

(Civil Jurisdiction)

State Law Office

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by hand

BETWEEN: LAHO LIMITED

AND: GOVERNMENT OF VANUATU

AND: ELVIS KALFAU

Judgement

The Plaintiff filed a writ of summons in October 2001 in which he claimed against the Government of Vanuatu as first defendant and Elvis Kalfau as the second defendant.

The claim is for repair costs suffered by the plaintiff as a result of a collision caused by the second defendant's careless driving on the night of the 5th of January 2001

The second defendant is a Police officer. Evidence produced before this court show that the following facts existed. The second defendant ~~was~~ had consumed some alcohol. He was driving the first defendant's vehicle registration number POL 9814 on the night of the 5th January 2001 on the Fresh Wota road. A collision occurred during which the plaintiff's vehicle sustained damages.

This case is particular in the sense that the second defendant has refused to make an attempt to enter an appearance to defend the claim against him so some of the things said against him is untested and some things said for him is hearsay at best.

However, in light of the ample opportunity made available to him to enter a defense, and the court being satisfied that he was aware of the proceedings dates and time but did not attempt to enter a defense, the court proceeded with the hearing and onto the making this judgement.

The major part of the facts of the case was uncontested. The legal issue before the court is that of liability. Is the first defendant vicariously liable for the actions of the second defendant? The court had the benefit of and is grateful for the legal submissions filed by the two counsels in this case.

On the most basic understanding of the principle of vicarious liability is that there has to be, in existence, a relationship between the defendant and the wrongdoer. The most pervading of these relationships is the master servant relationship. In the master servant relationship, one must distinguish between the type of contract that exist between the master and servant. The text "The Law of Torts in Australia" by Francis Trindad and Peter Cane refers to the Control Test determines whether the servant is an independent servant or an independent contractor. The independent servant is employed under a contract of service whereas the latter is employed under a contract for service.

I adopt the definition given in *Ready Mix Concrete V M.O.P (1968) 2 Q.B. 149* by Mackenna, J that a contract of service exists if:

1. The worker agrees that he will be paid for his work and skill in the performance of a service for his master.
2. The worker must agree that he will be subject to the control of the employer
3. The term of contract should be consistent with the contract being a contract of service.

To answer the question as to whether the second defendant was in a relationship with the first defendant, the facts show that this question must be answered in the affirmative.

Was the relationship one of a contract of service or that of a contract for service? Using the exposition given above, again the Court will answer this question in the affirmative.

The next question that I must apply my mind to is whether the actions of the second defendant is referable to that relationship. Was the wrong committed by the second defendant done in the course of his employment? In the alternative, was the wrong committed by the second defendant when doing authorized acts using unauthorized methods?

The facts (as accepted) in this case show that the second defendant acquired the subject vehicle forcefully and was driving outside of his shift. Another officer was on duty when the second defendant came and took charge of the subject vehicle and was driving it when the collision occurred. The second defendant was not in the course of his employment when the wrong was committed; nor was the second defendant doing an authorized act using unauthorized methods.

The provisions of section 10, 1002 (6) of the Police General Orders is also clear on the issue of liability of the State in cases of accidents involving government vehicles in unauthorized situations. The situation of the second defendant in this case was unauthorized.

For the reasons given above, I find the first defendant not vicariously liable for the actions of the second defendant and make the following orders that the claim against the first defendant fails and the Court enters judgement for the plaintiff against the second defendant in the sum of VT356, 606. The court will not grant the interest applied for. Cost of the suit is award to the plaintiff to be taxed if not agreed.

DATED AT PORT VILA, this 21st day of May 2002

BY THE COURT


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John Obed Alitee
MAGISTRATE

