IN THE MAGISTRATES' COURT
OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 90 of 2006

BETWEEN: ABEL KONNE
Claimant

AND: MINISTER OF TRADES & COMMERCE
First Defendant

AND: SAMSON HALEWA
Second Defendant

Coram: *Steve R. Bani*

Counsels: *Mr. Willie Kapalu for the Claimant*
Mr. Frederick J. Gilu for the Defendants

JUDGMENT

By a Magistrates Court Claim the Claimant claims damages arising out of a motor vehicle accident. The Defendants by an Amended Defence filed herein deny the claim. The burden and standard of proof (on the balance of probabilities) rests on the Claimant. This is a claim in tort of negligence. The Defendants deny such a claim.

The defendants opted not to adduce evidence in their defence and further opted not to cross-examine the Claimant's only witness Mr. Frank Relmal who filed a Sworn Statement as evidence in support of the Claimant's claim.

The Claimant alleges that he owns a Toyota corolla taxi registration No. 3827. On or about 19th August 2005 the Second Defendant, an employee of the First Defendant, whilst driving a Government vehicle registered No. G9 collided with the Claimant's car on the front left side. It is alleged that the Second Defendant was negligent. It is alleged that this incident occurred at Au Bon Marche shop. Vehicle G9 is alleged to belong to the First Defendant.

Given the position of the Defendants' election not to adduce evidence and not to cross-examine the only witness of the Claimant, Claimant's counsel asked the court to accept Mr. Relmal's Sworn Statement as evidence in support of the Claimant's Claim. The Defendants' counsel raised objections to some parts of the Sworn Statement as being hearsay and opinion inadmissible evidence. The court was referred to paragraph 3 of the Sworn Statement where the deponent sought to annex a copy of a police report to support the proposition he raises therein. It was submitted by counsel for the Defendants that the police report could not be admitted as evidence as it is hearsay evidence. That report purports to state the truth of the facts being denied by the Defendants. The court held that that part of the Sworn Statement is hearsay inadmissible evidence and was struck out accordingly. The court was also referred to paragraph 4 of the Sworn Statement. It is submitted by counsel for the Defendants that that paragraph contains opinion evidence and so is hearsay. It was submitted that the deponent is trying to say what the Second Defendant was thinking at that time. This court held that paragraph 4 is inadmissible opinion evidence and was accordingly struck out.

The court admitted the Sworn Statement of Mr. Relmal (excluding the parts that were struck out as inadmissible evidence) as the only evidence in this trial. That evidence is set out as follows:

1. Mr. Frank Relmal was the driver of the Toyota corolla taxi registration 3827 on 19th August 2005.

2. In or about 1527hrs, Mr. Relmal parked the taxi in front of Au Bon Marche parking area waiting for a customer.

3. As he was making an exit out of Au Bon Marche parking area, vehicle registration G9, driven by the Second Defendant collided into the left side of the taxi.

4. Because of the Second Defendant's action, repairs had to be done to the taxi driven by Mr. Relmal. Annexed to the deponent's Sworn Statement copies of quotations from 3 different garages. Deou Motors, Auto Smash Repairs and Asco Motors respectively.

The issues therefore are (i) whether the Second Defendant was negligent, and (ii) if so whether the Defendants are liable for any damages caused?

To prove negligence, indeed the Claimant must show on the balance of probabilities;

a) That the Defendants owed a duty of care to the Claimant; and
b) That the Defendants breached that duty of care; and
c) Thereby occasioning loss/damages to the Claimant.

In actions such as this, it was held that road users owe a duty of care to others to take care in a manner of their driving (*Coconut Oil Productions (Vanuatu) Ltd (COPV) & Or –v- Peter Terry* [2007] VUCA 17; Civil Appeal Case No. 24 of 2006 (24 August 2007)). In that matter the court held that all road users (drivers) owe a duty of care to other road users. To assert that the Defendants breached this duty of care, the Claimant must show that the Second Defendant's driving fell below the standard of a competent prudent driver.

The only evidence before this court of the incident giving rise to this claim is that there was a collision between the Claimant's vehicle and the Defendants' vehicle. There were no other factual evidence of the incident, how it occurred, what directions the vehicles were traveling and, moreover the location of the collision is not stated. It is alleged that the incident occurred at Au Bon Marche parking area. There are a number of Au Bon Marche shopping centers in Port Vila.

In all actions involving traffic accidents, the duty of care is owed by a road user to another. To this end the starting point in assessing negligence is that both the Claimant's driver and the Second Defendant owed a duty of care to each other. It is accepted that a collision occurred, however, the party alleging negligence must show by evidence that the Second Defendant failed to exercise the standard of care required of a competent prudent driver. There is no evidence whatsoever that would lead this court to determine the degree of negligence (if any) on the part of the Second Defendant. The Claimant alleges that the Second Defendant failed to keep a proper look out. There is no evidence to support this proposition.

Counsel for the Claimant cited the case of *CPOV & Or v Peter Terry* [2007] VUCA 17; Civil Appeal Case No, 24 of 2007 (24 August 2007) as an the authority to apply to the present case. The facts of that matter are distinguishable to the present matter. In that case the parties led evidence to support their allegations of negligence whereas in the present action no evidence whatsoever was adduced in support of the Claimant's proposition that the Second Defendant was negligent. Indeed as is submitted by counsel for the Defendants, without any factual evidence of the wrongdoing the court is led to assume that the collision occurred because either the Second Defendant was at fault or the Claimant's driver was at fault, or, they were both equally at fault. In the absence of any evidence regarding the events leading up to the collision, the court can only be led to assume that both drivers were equally at fault. To this end neither party could be blameworthy.

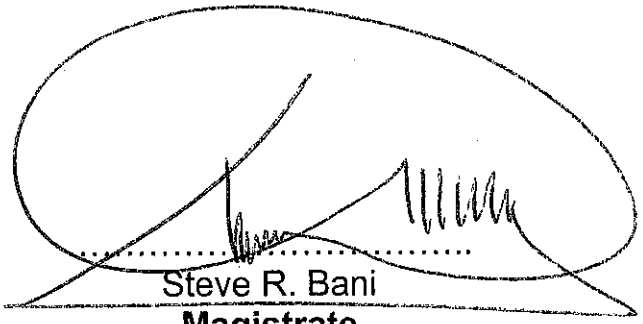
Counsel for the Defendants cited the matter of *Ashcroft v Mersey Regional Health Authority* [1983] 2 ALL ER 245 as authority supporting the proposition that where there are two equally possible explanation for the accident, one of which indicates that if the collision occurred without negligence on the part of the defendant, the claimant's action will fail. The principle of that case was misconceived. That matter was one of a duty of care exercised by a professional person. A doctor – patient relationship. There are no similarities between that case and the present one. This is mentioned only because it was raised as an authority in support of the defence case.

Having made these observations, it must be held that the Claimant failed to discharge the onus and standard of proof in this action. Issue (i) fails. That is on the evidence adduced before this court it is very difficult to attach liability on the Defendants. The Claimant's claim for damages in tort of negligence must fail. It follows also that the other claims for loss of business must fail.

Costs are awarded to the Defendants to be fixed by the court failing agreement.

Dated at Port Vila this 12th day of October 2007

BY THE COURT



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Steve R. Bani

Magistrate