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

Civil
Case No. 18/3436 SC/CIVL

BETWEEN Willie Kapi
Claimant

AND: Franck Franconieri
First Defendant
AND: Jose Franconieri
Second Defendant

Coram: ***Justice Aru***
Counsel: ***Mr. E. Molbaleh for the Claimant***
Mr. M. Hurley for the First and Second Defendants
Date of Judgment: ***20th July 2021***

RESERVED JUDGMENT

Introduction

1. This is a claim for damages for personal injuries arising from a motor vehicle accident which occurred on 23 December 2015 on the road between Teuma ville and Teuma valley in Vila.

Background

Agreed facts

2. The following background facts were agreed by the parties and filed on 7 October 2020 as agreed facts namely that a motor vehicle accident occurred on 23 December 2015 at approximately 4.15 pm along Teuma road when motor vehicle No 11262 (the vehicle) then being driven by the second defendant swerved to avoid a bicycle travelling in the right of way of the vehicle.

3. At the time of the accident the claimant was travelling in the rear of the vehicle with three other passengers.

4. Following the accident the claimant was taken to Vila Central Hospital at around 6pm on 23 December 2015 for medical treatment.

5. As a result of the accident Dr Ricky Mera Surgical Registrar reported that the claimant sustained the following injuries:-

   (i) Abrasion on the forehead; and
   (ii) fracture of the left clavicle (collar bone)

6. The claimant was discharged from the Vila Central Hospital on 25 December 2015 after being stable for more than 24 hours.

7. As a result of the accident the claimant sustained the following injuries:-

   (i) Abrasion on the forehead; and
   (ii) Fracture of the left clavicle (collar bone)

8. Prior to the accident the claimant worked for the first defendant from approximately June 2015 until 23 December 2015 and was paid VT 60,000 per month.

Summary of the pleadings

The claim

9. The claim is set out in the Further Amended Supreme Court Claim filed on 11 May 2020. The claimant alleges that the second defendant who was driving caused the accident. As a result the claimant says he sustained injuries to his body which have led to his incapacity to work or earn any income.

10. He alleges that he was observed with the following injuries:-

- a deep cut to his head
- a broken collar bone (clavicle) of his left shoulder
- skin rash on the left side of his body
- pain and bleeding
- was unconscious for a time

11. Since 2015 the claimant says he was earning a salary of VT 60,000 a month. The relief claimed is:-

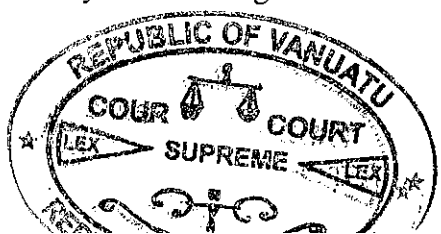
- damages for pain and suffering – VT 2 million

- compensatory damages – Past loss of income VT2,880,000

  Future loss of income VT3, 600,000
  5% interest on past loss VT 144,000
  Punitive damages VT 500,000
  General damages VT 1,000,000
  Costs

Defence

12. In their defence the defendants says that the accident occurred when the second defendant who was driving swerved the vehicle to avoid a bicycle travelling in the path of their vehicle.



13. They say the only injuries noted by the surgical registrar were an abrasion on the forehead, a fracture of the left temporal bone and fracture of the left clavicle (collar bone) and nothing else.

14. After treatment the claimant's medical certificate issued on 23 December 2015 stated that he was fit to resume work on 3 February 2016. The defendants say the claimant did work again after the accident.

15. They say that the claimant's injuries were wholly caused or contributed to by the bicycle rider who swerved onto the path of the second defendant. And the second defendant took evasive action in the "agony of the moment" to avoid hitting the bicycle when the accident occurred.

16. Furthermore the defendants say the loss or damage suffered was caused by the claimant's own failure to wear a seat belt inside the vehicle. He decided to sit in the open tray of the vehicle at the back.

17. The defendants says that the claimant is not entitled to the relief sought.

Issues

18. A number of issues were agreed by the parties for determination namely:-

    i) Did the motor vehicle accident on 23 December 2015 occur as a result of any negligence on the part of the second defendant?

    ii) If the answer to issue i) is yes, should there be any discount to the quantum of damages to be awarded to the claimant by reason of his contributory negligence for failing to wear to a seat belt.?

    iii) If the answer to issue ii) is yes, what is the percentage of the claimant's contributory negligence?

    iv) If the answer to issue i) is yes, what is the quantum of damages to be awarded to the claimant?

Submissions

19. In summary the claimant submits that the first defendant is vicariously liable for the actions of the second defendant who organised the Christmas party for workers at Eruiti before the accident. It was submitted that the second defendant was negligent in his driving and failed to exercise due care and drove very fast which resulted in the accident. That the accident was not caused by an agony or spur of the moment event.

20. Next it was submitted that under the Workmens' Compensation Act [CAP 202] the claimant is entitled to compensation in a sum ranging from VT 7,000,000 to VT 8,640,000 million as he suffered a total disability and can no long engage in full time employment to earn his living. In addition it was submitted that the claimant is entitled to claim for pain and suffering, loss of amenities of life, injuries sustained and loss of earning capacity past and future based on his salary as at 23 December 2015 being VT 60,000 per month.

21. For the defendants, in summary, the defendants submit that on the totality of the evidence the claimant has not proven his case on the balance of probabilities. It was submitted that the evidence does not establish that there was any negligent driving on the part of the second defendant. As to the first issue the defendants say that the claimant has not established that the second defendant was negligent. As to the second issue the defendants say that the claimant contributed to his injuries by not wearing a seat belt and in relation to the third issue the defendants say that that a finding of contributory negligence of at least 20% should be made against the claimant.

Discussions

22. This is civil claim. The claimant bears the onus of proof to prove his case on the balance of probabilities. I now deal with the issues. Issue i) is critical to the claimant's case. If I am satisfied that there was no negligence on the part of the second defendant then I must dismiss the claim.

Issue i)- Did the motor vehicle accident on 23 December 2015 occur as a result of any negligence on the part of the second defendant?

23. The claimant must prove that the second defendant was negligent in his driving which resulted in the accident.

24. Rules 4.2 (1) b) of the Civil Procedure Rules requires that *"each statement of the case must set out all the relevant facts on which the party relies, but not the evidence to prove them"*. Contrary to this rule of procedure the further amended claim fails to plead negligence and fails to give any particulars of any alleged negligent act. Paragraph 3 of the claim only alleges that the second defendant "caused" a vehicle accident but fails to provide any particulars of how it alleges that the second defendant caused the accident.

25. On the same note the claimant gave evidence that the second defendant was driving at high speed under the influence of alcohol. The issue of speeding or intoxication or driving under the influence of alcohol is not part of the claimant's case as it was not pleaded in the claim.

26. The only remaining possibility is what or who "caused" or was responsible for the accident. The facts as agreed by the parties recorded above are that the motor vehicle

No 11262 was driven by the second defendant when he swerved to avoid a bicycle travelling in the right of way of the vehicle.

27. At the time of the accident the claimant was travelling in the rear of the vehicle with three other passengers.

28. The claimant in his sworn statement "**EXHIBIT C1**" at paragraph 7 , 8 and 9 said that -

"

7. At the end of the Christmas party celebrations, five of us employees hopped at the back of the defendant's truck and another employee was with the defendant inside the truck...

8. At the corner of the road at Teouma ville hill down to Teouma valley the defendant tried to avoid a bicycle that was approximately five (5) meters away from the truck.

9. The defendant swerved the truck to the side of the road and tried to swerve it back to the main road but the wheels were caught in the drainage."

29. Under cross examination the claimant confirmed that what he said at paragraphs 8 and 9 of his sworn statement is what happened. He was asked:

"Q. At paragraphs 8 and 9 is what happened before and during the accident ?
A. Yes

30. The claimant was not re examined on this point and none of the other passengers who were travelling with him at the time of accident were called by the claimant.

31. The second defendant in his sworn statement "**EXHIBIT D1**" at paragraph 6 and 7 said that:

"6. Although there was room inside the vehicle for everyone, the claimant and three other employees chose to sit in the rear tray of the vehicle.

7. At approximately 4.15pm an accident occurred between Teouma ville and Teouma valley when I swerved to avoid a mountain bike that turned sharply in front of me which resulted in injuries to the two passengers in who were sitting in the tray of the vehicle."

32. He maintained his evidence under cross examination when asked:

"Q. At the time of the accident you were driving too fast
A. No someone on a bicycle in front of us decided to cross the road and to avoid him I turned left and the rear of the car went into the drain."

33. The second defendant's evidence is reaffirmed by the Police Report of the accident signed by Pc808J. W. Bila which reported what occurred when the vehicle approached the bend at Teouma ville heading down to Teouma valley:

> *"Arriving at the corner (before Teouma valley) an orange mountain bike was travelling on the right of way of vehicle 11262. Mr Franconieri avoided the bike by doing a left turn and then vehicle (11262) went into the water drainage. When the driver was turning back towards the road, one of the vehicles tyres broke causing the said vehicle to roll over''.*

34. There is no evidence that the second defendant was prosecuted as a result of the accident. Similarly there is no pleading that the claimant was speeding or driving under the influence of alcohol.

35. The second defendant's evidence is there was enough space in the truck behind the driver for the claimant but he opted to sit in the tray of the vehicle with the others. When the truck approached the Teouma ville bend a bicycle suddenly entered its right of way which led the second defendant to swerve the vehicle to avoid hitting the bike and the vehicle was caught in the drain which caused the vehicle to roll over.

36. The main question is did the second defendant cause the accident as pleaded. In his defence he pleads at paragraph 9 that –

> *"8. The second defendant took all reasonable evasive action to avoid the accident in the agony of the moment due to the bicycle that swerved in front of him without warning."*

37. Mr Hurley submitted that the second defendant's actions amounted to agony of the moment as he tried to avoid the bicycle which suddenly entered his side of the road therefore he should not be held responsible for the accident. Counsel referred to the following cases which have developed and applied the principle namely ***The Bywell Castle*** (1879) 4 PD 219, ***Kahn v Chetty*** [2017] FJHC ***Govinda Raju & Anor v Laws*** [1966]1 MLJ at 190. I refer to what Street CJ said in ***Leisman v Thomas*** (1957) 75 WN (NSW) 173 at 175 that :-

> *"this so called principle of acting in the 'agony of the moment' is merely an application of the ordinary rule for ascertaining whether or not the conduct of any party has been negligent by looking at all the surrounding circumstances and ascertaining whether the defendant behaved in such a fashion as a reasonably prudent man , in light of the circumstances would not have behaved."*

38. Fatiaki J in ***Covo v Ritsinias*** [2018] VUSC 259 at 44 to 45 referred to this principle as a split second decision to avert or minimise the impact of the collision.

39. The facts as agreed by both parties are that the second defendant swerved to avoid a bicycle travelling in the right of way of the vehicle driven by the second defendant. By looking at the surrounding circumstances, the bicycle entered the second defendant's right of way without notice. The claimant's own evidence is the bicycle was about 5 meters from the truck. The second defendant took a split second decision to avoid hitting the bicycle in in its path and swerved the vehicle to his left. When swerving back to the right a tyre got caught in the drain and burst causing the vehicle to roll out of control. This is confirmed by the claimant himself and the Police report.

40. Taking these factors into account I am satisfied that a reasonable person would not have behaved any different to the second defendant. The second defendant could not be held liable for the accident. As I mentioned above negligence and speeding or driving under the influence are not pleaded as part of the claimant's case therefore any evidence to that effect cannot be taken into account.

41. Issue 1) must be answered in the negative. The accident of 23 December 2015 did not occur as a result of the second defendant's negligence therefore he could not be held responsible for the accident or liable for damages.

42. Given my answer to the first issue, the claimant has not proved his case as to liability. I must therefore dismiss the claim and there is no need to consider the remaining issues.

Result

43. The claim is hereby dismissed. The defendant is entitled to costs to be agreed or taxed by the Master.

DATED at Port Vila this 20th day of July, 2021
BY THE COURT

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D. Aru
Judge

REPUBLIC OF VANUATU COUR SUPREME COURT LEX LEX REPUBLIQUE DE VANUATU