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

Civil Appeal
Case No. 19/8 CoA/CIVA

BETWEEN: NICOLAS RITSINIAS
Appellant

AND: ORY COVO
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John von Doussa*** ***Hon. Justice Ronald Young*** ***Hon. Justice Oliver A. Saksak*** ***Hon. Justice Dudley Aru*** ***Hon. Justice Gus Andrée Wiltens*** ***Hon. Justice Felix Stephen***
Counsel:	*M. Hurley and A. Kalmet for the Appellant* *PT Finnigan and N. Morrison for the Respondent*
Date of Hearing:	*2nd May 2019*
Date of Judgment:	*10th May 2019*

JUDGMENT

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1. This appeal is against the finding of the Supreme Court that the Appellant's negligence was the sole cause of a collision with a motorcycle ridden by the Respondent, and against the resulting judgment that the Respondent recover damages to be assessed for personal injuries suffered by him in the collision.

The Trial

2. Initially at trial the Appellant denied that he had driven negligently, but part way through he admitted negligence, and the question remaining was whether the Respondent had been guilty of contributory negligence, and if so by what percentage his damages should be reduced.

3. It is common ground that the collision occurred about 7:30am on 29th November 2013 on Mele Road, Efate. It was a public holiday. The weather conditions were fine and the road surface was tar-sealed.

4. The Respondent was riding a motorcycle model CRF450X from the direction of Salili towards Tagabe, that is in a generally south direction along Mele Road. At the same time the Appellant was driving a Toyota Hilux Double Cab motor vehicle in the opposite direction. As the motorcycle approached, the appellant signaled his intention to turn left, and then made a left turn into his business premises on the western side of Mele Road, cutting across the path of the respondent. The Respondent's motorcycle collided with the right-hand side rear door of the Appellant's motor vehicle, causing damage to both vehicles and severe injury to the respondent.

5. At trial there were factual differences as to whether the Appellant brought his vehicle to a stop close to the center of the Mele Road before commencing his turn, or whether he merely slowed down before turning; as to whether the Appellant failed to see the Respondent at all, or whether he saw him at the last moment as he was turning; and as to where on the road surface the point of impact occurred. After reviewing the evidence the trial judge held that the Appellant stopped before commencing his turn, and that he failed altogether to see the Respondent approaching. The point of impact had been determined by a police officer who investigated the collision at that time as being at the southern end of wheel marks on the western half of the roadway, and in a position such that the western carriage way would have been blocked by the Appellant's turning vehicle. As the police accident diagram showing the point of impact was admitted by consent the judge rightly accepted that the point of impact was in the area determined by the police and not further to the west as some of the Appellant's evidence suggested. The police accident diagram showed two wheel marks on the sealed carriage way attributed to the Respondent's motorcycle depicted as parallel with each other, and parallel to the western edge of Mele Road. The marks were 22.5 meters in length.

6. The Respondent by reason of his injuries had no recollection of the accident. As the Appellant did not see the approach of the Respondent, and as there were no eye witness to the accident, there was no direct evidence as to the speed of the Respondent before the accident occurred. At trial evidence was led from two witnesses, called as expert witnesses, to establish the Respondent's pre-breaking speed. Ms Miri Schiller was called by the Respondent. She is a citizen of Israel who claimed expertise from extensive practical experience in car accident investigation and reconstruction. Associate Professor Anderson from South Australia was called by the Appellant. He claimed expertise in vehicle safety and injury bio-mechanics through both extensive academic study and research in mechanical engineering, and from practical experience.

7. Ms Schiller made her calculations of the Respondent's pre-breaking speed by adopting a formula developed and used by the Israeli Police Traffic Section for calculating initial speeds before impact. We set out her calculation:

"Calculations
Motorcycle skid marks found at the scene of the accident and documented by the police were 22.5 meters long.

In order to calculate the motorcycle's speed prior to the accident, we should use the formula:

*V=18.95*Vf*s*
V=initial braking speed
15.95=constant
F=drag factor
S=skid marks length

F for motorcycles is determined as 0.7 when road is made of asphalt, dry, no oil/ water on it, straight and complete.

Therefore, our calculation will be as following:

*V=15.95*V0.7*22.5*
*V=15.95*V15.75*
*V=15.95*3.968*
V=63.3KM/h

The motorcycle's initial breaking speed was 63.3 Km/h

- *Formula has been taken from the investigation and re-construction of car accidents, issued by the Israeli police, updated May 2016, and being used in Europe and the UK for calculating initial speeds before impact, (in case of a motorcycle skid marks-both skid marks-front and back)."*

8. Professor Anderson provided two reports to the Appellant's lawyers before trial, the first based only on information contained in a statement from the Appellant and photographs of the damage to the two vehicles. On this information he formed the opinion that the impact speed of the motorcycle is unlikely to have exceeded approximately 50kph. Professor Anderson was then provided Ms Schiller's calculations and report that included the police accident diagram. This new information led him to revise his earlier report. He observed that Ms Schiller's calculations would only be correct if the motorcycle came to a standstill at the point of impact. Professor Anderson adopted a different formula to calculate pre-breaking speed that included the speed at impact. In applying that different formula he adopted the same assumptions which Ms Schiller had made as to the drag factor (0.7g) and a breaking distance of 22.5 metres. Using these assumptions and his own opinion as to the impact speed earlier formed he concluded that the pre-breaking speed would be 81kph, or if a lower impact speed of 40km/kph was adopted in the formula the calculated pre-breaking speed would be 75kph.

9. Ms Schiller, when questioned on Professor Anderson's report, agreed that the motorcycle collided "*at speed*" with the Appellant's vehicle and that her estimate of the pre-breaking speed could be somewhat higher than 63.3kph. She

challenged Professor Anderson's opinion as to the impact speed saying that it might have been as low as 20kph, and accepted that this additional input could lead to a speed calculation in the order of 66 – 70kph.

10. The trial seems to have proceeded on the footing that before he was confronted by the Appellant's turning vehicle the Respondent was travelling at a speed somewhere between the various speeds calculated by Ms Schiller and Professor Anderson. The trial judge made no precise finding about the Respondent's speed. In his judgment he said:

"In the present case, it is not necessary for me to finally determine which expert is correct in his or her estimation of the claimant's pre-braking speed because of my clear and firm satisfaction that the defendant at no time prior to the actual impact observed the claimant's motorcycle approaching on its correct side of the road from Mele and heading towards the defendant's turning vehicle. In other words, whatever the claimant's pre-braking speed might have been, it would have had no effect at all on the defendant's driving."

11. The observation in the last sentence is correct on the finding that the Appellant at no time saw the approach of the Respondent, but it is not a finding that necessarily excludes the possibility that the Respondent was travelling at a speed excessive in the circumstances which prevented him taking more effective action to avoid or lessen the impact. In later passages in his judgment the trial judge, without making any finding on the expert witnesses' calculations, has concluded that the Respondent's speed was reasonable in these circumstances. He said:

"42. I do not accept that the claimant's pre-braking speed had anything to do with the accident occurring or that he was contributorily negligent in any material sense beyond the axiomatic fact that he was riding his motorcycle at a reasonable speed on his correct lane at the relevant time and place.

43. In particular, defence counsel submits that "a vehicle such as a motorbike weighing less than 2 tons should not be travelling at a speed greater than 60kph on the Mele Road". I disagree. The speed limit of 60kph has no application to a motorcycle which is lighter, faster, and more manoeuvreable than a truck. Whatsmore a motorist approaching a stationary left-turning vehicle on a main road is entitled to assume that the driver of the turning vehicle has seen his approaching vehicle and will give him way before executing the turn. Counsel also submits that "... a reasonable motorbike rider faced with the same weather and traffic conditions on the morning of the accident would not have been travelling more than 60kph". Again, I disagree. The weather was fine, the road was straight, visibility was good and clear and traffic was light since it was a public holiday. The claimant was driving on his correct lane even at the "point of impact" and, at least, he saw the defendant's turning truck albeit at the very last moment as the motorcycle's brake marks indicate."

Appeal

12. Before this Court counsel for the Appellant argued the appeal on the ground that the trial judge fell into error in failing to find that the pre-breaking speed of the Respondent was excessive in all the circumstances and was thereby a causal factor in the accident. Had the trial judge found that the pre-breaking speed was excessive he should have made a finding of contributory negligence.

13. The question for this Court is whether on the evidence the trial judge should have found that the Respondent was riding at an excessive speed immediately before he was confronted by the Appellant's turning vehicle.

14. As the Appellant did not see the Respondent's approach, this is not a case where it is necessary to consider whether the speed of the approaching motorcycle was such that the turning driver was misled because he had wrongly assumed that the on-coming vehicle was traveling at a slower speed. Here the sole question is whether, if the Respondent's speed was reasonable in all the circumstances, he could have avoided the collision, or at least so reduced its consequences that he should be held to have contributed to his injuries.

15. The Appellant does not challenge the finding that he stopped before turning, and that he did not see the approach of the Respondent. The point of impact indicated in the police accident diagram is also accepted.

16. At trial no objection had been taken to the qualification of either Ms Schiller or Professor Anderson to give opinion evidence as to the likely pre-breaking speed of the Respondent. That, however does not mean that the Court should not analyze the reasoning on which their opinions are based and the accuracy and reliability of factual assumptions which they have adopted as the basis for their opinions.

17. There was no evidence led at trial that would assist the Court in determining what speed could be considered reasonable on Mele Road at about 7:30am on a fine public holiday day. There was no evidence led about prevailing vehicle or pedestrian traffic in the vicinity, or about speed usually travelled by vehicles, light or heavy, on that straight road at that time of the day. The only assistance available to the Court on this score was that adopted by the trial judge in paragraph 43 of his judgment (above). The accident happened on a straight sealed road that was not subject to any regulatory speed limit for vehicles weighing less than 2 tons. The judge was entitled to reason that by inference if the vehicle weighed less than 2 tons a speed over 60kph was not necessarily considered unreasonable by the road authorities.

18. Even without helpful evidence about traffic conditions and road use a high speed, if established, could lead to a finding of contributory negligence on the basis that

the speed lessened the opportunities to avoid or minimize unexpected risks arising on the roadway. It is on this basis that the Appellant argues before this Court that a speed even in the order of 70kph, and certainly in the order of 81kph should lead to a finding of contributory negligence.

19. The starting point of this argument must be a finding that the Respondent's speed was about 70kph or greater. The Appellant argues that the expert evidence, especially that of Professor Anderson, requires such a finding.

20. Ms Schiller's calculations (set out in paragraph 7 above) rest on several critical assumptions, each of which in our opinion is open to serious question. First she assumes the wheel marks depicted in the police accident diagram are "*skid marks*". The marks are not so identified either in the diagram or otherwise. The marks are not the subject of any description in the evidence. That there were two marks separated by a distance measured at 1.05 metres immediately before impact at the least indicates that they were not left by the motorcycle whilst travelling in an upright and direct course towards the point of impact. The separation of these marks suggest that the motorcycle was at least partly side on to its original direction of travel, suggestive of it being in a slide.

21. Next, Ms Schiller assumes a drag factor of 0.7g. How this factor was arrived at, and what variables may influence it such as the weight of the vehicle in question and its passenger, the type of tyre tread, or the width of the contact surface of the tread with the road surface are not addressed. These factors might require a significant variation of the drag factor in this case where the motorcycle was a relatively light "*dirt bike*" with a distinctive tyre tread dissimilar to the usual tyres fitted to a road motorcycle. The only information given by Ms Schiller is that the assumed drag factor is applicable to motorcycles when "*road is made of asphalt, dry, no oil/water on it, straight and complete*". Ms Schiller does not explain what "*straight and complete*" means, but later in her calculations she says the formula she used is for calculating initial speed before impact "*when having documented straight and one piece skid marks at the accident scene (in the case of a motorcycle skid marks – both skid marks – front and back)*". Again the requirement of "*straight and one piece skid mark*" is not explained. The police accident diagram does not depict a straight one piece skid mark. Rather it shows two piece markings that are not described as skid marks. Ms Schiller's calculations, and her report generally, does not address these issues so as to permit the Court to understand whether the assumptions she has made are appropriate to the facts of this case. The fact that the police accident diagram suggests that the motorcycle was sliding sideways, at least partially, would appear to seriously challenge the notion of a skid mark used in the calculation being "*straight and one piece*". The absence of any description of the wheel marks depicted in the police accident diagram in our opinion rendered the attempt by expert evidence later to estimate pre-breaking speed doomed from the outset. Moreover, the Court is given no evidence to assess how and to what

extent the drag factor could vary from 0.7 on account of the factors earlier mentioned.

22. These uncertainties carry through to Professor Anderson's calculations. He does not purport to arrive at an opinion of the Respondent's pre-braking speed from his own expert knowledge and investigation of the road markings found at the accident scene. He has applied a different formula that takes into account his estimated speed at impact, but otherwise his calculations depend on the assumptions made by Ms Schiller. His estimate of 81kph therefore suffers from the same uncertainty as Ms Schiller's calculations.

23. In our opinion the evidence led from Ms Schiller and Professor Anderson based on road markings do not provide reliable estimates that can be accepted by the Court to make a finding as to the Respondent's pre-accident speed. As there was no direct evidence from eye witnesses about speed, there is in our view no basis on which the Court can find that the Respondent was guilty of riding at an excessive speed, and there is no basis upon which a finding of contributory negligence based on speed can be made.

24. In the Appellant's written submissions it is suggested that the Respondent had a propensity to speed as he had earlier convictions for speeding, and because some distance before the accident he had passed his brother who was driving a loaded motor vehicle who later commented that the Respondent was "*driving his motorcycle fairly fast at that time*". This propensity argument was not pressed in oral submissions, and could provide no basis for a finding that just before the accident the Respondent was riding at an excessive speed.

25. The written submissions also contend that because the Respondent's motorcycle was not registered and insured as required by law this was a basis for a finding of contributory negligence. Reference was made to decisions of the Supreme Court of Papua New Guinea that there were said to support this submission. The basis of the remarks relied on in those decisions is not clear to us. Possibly the vehicles there in question were un-road worthy, leading the Court to consider there was relevant relationship between registration and road worthiness. However in this case there was unchallenged evidence that the Respondent's motorcycle was in good repair. The lack of registration of the motorcycle is wholly unrelated to the factors which cause the accident, and can provide no basis for a finding of contributing negligence.

26. The parties have agreed that the judgment in the Supreme Court requires amendment so as to delete an interim assessment of special damages made by the trial judge. Subject to that, for the reasons given above the appeal fails and must be dismissed.

27. The formal orders of the Court are:

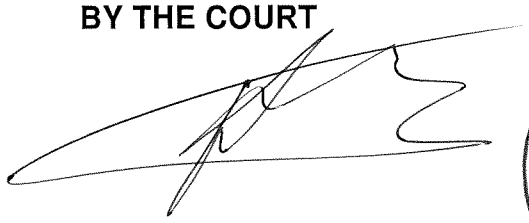
(1) The judgment of the Supreme Court is amended by deleting the award of AUD$46,248.37 and interest thereon, but the finding of liability against the Appellant for damages to be assessed is otherwise confirmed.

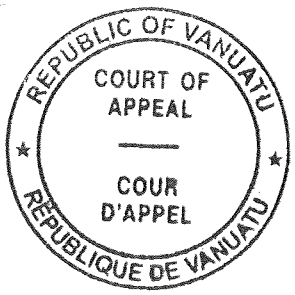
(2) The appeal is dismissed.

(3) The Appellant shall pay the Respondent's costs to the appeal on the standard basis.

DATED at Port Vila, this 10th day of May, 2019.

BY THE COURT





Hon. Vincent Lunabek
Chief Justice.