

(Civil Jurisdiction)

**BETWEEN: MARGRET SEIPA**

Claimant

**AND: THE REPUBLIC OF VANUATU**

Defendant

Mr Justice Oliver A. Saksak

Mr Saling N. Stephens for the Claimant  
Mrs Viran M. Trief, Solicitor General for the State

Date of Hearing: 4<sup>th</sup> October 2012  
Date of Judgment: 7<sup>th</sup> March 2013

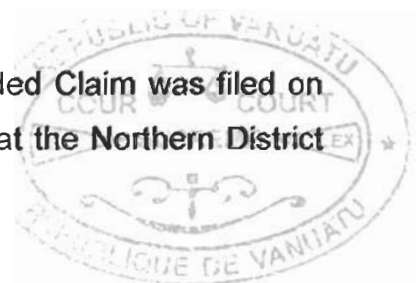
## **JUDGMENT**

### Introduction

1. On 4<sup>th</sup> October 2012, Counsel for the Claimant conceded to the State's application for leave to appeal and accepted the State's submission that Dr.Yakep's evidence by sworn statement be admitted into evidence, without any intention to cross-examine the deponent.
2. On that basis, the State's application and cross-application the Claimant were withdrawn.
3. The Court directed that written submissions be filed within 21 days each from 4 October 2012. No such submissions have been filed by both the Claimant Defendants. Due to the delay, the Court will dispense with those submissions.

### Background Facts

4. This claim was filed on 1 September 2008. An Amended Claim was filed on 27 July 2009. The Claimant was admitted for surgery at the Northern District



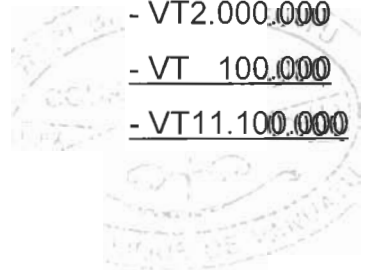
Hospital after she experienced difficulties during delivery. A caesarean operation was done in order to remove her baby and after that a tuba ligation operation (T/L) was performed by the surgeon at the time to prevent further pregnancies in the future. The Claimant and her husband had agreed jointly to the T/L operation by signing the Consent Form with authorisation. This was the second caesarean operation after the first on 3 October 1995.

5. More than 12 months later on 11 December 2003 when the Claimant visited the ante-natal clinic, she was diagnosed as being pregnant again despite her T/L operation on 26 September 2002.
6. On 22 December 2003, the Claimant was evacuated to the Central Hospital in Port Vila where on 7 January 2004, another caesarean and T/L operation were performed on her. She gave birth to a baby girl by name of Jacklyn. This was her third caesarean operation.

Allegations and Claims

7. The Claimant alleges that –
  - (a) The birth of Jacklyn was unplanned and therefore wrongful.
  - (b) As a result of her two operations, she is now incapacitated and no longer 100% fit and healthy to do heavy duty work.
  - (c) The surgeon who performed the T/L operation on her on 26 September 2002 owed her a duty of care.
  - (d) As a result, she has suffered loss and damage and claims for the following-

(i)	Damage for professional negligence	– VT2.000.000
(ii)	Pain and Suffering for two caesarean operations plus 9 months of pregnancy	– VT2.000.000
(iii)	Wrongful birth of an unplanned child	- VT3.000.000
(iv)	Mental Stress	- VT2.000.000
(v)	Exemplary Damages	- VT2.000.000
(vi)	General Expenses	- VT 100.000
	Total	- <u>VT11.100.000</u>



- (vii) Interests thereon at 4% from date of judgment.
- (viii) Costs of and incidental to the action.

### Burden of Proof

8. The Claimant has the burden of proof on the balance of probabilities.

### The Evidence

#### 9. A. By Claimant

9.1. The evidence of the Claimant is contained in her sworn statement dated 19 August 2008 but filed on 1 September 2008 where she discloses the Operation Consent Form and diagrams, her ante-natal and delivery record, her Medical Report and certain correspondences from doctors. The State raised objections to parts of her evidence and these were noted and ruled on by the Court on 4 October 2012.

9.1.1. The Claimant also produced evidence from her husband Freddie Seipa which is also dated 19<sup>th</sup> August 2008 and filed on 1 September 2008. The State raised objections also to these statements and the Court noted and ruled on those objections also on 4 October 2012.

#### B. By the Defendant

9.2. The State produced expert evidence from Dr Yakep. It is dated 30 April 2009. No objections were raised by Counsel for the Claimants and the expert evidence is admitted in its totality and remains unchallenged and unrebutted by the Claimant. The defendants also filed and relied on the sworn statement of Lydia Aga dated 16 April 2012.

### 10. Discussions and Considerations

10.1. The defendants filed their original defences on 17 November 2008 generally denying liability for all claims. On 26 August 2009, the State filed an amended defence maintaining their previous defences and adding a new defence about statutory limitation of the claims of the Claimant.



10.2. In the absence of written submissions by the Parties identifying the relevant issues for determination, the Court will consider the following to be the issues:-

(a) Time Limitation – The period of limitation under the Limitation Act for tortious actions is 6 years. The action was originally filed on 1 September 2008. It was still within the 6 years period by 25 days. The defendant's defence of time limitation is therefore untenable and is rejected.

(b) Professional negligence – Whether the surgeon who performed a T/L operation on the Claimant was negligent?

Both the Claimant and her husband gave evidence that they consented to the operation being done by signing the appropriate Consent Form (Annexure "A") to the Claimant's statement of 19 August 2008. They both acknowledged their signatures on the form. What both alleged was that the surgeon did not advise them on the failure rate of success of the T/L operation. However Lydia Aga, a senior nurse gave evidence that she explained the failure rates to the Claimant (paragraph 4) and said that normally the surgeon doing the operation would do so as well (paragraph 8). In cross-examination by the Solicitor-General the following transpired:

"Q: *Refer long Consent Form – Annexure "A" – Yu konfem signature blong yu?*

A: *Yes.*

Q: *Yu bin harem nogud tumas mo yu wantem nomo se baby I mas kamaot?*

A: *Yes.*

Q: *Yu bin agri taem yu signem?*

A: *Yes.*

Q: *Nurse I bin Lydia?*

A: *Yes.*

Q: *Hemi explain about failure rate before yu sign?*

A: *Yes.*



Q: *Then Dr. Wan I mekem operesen?*

A: Yes.

Q: *Yu luk stetmen blong Dr. Yakep?*

A: Yes.

Q: *Dr. Yakep I tokbaot failure rate?*

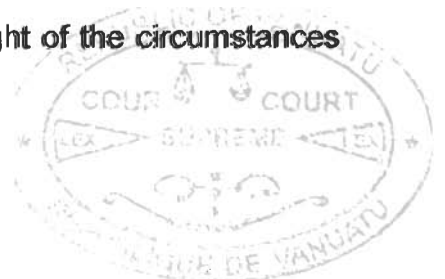
A: Yes.

Q: *Failure rate hemi minim se operation hemi no save be 100% oltaem?*

A: Yes.”

From that record, it is apparent that there was clear explanation about both the operation and the failure rates given to the Claimant and her husband prior to them signing the Consent Form and prior to the T/L operation being performed. The Claimant’s claim for professional negligence therefore fails.

- (c) Pain and Suffering for 2 Ceasarean Operations and 9 months pregnancy - A vexatious and unfounded claim, that would succeed only had the Claimant established professional negligence. But she has not, therefore this claim also fails.
- (d) Wrongful Birth of an unplanned Child – Another vexatious and unfounded claim. The Claimant and her husband consented to the T/L operation with knowledge of failure rates clearly explained or advised. This claim is also dismissed.
- (e) Mental Stress – Again there is no basis for this claim and it is dismissed.
- (f) Exemplary Damages – This claim is unfounded and is hereby dismissed.
- (g) General Expenses – There is no sufficient evidence to prove these. Even if there was evidence, it is not claimable in the light of the circumstances of the case. It is hereby dismissed.



Conclusion


11. The Claimant is unsuccessful in all her claims against the defendants. Accordingly, all her claims are dismissed in its entirety.

Costs

12. In the circumstances of the case costs must lie where they fall.

**DATED at Luganville this 7<sup>th</sup> day of March 2013.**

**BY THE COURT**

  
**OLIVER A. SAKSAK**

**Judge**

