**IN THE HIGH COURT OF THE COOK ISLANDS**
**HELD AT RAROTONGA**
**(CIVIL DIVISION)** **PLAINT NO. 9/03**

**BETWEEN** **NGAMETUA TAVAI** of Rarotonga, Barmaid

**Plaintiff**

**AND** **RON DE GROOT** of Tahiti, Airline Manager

**Defendant**

Mr C Little for Plaintiff
Ms McCarthy for Defendant
Date of Hearings: 10,11 and 12 May 2004
Date of Judgment: 1 June 2004

**JUDGMENT OF GREIG, CHIEF JUSTICE**

On 14 June 2002 the Plaintiff on her motor cycle and the Defendant in his car were in collision outside the RSA building in Nikao. The Plaintiff suffered a number of injuries and brings this claim against the Defendant for general damages of $50,000 and special damages of $30,000. The Defendant denies the claim and alleges that the fault is all that of the Plaintiff and seeks by way of counterclaim damages for the repairs to his vehicle in the sum of $7111.31.

14 June 2002 was a Friday. The Plaintiff who then worked at the Club Raro as a waitress had finished work in the evening and decided to go to her sister's house in Panama. She arrived there about 9.30 in the evening. She admits that she drank some four cans of beer mixed with lemonade. Shortly after 11.00pm she left on her motorcycle intending to go to the RSA Club room. She was traveling towards the airport and the RSA in a generally westerly direction.

The Defendant also worked late on that Friday evening. He admits to having a light beer at about 5.30 and then had a meal in a restaurant from about 7.30 onwards consuming two glasses of wine and a glass of soda water. He left the restaurant at about 11.00pm heading in a similar direction to the Plaintiff.

As the two vehicles approached the airport on the left hand side and the RSA on the right hand side they were in relative close proximity with the Defendant's vehicle behind the Plaintiff's motorcycle. An international flight had not long arrived at the airport and so there were lights and people and cars in and around the airport car park and buildings. The Defendant's evidence is that as he approached the RSA site he noticed a group of people on each side of the road. The next thing that he was aware of was a bump and a rattling noise. He did not know what it was but thought that somebody might have thrown something at his vehicle. He drove on and stopped some 150 or 170 metres further on. The Defendant had in fact struck the rear and right hand side of the motorcycle. The Plaintiff remembers leaving her sister's house in Panama but remembers nothing else about the accident or the events until she woke up in the hospital the next day.

At the time of the collision a police constable on a motorcycle was parked some 150 metres west of the RSA building beside Rarotonga Rentals. He did not see the accident but heard the noise of it and started his motorcycle, driving back towards the RSA. He saw the Defendant's vehicle approaching him. The police constable then did a u-turn and followed the Defendant until he stopped his vehicle. I should say that at this stage that I entirely reject the suggestion that the Defendant had any intention to continue on and not to stop. I am satisfied that he was stopping but looking for a suitable space to bring his car to a safe parked position. The police constable then returned to the site of the accident, attended to the Plaintiff who was then unconscious on the roadway, directed traffic and attended the ambulance and the removal of the Plaintiff. He did not

ascertain any eye witnesses to the accident. He did take steps to identify some of the material situations of the events and later made a sketch with a number of measurements of the site in which he fixed the place at which the Plaintiff's body come to rest, assessed the point of impact and the place at which the motorbike had come to rest.

There were two other independent witnesses who were in the vicinity of the accident at the time it happened. Ms. Donna Smith and Ms.Nu'u were at the airport waiting for a relative to arrive on the international flight. After the plane had landed, but before the passengers had come through Customs, they left. Ms Nu'u was driving Ms Smith's car. That is to say then that they left the airport before other people left with the arriving passengers. Ms Nu'u drove out of the exit, turned right towards the main town Avarua and drove on past the RSA building. Ms Smith was in the back of the car. Her attention was attracted by something said by the driver. Her evidence was that she then looked up, a car flashed past and she heard the crash, she saw nothing else. Ms Nu'u on the other hand who was driving gave evidence that she saw a motorcycle coming towards her, she said that she saw that its lights were on and she estimated that it was driving at about the same speed as she was. She then saw a car coming around the corner beyond the entrance to the airport. It was her evidence that she thought it was speeding a lot faster than the motorcycle. She said that she thought that there would be an accident and she kept watch. In the side mirror, she saw the tail lights of the motor vehicle but could not see the motorcycle. She saw no brake lights come on but saw the collision because she saw bits of the motorcycle flying off to the side of the road. She made a u-turn and went back to the site of the collision. She confirmed that as she passed the RSA building she saw people outside on that side but did not notice any people on the other side, the airport side. It was her impression that at the time of the accident the motor vehicle swerved slightly.

The Defendant's evidence was that he was driving at about 40 km along the road, saw the groups of people on either side but did not see the motorcycle at any time. He did not suggest that he had slowed down at any stage before the accident but denied that he had speeded and insisted that he was careful to ensure that he maintained his speed at 40 km.

The Plaintiff called as an expert witness Colin John Wingrove of New South Wales, Australia a consultant transport engineer. The Defendant on his part called as an expert Christopher Curtis O'Neill Marks of Auckland, New Zealand. Both have extensive experience in examining, investigating and reporting on motor vehicle accidents and in giving evidence in Court and elsewhere on their investigations. The material on which the two experts gave their opinions included the Police files with various statements and reports; the diagram prepared by the Police constable; a number of photographs of the two vehicles after the accident showing the damage to them. Each expert had examined the site on their arrival in Rarotonga to give evidence and each of them sat through the trial hearing the witnesses. Both adverted to the deficiencies of the Police diagram and the lack of measurements and accurate details. Mr Wingrove, because of these deficiencies felt unable to fix the point of impact, the resting place of the motor cycle (it had been moved before the Police constable arrived back at the site after the Defendant had stopped his vehicle) and was thus unable to estimate any speeds or other matters which might have assisted. In spite of the deficiencies Mr Marks felt able to fix more accurately some of the salient points from his examination of the site after his arrival in Rarotonga and made calculations and estimates of various speeds.

The damage to the motorcycle was contact damage to its right rear. The tail light and rear indicator lenses were unbroken. A pillion passenger footrest on the right side had been bent forward and outward through angles of over 90 degrees. Both the right rider footrest and the kick starter seemed to have been

involved in the collision. The right rear vision mirror of the Yamaha was missing and broken fairing panel fragments were from the right side leg fairing and possibly the head light fairing were damaged. The motor vehicle damage was confined to its left front corner area. There was paint transfer which has the colouring of the motorcycle and other damage which when measured was consistent with the height of the right pillion footrest and the other items on the rider's footrest. There was damage to the windscreen at the top left hand corner. The left hand outside mirror was damaged and there was damage to the left hand side headlight assembly at its furthest leftward point. The point of disagreement between the experts in relation to damage arose about what was described as a flat spot visible on the rim of the rear wheel of the motorcycle. The rear wheel was no longer apparently circular but showed flattening on one part. How this had occurred was not agreed upon. Mr Wingrove thought it was damage caused by the front left wheel of the motorcar. Mr Marks had earlier thought that it might have come from some tumbling of the motor cycle but preferred the possibility that it could have occurred as a result of the forces developed between the motor cycle tyre or wheel and the road.

Mr Wingrove's conclusion was that the two vehicles had been traveling in a straight line, parallel with the motor vehicle at the rear and on the right of the motorcycle. He found no evidence that would suggest that the motorcycle had turned from the left side of the road in an attempt to make a right turn across the front of the motor vehicle. Mr Marks' opinion was that vehicles collided with the Yamaha at a clockwise angle of between 5 degrees and 15 degrees to the part of the motor vehicle while it was leaning slightly to the right.

There are two salient features of this case. The first is the fact that the two vehicles were proceeding in the same direction and the Defendant was following or behind the Plaintiff. The second is that the Defendant did not see the Plaintiff or her vehicle. Mr Marks made a number of observations about studies of

inattentiveness and the inability of ordinary people to see at all times what is in front of their eyes. A driver of a motor vehicle cannot excuse himself by saying that she did not see another vehicle. It is the duty of a driver to keep a lookout; to see vehicles in front of him and to avoid them by braking or steering clear of them. It is no excuse that human beings from time to time fail to see particular aspects of a scene in front of them. There is no clear evidence about the motorcycle's rear lights or reflectors except the evidence that the witness saw the front light on and the evidence that the vehicle had been recently purchased from Budget Rental Cars. There was a reflecting number plate and a reflector mounted beside or above the rear lighting assembly. What seems more to the point however is that the driver was aware of the fact that there were a number of people on both sides of the road as he approached the RSA building. This ought to have alerted him to the possibility that someone might come on to the road and to pay particular attention in front of him.

The Plaintiff was driving a relatively short distance from the house in Panama to the RSA room. She had reached or almost reached her destination. The probability is that she was about to or had just commenced the approach to cross the road to the RSA entrance. But what she was doing even at the larger angle proposed by Mr Marks is no sudden turn across the Defendant's path but is the beginning of a gradual movement. This is not the case of a sudden unforeseeable movement by another person or vehicle. It remained the responsibility and the duty of the Defendant to take care; all the greater because of the distraction of the pedestrians on the sides of the road. In my judgment, he failed that duty, was negligent and his negligence was a cause of the accident.

The next question is whether the conduct of the Plaintiff amounts to contributory negligence; negligence on her part and in regard to herself which contributed to the accident. As I said I think the probability is that she was turning or had

commenced the movement to turn towards the RSA. The Defendant's vehicle was coming up behind her, it had its lights on, she has deviated slightly into the path of that vehicle. For one's own safety it is necessary to keep a lookout to the rear before making any move which takes you into the path of another vehicle. In my judgment the Plaintiff did fail to take appropriate care for her own safety and that her conduct did contribute to the causes of the accident. Clearly the principal contribution is that of the Defendant. But I would put the Plaintiff's contribution at ten percent (10%).

I turn then to the question of damages. The Plaintiff suffered a comminuted fracture of the right tibia and fibula. She spent 39 days in hospital. In hospital, the hospital undertook an open reduction and internal fixation of the fractures which included the insertion of a plate with five screws and one interfragmentary screw. She suffered other bruising but that has all cleared up. Medical reports show the slight outward angulation of the tibia, a scar over the front of the right iliac crest which was part of the bone grafting operation, and there was a scar down the front of her right shin. The right knee shows some excruciate ligament laxity and a slight restriction of movement in the right ankle, this according to a examination in August 2003. At that stage the specialist made a favourable prognosis that suggested that the Plaintiff was likely to have ongoing instability of her knee such in turning rapidly or jumping or running. He thought it unlikely that the right ankle would be affected by any degenerative joint disease but thought that the right knee might be affected in the future.

After the accident the Plaintiff was off work for about 3 months and then returned to work but found that she was unable to stand or walk for any length of time or distance and had to sit down quite frequently. She also suffered from dizziness and migraines or headaches. She was examined by a neurologist in 2003. He proposed exercises to get over the problem of dizziness. He did not expect worsening of symptoms and thought there would be significant

improvement. He diagnosed post dramatic vertigo but that that would settle within 6 months or so.

The Plaintiff's evidence is that she has not enjoyed any real improvement in her condition. She has worked in a shop in a more sedentary style and as a waitress but during 2003 decided to stay home. She now has a partner who is supporting her and does not work. She complains of still having dizzy spells and having headaches frequently. She was active in sport coaching soccer, and enjoyed dancing and other general social activities. She can no longer run and is unable to take part in these more vigorous activities. She has gained a lot of weight This is causing her embarrassment as do the scars on her leg and she feels unable to wear a short skirt or shorts.

Clearly the Plaintiff has suffered a considerable amount of pain and is still suffering this. There is a loss of enjoyment of life and that is clearly likely to continue. The Plaintiff was born in October 1977 so she has a long life ahead of years in which she might well have expected to continue the activities which she was doing before the accident. There is a continuing disability and the likelihood of further disability by the possibility of degenerative changes which will be attributable to the accident and its aftermath.

The assessment of general damages is not a mathematical process. In this case there has been no accounting or actuarial evidence so it is a matter of a general assessment of what is appropriate by way of compensation in this particular case and for this particular Plaintiff. Reference was made to a number of cases in which damages had been assessed or compromised settlements had been reached in accidents involving personal injury in Rarotonga. Particular emphasis was put on the case of Harmon v Kikorio,( unreported Appeal No. 7/89 Judgment 8 November 1991 McCarthy, Roper, Chilwell JJ.) That was a case where there was an appeal against the award of general damages in the sum of

$40,000 on the grounds that it was manifestly excessive. The plaintiff in that was a young man aged 21 who had had compound fractures of thigh and lower leg bones as well as dislocation of the pelvis. He underwent some seven operations and had permanent disability including gross disfigurement to his leg. The Chief Justice in giving judgment in the High Court described the Plaintiff's future as bleak. The conclusion of the Court of Appeal was that the award was not so inordinately high that it must be an erroneous estimate of the damages and the appeal was therefore dismissed. At page 18 of the Court of Appeal decision the following statement of principle is made: *"The heads of general damages in this case are not capable of accurate assessment and so the task of the trial Judge was to give the first respondent fair and adequate compensation. See H West & Sons Ltd v Sheppard [1964] AC 326,346. some measure of uniformity is required so that.*

> *"similar decisions are given in similar cases: otherwise there will be great dissatisfaction in the community, and much criticism of the administration of justice" (Ward v James [1965] 2 WLR 455 per Lord Denning MR at 470)."*

Reference was also made to observations of a decision of the Privy Council in Jed Singh v Tong Fono Omnibus Co. [1964] 1 WLR 1382,1385.

> *"... to the extent to which regard should be had to the range of awards in other cases which are comparable such cases should as a rule be those which have been determined in the same jurisdiction or in a neighbouring locality where similar social, economic and industrial conditions exist."*

So here it is a question as to what fair and adequate compensation ought to be awarded in this community and for this plaintiff. This does not mean however taking any one case or all cases and then applying some arithmetical scale

measuring the Plaintiff's particular disabilities, loss of amenity of life and so on against those in other cases. It has to be borne in mind too that for example in Harmon's case the Court of Appeal did not decide that that amount was correct but merely that it was not inordinately wrong. Moreover cases which are settled out of Court are extremely difficult to compare or to take into account simply because the parties have compromised or settled on a figure. Account must also be taken of the fact that the value of money changes over time and what may have been a reasonable or substantial award 15 years ago might no longer be adequate. Taking account of the Plaintiff's age, her pre-accident life and activity, the pain and suffering she has and is continuing to undergo, the disability, loss of enjoyment of all the amenities of her life and the possibility of disability in the future I assess as a fair and adequate compensation the sum of $20,000.

The claim for special damages was not detailed in the statement of claim. It includes a claim for the cost of hospital expenses and the assessed cost of repairs to the motorcycle. These figures were agreed at the sum of $1415 and $971. The complication in relation to the motorcycle is that it has not been repaired. The Plaintiff could not afford to repair it and handed it over to a cousin so that he might repair it. It seems that it has not been repaired and is still in the possession of the cousin. It is agreed that the damage to the motorcycle is in the sum of $971.00 and that it can be repaired. Although it is not at present in the possession of the Plaintiff it no doubt will be repaired if the money is forthcoming. I believe that the assessed repairs as agreed is a proper award for special damages to the Plaintiff in respect to the damage and loss she suffered in relation to her motorcycle.

The loss of wages is a matter that has not been approved. A number of wage records was included in the bundle of documents which was presented by agreement by counsel. No attempt was made to analyze these or indeed to deal with them in any way. There was no evidence, other than very general assertion,

as to what time or times the Plaintiff had worked or had not worked and the wages that she received or would have received. For the first time in closing submissions Mr Little made some calculations for the periods that he suggested the Plaintiff had not worked during time in hospital and thereafter until she went back to work but there was no adequate proof of what was involved in that. It is evident that the Plaintiff did suffer some loss in this regard. The Court is quite unable to assess any figure for the future.

Plaintiff said that she was being paid at the rate of $5.00 an hour and it was suggested by counsel that the Plaintiff had been receiving $152.00 net per week. I believe it is appropriate that there should be some award in this regard and I must make such assessment as I can in the absence of any detailed proved facts on the matter. I think a proper compensation on this would be the sum of $3,500.00.

In the result then there will be judgment for the Plaintiff on the Defendant's counterclaim. There will be judgment for the Plaintiff on her claim. I assess general damages in the sum of $20,000.00 and special damages in the sum of $5,886.00 made up loss of wages $3,500.00, hospital expenses $1,415.00, repairs to motorcycle $971.00. I assess the Plaintiff's contributory negligence at the sum of 10%. Costs follow the event but are formally reserved.

**CHIEF JUSTICE**