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

CIVIL APPEAL CASE No. 1745 OF 2018

BETWEEN: **TELECOM VANUATU LIMITED**
First Appellant

AND: **FABRICE AISSAV**
Second Appellant

AND: **ABEL TARI and ELIZABETH TARI**
Respondents

Coram: ***Hon. Justice John Mansfield***
Hon. Justice Daniel Fatiaki
Hon. Justice David Chetwynd
Hon. Justice Gus Andrée Wiltens

Counsel: ***Mr A Kalmet and Mr M Hurley for the Appellants***
Mr E Molbaleh for the Respondents

Date of Hearing: *17th July 2018*

Date of Judgment: *20th July 2018*

JUDGMENT

1. This is an appeal by Telecom Vanuatu Ltd ("TVL") and Fabrice Aissav ("Mr Aissav") who is TVL's employee. The Respondents are Mr Abel Tari ("Mr Tari") and his wife Mrs Elizabeth Tari ("Mrs Tari). The decision appealed is dated 13th June 2018.

2. Mr Tari was the owner of a bus registration number B7571. On the 16th of January 2015 he was driving his bus on the road from Tamanu Beach to Port Vila. He was carrying two passengers from the resort at Tamanu Beach and his wife Mrs Tari was a front seat passenger. During the journey the bus came into collision with a vehicle driven by the second appellant Mr Aissav who was driving it in the course of his employment with the first appellant TVL. As a result of the collision Mr Tari suffered injuries to his legs and was trapped for some time. Mrs Tari suffered minor injuries. The bus was so badly damaged it was beyond economical repair, in common terms a write–off.

3. The respondents filed a Supreme Court claim on the 19th of May 2017. The claim alleged the accident occurred as a result of the negligent driving of Mr Aissav. Both Mr and Mrs Tari were seeking damages for the injuries they suffered and for other losses which resulted from the accident. The claim was defended on the

basis the accident occurred as a result of the negligent driving of Mr Tari. A trial about liability was held and in a decision dated 26 September 2017 the primary judge found Mr Aissav to be solely responsible for the accident. The judge noted in particular that Mr Aissav had been convicted of an offence of causing death by dangerous driving two years previously. The decision on liability has not been appealed.

4. Following that decision the case was listed for assessment of damages. The hearing took place in March 2018 and the decision was handed down on the 13th of June 2018. Mr Tari was awarded general damages for pain and suffering and loss of amenities of VT 1,900,000. He was also awarded damages totalling VT 4,283,100. Those damages were broken down into future loss of earnings, VT 2,300,000; the value of the bus, VT 900,000 and VT1,083,100 for other losses described as special damages. That sum related to school fees the respondents had had to pay, a loan obtained from another relative to pay for those school fees and other expenses and depletion of their savings. There was no award of damages to Mrs Tari.

5. The appellants filed their appeal on the 22nd of June, 2018. They dispute the amount of damages awarded for loss of earnings and the special damages relating to school fees, loans and savings. The respondents have filed a cross appeal seeking an award of general damages to Mrs Tari, increased general damages and damages for loss of earning capacity for Mr Tari and increased costs.

6. Turning to the appeal on the loss of earning capacity issue first, the judge reached his decision on quantum in this way:-

> *"In my view loss of future earnings should be assessed from the day after the accident being 17th January 2015. His evidence shows that from 1st January to 15th January 2015 he earned VT 125,000 that is on the average income of say VT 9000 per day. His evidence was also he worked from Sunday to Sunday. In a month he was making an income of an average of VT 200,000 multiply by 11 months from February 2015 to December 2015 he would have earned VT 2,200,000 plus VT 100,000 On average from 17th to 31st January 2015. His average total loss of earnings for the rest of the year to December 2015 would be VT 2,300,000."*

The judge also decided that the end of 2015 was the cut-off date on the basis that the road tax, insurance and Mr Tari's business licence would all expire then so he would no longer be able to earn any income through his bus.

7. The appellants say the judge was wrong to accept the figures supplied as to daily earnings because they were suspect and in cross examination shown to be incorrect. The appellants submit there was no evidence as to daily earnings. That is not correct. Mr Tari gave evidence about his daily earnings and there was no finding by the judge that that evidence could not be accepted or was unreliable.

8. Secondly, the appellants say that the figures relied on were gross figures with no allowances for costs such as fuel, repairs or general maintenance. We accept that is correct. The loss of earnings calculation should have been based on the net income of the business. Mr Kalmet for the appellants submitted the correct

daily figure would be VT5,000. We are prepared to accept that submission and will work with that figure, particularly in the absence of more detailed evidence from Mr Tari.

9. We are of the view that the judge was wrong to limit loss of earning capacity to the period from the date of the accident to the end of 2015. Mr Tari's loss of earning capacity comprises two periods. There must be an allowance for the time that Mr Tari was totally unable to unable to work as a result of his injuries; and a separate calculation for his loss of earning capacity in the future.

10. It is clear to us that Mr Tari was a hardworking man who was doing his best for his family. He may not have had the business acumen of an international entrepreneur but he had, by dint of saving his earnings whilst working as a fruit picker in New Zealand, purchased a bus and was making a living from it which supported his family. The accident put an end to that.

11. There is an undated medical report which was compiled after a review consultation in October 2017. Dr Cullwick provided the short report confirming that Mr Tari had suffered a left tibia plate fracture. In October 2017 the fracture was seen as having healed with a 5 -7 degree angulation of the left lateral plateau. The doctor also noted Mr Tari walked with a limp and that he had reduced muscle strength and muscle wasting. He did have full neurological function of both legs but he had a 10 -12 % (percent) disability. There were other medical reports provided to the court below but which were not part of the appeal book. It was common ground they related to his initial injuries only. From the Schedule A prepared by the appellants for the primary judge those other reports dealt with injuries to the left knee and to skin degloving and lacerations to Mr Tari's right leg.

12. Mr Tari's written sworn evidence was that following the accident he was on crutches for 18 months. He said that it had taken "*months and months*" to fully recover to a state where he could walk around and he added he still felt pain from the injury to his left knee. He found it difficult to carry weights (such as 25 kg bags of rice) and walk up and down hills. He did not feel he would be able to climb ladders or trees and the fruit picking work he had been doing in New Zealand was no longer an option. He also said in evidence he was not now able to drive a bus because of the pain in his knee when he tried to bend it. The pain was worse during the colder winter months. Mr Tari did not expect ever to be able to drive professionally again.

13. Mr Tari's evidence was that before the accident he had been working every day. He said from March 2011 he had a contract with a small tourist resort and he would pick up guests at the resort every day.

14. There was some discussion before us that Mr Tari had driven a vehicle to collect firewood. We accept that was the case but we also consider that driving a vehicle for a short time is far different from driving a bus as a business.

15. Mrs Tari gave evidence confirming her husband's difficulties when walking up and down hills and trying to climb ladders. This was also confirmed by Mr and Mrs Tari's son Braydon. He spoke about having to carry his father to the shower or

the bathroom in the period just after the accident. His evidence was that situation prevailed for something like 3 months.

16. The other evidence about Mr Tari's total incapacity to work came from his cousin Mr Humble Arukelana. He was anxious to try and help the family and he says that he offered Mr Tari the opportunity to sell kava at his nakamal. This was "*something like six months after the accident*". Mr Tari confirms he started selling kava and when he did so he earned on average VT 1,250. That was his profit per night.

17. Taking all this evidence into account we conclude there was a period of the first six months when Mr Tari was unable, through injury, to take on any kind of work. He would have lost earnings at the accepted daily rate of VT 5,000 during this period (see paragraph 8 above). On the basis of a 6 day working week that, rounded up, would amount to VT 780,000.

18. Mr Tari has not been able to continue driving buses. The primary judge accepted that. It is a finding available on the evidence. We accept that his injury makes it more than likely that he will never be able to return to driving buses to make his living. He is aged 49 at the moment and so he has 16 years to go until he reaches retirement. He must be compensated for his loss of earning capacity over that period.

19. The medical report from Dr Cullwick establishes Mr Tari's disability at 12% which in turn means that that is an indication of the percentage of his earnings that he will lose. The accepted daily rate is VT 5,000. From that must be deducted the earnings from work he has done and would still be able to do, the selling of kava. His evidence is that his average daily earnings are VT 1250. His net daily loss of earnings is VT 3,750. Over a period of 12 months and on the basis of a 350 working days this loss would amount to VT 1,320,000.

20. It is not appropriate simply to adopt that figure for determining the future loss of earning capacity. Looking at Mr Tari, he is not a particularly well educated man and has limited fields in which to earn his living. Those he has prospered in, his fruit picking and his bus driving, are now not available to him. The accident and the resulting injuries have reduced his employment prospects quite drastically. If he had been employed in a sedentary job, say a clerk in an office, his knee injury would not have been so detrimental to his employability

21. On the other hand, there may be other employment opportunities he can explore. There are other adverse contingencies to consider, illness, other accidents, early retirement, family circumstances and the like. The amount he recovers will represent the present value of earnings potential over a period of years into the future. There is no science to selecting a correct figure. On the material we have, we consider the allowance for future loss of earning capacity should be VT 4,000,000.

22. Turning now to the appeal against the award of special damages, the award was made for school fees paid by Mr Tari after the accident. He would have had to pay those fees anyway and they are not related to the accident. The special damages also involved a loan obtained from Mr Arukelana of VT 460,890. This was

to enable the Tari family to meet daily expenses. Whilst it could be said the need for the loan arose as a result of Mr Tari not being able to work, the expenses it paid for did not. These were the everyday expense the family would have had to have met in any event. The same comments would apply to the VT 500,000 reduction in the family's savings. The appeal against the award of special damages amounting to VT 1,083,100 is allowed. It should include only the medical and hospital expenses and other expenses he incurred. There is evidence of paying VT 90,000 to the hospital. The special damages should be allowed for that sum.

23. The value of the bus is part of the special damages claim. There is no need to interfere with the primary judge's decision to award special damages of VT 900,000 in respect of the bus.

24. Moving then to the cross appeal, we are of the view that the judge was wrong to refuse to award Mrs Tari general damages because there was no medical evidence to support her claim. She gave evidence of suffering a head cut and of being in shock immediately after the accident. That is a normal reaction to being involved in a road traffic accident and does not need detailed medical confirmation. If Mrs Tari was claiming extended shock and psychological effects then she would need to bring medical reports to the Court. But in this case she suffered minor head injuries and suffered the trauma of being involved in a traffic accident. She suffered further trauma by seeing her badly injured husband trapped in the wrecked bus following a serious accident as she put it, "*in the middle of nowhere*". She was naturally very concerned and had to endure a lengthy wait (the evidence suggests an hour) before her husband was even freed from the wreck. There was then a further wait before medical assistance arrived and Mr Tari was taken to hospital. A modest award of general damages to Mrs Tari for pain and suffering is appropriate, and we set a figure of VT 75,000.

25. The respondents also seek an uplift of the general damages awarded to Mr Tari. The judge in the court below accepted the principles set out in the *Solzer v Garae* case [1]. He based the award of general damages on comparisons with the guidance contained in the UK Judicial Board of Studies Guidelines for the Assessment of General Damages in Personal Injury Cases. The principles set out in *Solzer* have been generally accepted as appropriate in many cases since first expounded by Chief Justice D'Imecourt in 1992. The guidance found in the UK Judicial Board of Studies publication can only be that, guidance. It is necessary to look at the particular circumstances of the injured party to arrive at appropriate award of general damages rather than just the injuries suffered. There is no doubt that the impairment experienced by one person as a result of a particular injury may be very different to that experienced by another from exactly the same injury. Obvious examples would be the loss of sight in the right eye of a man already blind in the left eye as opposed to loss of one eye to a normally sighted person; or the loss of a finger by a concert pianist as opposed to a labourer.

26. We have considered the submissions. The injuries to Mr Tari were severe, but on the medical evidence have resolved with the disability referred to. The primary judge has taken account of them, and of how they have affected his

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[1] *Solzer v Garae* [1989-1994] 2 VANLR 528

enjoyment of life. Although his lifestyle, and that of his family, has been greatly altered, his ongoing pain and suffering and his ongoing disability (putting aside the loss of earning capacity) has been properly considered by the primary judge. We do not consider that there is an error in that assessment.

27. The remaining grounds of the cross appeal are in respect of the interest to be paid and the costs. That in respect of the interest has been effectively withdrawn, certainly so in respect of the rate of interest. In any event, this Court has already dealt with the way to apply interest in running down cases such as this. The decision in *Kennedy v Taria* [2] explained,

> *"Interest on the judgment sum should be awarded only in respect of past losses, rather than losses to be incurred in the future. Consequently, in our view, the calculation of interest should be on the past loss of earnings, progressively suffered from the date of the accident, and as a proportion of the losses suffered in respect of pain and suffering and loss of amenities to the date of the judgment."*

It is also clear that the rate should be 5%.

28. As for costs, there is no reason to interfere with the judge's proper exercise of his discretion concerning costs in the Court below. The respondents' costs in the Supreme Court will be taxed on a standard basis if not agreed. So far as costs in the appeal are concerned, the appellant has succeeded to a very limited degree on the issue of special damages whilst the respondents have succeeded to a greater degree. The appellants shall pay the respondents' costs of the appeal, such costs to be agreed and in default of agreement to be taxed on a standard basis.

29. In our judgment the appeal should be dismissed. The appellants have demonstrated error in one respect, but overall the judgment in favour of Mr Tari is not reduced.

30. The cross appeal is allowed.

31. The judgment in favour of Mr Tari is increased to VT7,670,000 made up of:-

Non-economic losses		
(pain and suffering and loss of amenities)		VT 1,900,000
Loss of earning capacity	(past)	VT 780,000
	(future)	VT 4,000,000
Special damages	(hospital and other expenses)	VT 90,000
Value of the bus		VT 900,000

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

[2] *Kennedy v Taria* [2016] VUCA 33; Civil Appeal case 1814 of 2016 (22 July 2016)

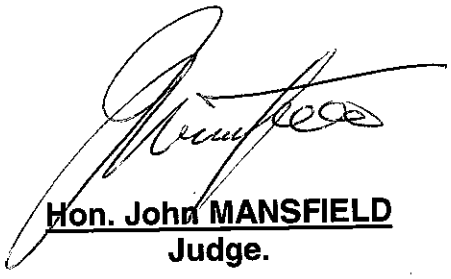
Interest should be payable on the past losses at 5% from the date of the accident. Interest will be payable on the judgment sum from the date of this judgment under the Rules of Court.

32. The appeal of Mrs Tari is allowed.

Judgement is entered in her favour for VT 75,000

DATED at Port Vila this 20th day of July, 2018

BY THE COURT



Hon. John MANSFIELD
Judge.