion which was reached. It does appear as if the focus of the trial Judge was, at least in part, upon whether there had been an incident in which the appellant suffered injury by his foot being ran over that night, rather than the nature of the vehicle which caused the damage. However, that was specifically the focus of the trial Judge as apparent from [52] of the reasons for judgment quoted above.

17. It should be noted, that it was apparent through-out the case that the case of the State was that it was not a police vehicle as described which could have caused his injuries.

18. Also, in [44] of the reasons, also quoted above, the trial Judge has made the finding that the only police vehicle that could possibly have run over the appellant's foot was that driven by Constable Taivakolo. Constable Taivakolo specifically gave evidence that he did not drive near the AIO store at Tebakor that evening when attending to that incident, and that evidence was expressly accepted by the trial Judge. Those two matters are confirmed also by the trial Judge's acceptance of the reliability and comprehensiveness of the records of the occurrence book, so as to exclude other possible reported incidents leading to other police vehicles being in the vicinity at the time of the accident.

19. That left the trial judge in something of a quandary. He accepted as reliable the evidence of all the witnesses, including the appellant and the two eye-witnesses that it was a police vehicle which ran over the appellant's foot.

20. Counsel for the respondent submitted those findings could not stand together, so the cross-appeal must be allowed.

21. However, it is implicit in the position taken by the respondent that all incidents that evening were reported. The probable, and available, explanation for the trial judge's conclusion is that the incident in which the appellant was injured was not a reported incident but happened in the course of police vehicles routinely patrolling the area. The appellant and his witnesses described the police vehicle involved. It matched the description of at least one of the police vehicles on patrol that evening. In addition, the fact of the police being aware of the incident in which the appellant was injured is shown by an official Request for Medical Report Form of the Vanuatu Police dated 26 May 2015 to the Vila Central Hospital saying the appellant was alleged to have been run over by a vehicle. As the trial judge noted at [12], it is not explained how that form came to be filled in, or how the police officer who filled it in came to know of the injury to the appellant. There was no cross-examination of the appellant or his witnesses about that, or of their version of events which might have suggested to the trial judge that this version of the incident, especially that the identification of the vehicle as a police vehicle, was not correct.

22. In those circumstances, we are not persuaded that the findings of the trial judge referred to at [14] and [15] above are not correct.

23. The cross-appeal therefore is dismissed.

REPUBLIC OF VANUATU
COURT OF APPEAL
COUR D'APPEL

Quantum of Damages

24. At the time of the incident, the appellant was an 18 year old healthy and active young man. He was attending Year 10 at school, and apparently progressing satisfactorily.

25. The trial Judge accepted that the appellant experienced severe crippling pain on his right foot when it was run over and badly injured. He was taken to the VCH, where he underwent an operation including a skin craft to repair the damage to his right foot. Inevitably, he experienced considerable pain. He had to use a wheel chair to move around for a time and after discharge from the hospital he continued to experience pain and needed a walking stick for support until about the end of 2015 (a period of about 7 months).

26. He has a permanently scarred and disfigured right foot.

27. By about mid-July 2015 his wound had healed but he had no active movements in his right big toe although passive movements could be generated without pain. He was continuing to have physiotherapy on his affected toe at that time. By November 2015 he was found to have recovered to the extent that he would. He has lost total extension of his right big toe and sensation in that toe. He therefore walks awkwardly in an abducted position with his toes. He was assessed as having lost 100% function of his right big toe.

28. A medical assessment in October 2018 confirmed that there was scarring on the top part of his right foot towards the base of his big and second toes, and the loss of motion and sensation over that area and into the big toe.

29. The trial Judge noted that the appellant now walks with his right foot at a slight angle. He accepted that the appellant no longer enjoy sports or doing some ordinary things, and in addition has a scar on his right thigh from where the skin graft was taken.

30. After referring to decisions which might have provided some guidance to the trial Judge, he awarded the appellant VT 500,000 for pain and suffering and VT 1 million for loss of amenities and enjoyment of life. He awarded interest on those sums at 5% per annum calculated from 18 August 2017 until payment.

31. There was one aspect of the damages claim which did not attract a separate award. The trial Judge noted the claims for loss of *"chance on formal education"* and of achieving his *"dreams"* of becoming a pilot or a national soccer representative or professional footballer. He dismissed those claims as misconceived and unproven, and too remote.

32. On the appeal, the appellant had first sought leave to call further evidence. It was in the form of an affidavit from Seiloni Iaruel, a football player, playing for the National Team of the Republic of Vanuatu

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL

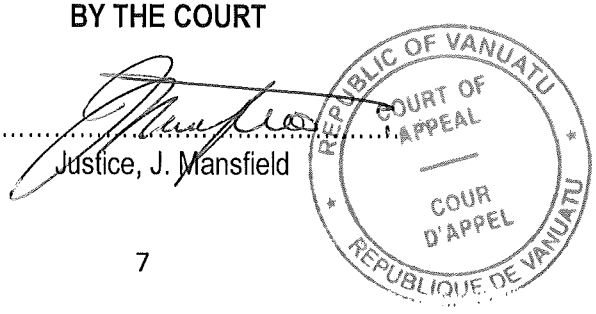
as a goalkeeper, and in other competitions. He confirms that a person with the loss of function of the big toe of which the appellant complains, would find his capacity to play professional soccer would be significantly impaired. That application was not pursued. As the trial Judge accepted that the appellant is no longer able to play sports including soccer at an active level, it probably would not have added much if anything to the findings of the primary Judge. There is no focus in the evidence on the prospects or otherwise of the appellant becoming a professional soccer player or playing soccer at a level from which he might have made an earning. His evidence does not suggest that, up to the age of 18, he had that potential.

33. In our view, however, it was appropriate for the primary Judge to have made some allowance for loss of earning capacity on the part of the appellant. Inevitably, in the case of an 18 year old male, that must be somewhat speculative. That does not mean that it is not compensatable. It is clear that his schooling for 2015 was unable to be completed for 6 months. There is evidence that, despite him having lost that 6 months of schooling, he should have been able to return to school and complete his education thereafter. He says that in 2015 he made enquiries about that which did not succeed. There is no evidence to support such an assertion, and if it were a significant element of the claim for damages, it should have been supported by appropriate evidence. There is no evidence to indicate that, physically, the disability from which he suffers would impair his capacity to become an airline pilot. It can however fairly be said that a person with his disability is inevitably somewhat, but perhaps not greatly, impaired in the capacity to do certain jobs which he might otherwise have done compared to his capacity prior to this incident.

34. For those reasons, in our view, it was appropriate for the primary Judge to have made an allowance for loss of earning capacity. His career, whatever it might be or might have been, was put back by 6 months by his schooling being set back by that period. Thereafter, he is somewhat impaired in the range of activities which he can pursue in employment. His sworn statement, made on 18 August 2017, does not indicate what activity or employment he has pursued since the end of 2015. In those circumstances, a conservative allowance only should be permitted. In our view an appropriate additional award for loss of earning capacity in the past and for the future should be assessed at VT 500,000. That sum should be added to the judgment sum together with interest, and the appeal allowed to that extent.

35. For the reasons given, the appeal is allowed and judgment is entered for the appellant against the respondent for VT 2,000,000 plus interest at 5% per annum with effect from 18 August 2017 to the date of this judgment. The cross appeal is dismissed. The respondent is to pay the appellant the costs of the appeal and the cross appeal fixed at VT 60,000.

Dated at Port Vila this 19th day of July 2019
BY THE COURT



.....
Justice, J. Mansfield