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

Civil Appeal
Case No. 19/1923 CoA/CIVA

BETWEEN: **Monique Joseph and Kalfatak Kalnaure**
Appellants

AND: **Republic of Vanuatu**
Respondent

Date of Hearing:	*13 November 2019*
Before:	*Chief Justice V. Lunabek* *Justice J. von Doussa* *Justice J. Hansen* *Justice O. Saksak* *Justice G.A. Andrée Wiltens*
In Attendance:	*Mr E. Molbaleh with Mr J. Taiva for the Appellants* *Mr S. Aron for the Respondent*
Date of Decision:	*15 November 2019*

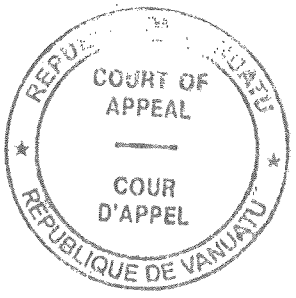
JUDGMENT

A. Introduction

1. On 20 May 2014 Monique Joseph was admitted to Hospital as her labour pains had commenced. Unfortunately she delivered a still-born child early the next day. Kalfatak Kalnaure was the father. The couple considered that staff at the Hospital had been negligent in their care of Ms Joseph and brought an action accordingly. Their claim was initially dismissed but re-instated by the Court of Appeal with a decision in their favour as to liability.

2. The matter was then remitted to the Supreme Court for a damages assessment hearing, which resulted in an award of VT 3 million which was to be paid in three months, and with each party to pay their own costs.

3. That decision is appealed on the basis that the award was insufficient and that several specific causes of action had not been taken into account by the primary judge in coming to the final assessment.



B. Background

4. The basis on which liability was determined is instructive as to the quantum of the Claim. The appellants' case was that the mid-wives looking after Ms Joseph during her labour had failed to adhere to standard medical procedures and were accordingly negligent. The failures were said, on the balance of probabilities, to have caused the death of the baby.

5. The evidence was that Ms Joseph was admitted at 3.40pm, and checked by a mid-wife. At that stage everything was as it should be. That mid-wife finished her shift at 11pm and she then went home. Her replacement mid-wife was supposed to commence her shift at 11pm, but she did not arrive at the Hospital until sometime between 1am and 1.30am. By then Ms Joseph had not been checked by any of the Hospital staff for 9.5 hours, and she was complaining of back pain. When checked at that time by the newly arrived second mid-wife, there was no sign of any foetal heartbeat. The on-call Doctor was then contacted. She arrived subsequently and confirmed the lack of foetal heartbeat.

6. The Court of Appeal accepted that the Hospital mid-wives were obligated, by their own standards, to check on the foetal heartbeat every hour – that was not done. The lack of checking between 3.40pm and 1.30am was therefore a serious failure of the duty of care owed to Ms Joseph.

7. Further, due to the stage of dilation Ms Joseph was at when she arrived at the Hospital, she should have been examined after an hour, and thereafter at least 4-hourly, to ascertain when she might be ready to deliver. In also not attending to that standard, the Hospital staff had fallen well below the required standard of care.

8. It was also obvious that for a 2.5 hour period Ms Joseph had no mid-wife to call on at all, and that was a further aspect of the Hospital's negligence.

C. Decision

9. The primary judge set out the heads of claim, which were medical negligence, compensation for the loss of the child, VT 1.5 million in punitive damages, VT 0.5 million in general damages, interest on those amounts and costs.

10. The primary judge noted Rule 4.10(2) of the Civil Procedure Rules making it mandatory where general damages are claimed that they be particularised as to the nature of the loss/damage, the exact circumstances of the loss/damage, and the basis on which the amount claimed has been worked out or estimated. The primary judge found no such detail had been pleaded as required.

11. The primary judge further noted that evidence to establish loss of expectation of life, funeral expenses and nervous shock dealt with aspects of the claim that had not pleaded and which could therefore not be considered.

12. The submissions by the appellants that VT 50 - 60 million was appropriate were declined. The submissions of Mr Aron, having regard to the precedent of *Ranbel v Republic of Vanuatu* [2018] VUCA 2, were accepted. Accordingly the primary judge concluded that an overall realistic figure to award was VT 3 million. The primary judge ordered that sum be paid in 3 months, and that each party was to bear their own costs.

D. Appeal

13. Mr Molbaleh submitted that the global figure arrived at was inadequate. He maintained that the *Ranbel* case was not a useful authority to follow, as the figure of VT 5 Million arrived at in that case was the result of agreement between the parties. He maintained that VT 50 – 60 million was what should have been awarded.

14. Mr Molbaleh submitted that the award should have been split between the appellants, and suggested that be at a ratio of 70:30, with Ms Joseph obviously having suffered the most.

15. Mr Molbaleh submitted the primary judge had not considered several aspects of the claim, and that his decision was therefore in error. In particular he pointed to compensation for loss of the child, punitive damages, interest and costs. He repeated his plea that funeral costs ought also to have been factored in.

16. Mr Aron produced very useful written submissions.

17. He relied on Republic of *Vanuatu v Emil* VUCA [2015] 16 as authority that the Court cannot make findings and awards of damages on issues not raised in the pleadings.

18. He submitted the rule in *Baker v Bolton* established that it is not possible to recover damages for the death of another.

19. Mr Aron also dealt with the aspect of punitive damages, submitting that there was no evidence to support what is required to be established namely that the Hospital staff's conduct was "...high-handed, insolent, vindictive or malicious showing contempt of the plaintiff's right and disregarding every principle which actuates the conduct of common decency".

20. Mr Aron further submitted the decision to not award interest or costs was not shown be an error by the primary judge.

E. Discussion

21. The generality of the claim is the difficulty with the appeal. There is a lack of detail in the evidence supporting any of the heads of the claim. Evidence of that can be gleaned by Mr Molbaleh's repetition of the global sum sought being VT 50 – 60 million, without any supporting material.

22. The best evidence in terms of specificity related to Mr Kalnaure's alleged expenditure of VT 400,000 towards the funeral costs – a matter not specifically pleaded. While items such as funeral costs could be counted as part of an award of special damages, there was still an insufficiency of detail as to the actual costs incurred by Mr Kalnaure. Accordingly, even if the pleading issue could be over-looked, the primary judge was correct in our view to simply make a global assessment which we are sure undoubtedly included an award for funeral expenses.

23. In our view, there is no basis on which the loss of life could be compensated. What flows from the loss of life is the pain and suffering both Ms Joseph and Mr Kalnaure endured as a result of this matter, but that is also already encapsulated in the award made.

24. Further, we are of the view that there is no merit in the submission that punitive damages are appropriate.

25. We cannot find fault with the assessment of VT 3 million as a global figure of damages. We consider that is pitched at the correct level taking into account the circumstances of this case.

26. In short, we cannot see any error by the primary judge.

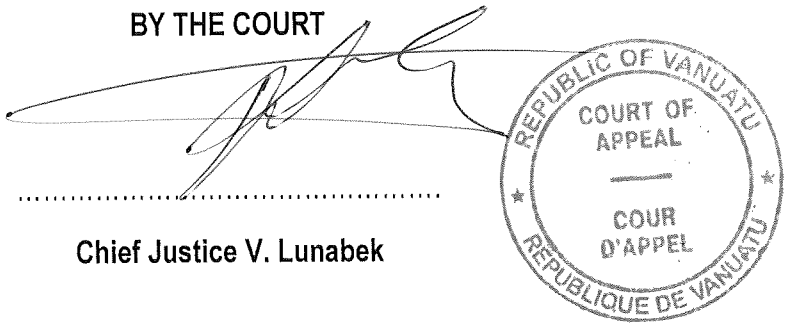
F. Decision

27. The appeal is dismissed.

28. Costs are to follow the event. We set the costs at VT 35,000 which are to taken from the award. The balance of the award should now be paid immediately.

Dated at Port Vila this 15th day of November 2019

BY THE COURT



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Chief Justice V. Lunabek