

**IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU  
(CIVIL JURISDICTION)**

**CIVIL CASE NO. 120 OF 2007**

**BETWEEN**

**ANN MARIE ATIS**

Claimant

**AND**

**KENNETH NATAPEI**

Defendant

*Coram:* Justice J. Macdonald

*Counsels:* Mr G Boar for the Claimant  
Mr E Nalyal for the Defendant

*Date of Hearing:* 30 September 2010

*Judgment:* 28 October 2010

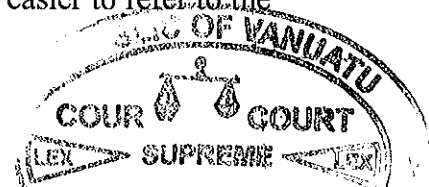
**INTERIM JUDGMENT**

**Introduction**

1. This hearing is to assess damages in respect of injuries the claimant suffered on 26 August 2004. She was struck by a vehicle driven by the defendant when crossing the road. The defendant has admitted liability for the accident.
2. The claimant seeks general damages of VT8,500,000 and special damages of VT6,718,700. She also seeks interest at 12 percent per annum and costs.

**The Injuries**

3. Because of her injuries the claimant was in hospital for a period of time, although the actual time is not stated. Her injuries are listed in paragraph (4) of her amended Supreme Court Claim, but it is probably easier to refer to the



medical report of 1 September 2004 from Dr Wari. If I have read it correctly he lists the injuries as follows:

- superficial laceration of left face;
- superficial laceration of her left wrist and dorsum of left hand;
- superficial laceration right tibia;
- superficial laceration of left knee;
- linear laceration left chest;
- deposition injury of left sacro-iliac joint.

4. A second medical report from Dr Wari dated 12 September 2004 provides further detail:

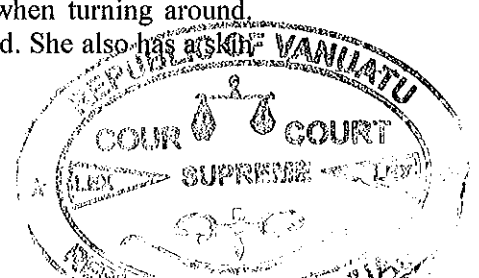
- Superficial laceration of the left side of the face from supra-orbital region to the zygomatic arch involving 60 percent of her left ear.
- Superficial laceration of her left wrist and dorsum of the left hand.
- Superficial laceration of 50 percent of her left knee.
- Superficial laceration of 40 percent of her right toe.
- A linear superficial laceration over her medial left iliac crest.
- Underlying is a crushed injury of the transverse process of the fifth lumbar spine onto the sacro-iliac joint.
- She experiences a lot of pain hence limited range of motion dragging her left leg on walking. The sacro-iliac joint itself shows a disruption.
- The prognosis especially of the left hip is guarded at this stage.

5. The further medical report of 24 April 2006 from Dr Bador records:

This is to certify that I saw Anne Marie Atis on 18 April 2006. She gave me a history of a road traffic injury (01/09/04). A certificate from the hospital mentions a disruption of sacroiliac joint and a crushed injury of L5.

She now complains of pain in the left thigh, with swelling, which forces her to miss work, especially when the weather is rainy. She also associates headaches and vertigo to sunny weather. She also cannot stand stress for too long.

On examination she is obese, with an apparent shorter left leg and a limp, she moves with pain and is unbalanced when turning around. Her back is stiff, her left thigh muscles are wasted. She also has a skin fungus infection.



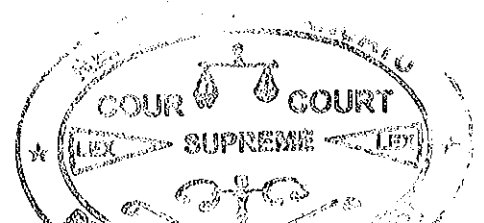
In November 2005, x-rays of her left knee were normal. Today, x-ray of her hips does not show abnormality.

I recommend her to see the surgeon at the hospital, Dr. McNamara, for further examinations.

6. The final medical report is from Dr Leona of 13 August 2009, where he found that she suffered from:
  - Lower lumbar-sacral tenderness;
  - Limping of right lower limb;
  - Medical meniscal injury of right knee.
7. Dr Leona expressed the opinion that she will need right knee arthroscopy but that is unavailable in Vanuatu.
8. I note that Dr Leona refers to the right lower limb and the right knee, which is at odds with all the other medical reports. I can only assume that he has made a mistake.

### **Sworn Statements**

9. The claimant has filed two sworn statements, the first on 25 July 2008 and the second on 1 June 2010. In terms of matters relevant to damages I list the following:
  - she is married with two children (aged seven and four), the younger child being born after the accident;
  - her injuries limit her ability to play with her children or be involved in physical activities with them;
  - she can no longer attend to normal household chores, which are now carried out by her husband;
  - prior to the accident she had played in a handball team but is now unable to do so;
  - she was unable to continue her employment after March 2007 (where she was paid VT18,000 per month) as the demands of her job became beyond her physical capabilities;



- she had not worked between 2005 and 2007;
  - her left leg is now shorter than her right leg, she experiences great pain during cold weather, she cannot stand for more than 30 minutes and sometimes gets dizzy if she walks in the sun;
  - the birth of her younger child had complications and she is no longer able to conceive (she had always wanted four children);
  - being unable to work had caused financial hardship and she has had to borrow VT54,000 from her brother to help pay school fees, and she has had to borrow from other family and friends;
  - she paid VT2,000 to hire crutches and a further VT1,000 for a water bag;
  - she has paid x-ray fees of VT9,388.
10. Commenting on the matters just listed there is no evidence to establish that the accident caused her inability to conceive any further children. Furthermore, the only receipts produced to substantiate any expenses incurred are in relation to the x-rays.

### **General Damages**

#### ***Pain and suffering***

11. In assessing an award to cover pain and suffering I must take into account the pain the claimant has suffered and will continue to suffer for the rest of her life.
12. Plainly it was a nasty accident. To be struck by a car in the way that happened to the claimant must have been terribly painful. She describes that in her sworn statements.
13. As mentioned before, I do not know the length of time she spent in hospital following the accident. I also note that her claim of being unconscious at some point is at odds with the medical report of 12 September 2008. However, I do not find that to be significant.



14. The most serious injuries, from which ongoing pain is likely to emanate, are in relation to the shorter left leg and the resulting limp. Furthermore, her back is stiff and the left thigh muscles have wasted. Apart from that the bulk of the injuries consisted of superficial lacerations, which would have healed.
15. There are, however, two matters that are unclear. Dr Bador in his report of 24 April 2006 refers to the claimant being obese and of having an “apparent shorter left leg and a limp”. Neither matter is referred to in the earlier medical reports. Significantly, I also do not know whether the claimant was obese at the time of the accident and whether the shorter left leg and limp was caused by the accident. Clearly that has implications when considering her employment status and any loss suffered in that regard.
16. In terms of comparative cases counsel have referred to:

*Enterprise Roger Brand v Hinge* [2005] VUCA 21;

*Obed v Kalo* [2008] VUSC 47;

*Alphonse v Tasso* [2007] VUSC 54;

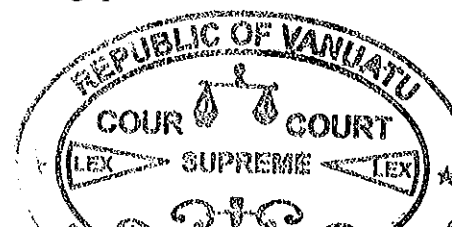
*Solzer v Garae & Anor* [1992] VUSC 3; and

*Shem v North Efate Timber Ltd* [2008] VUSC 48.

17. I have considered those cases in a comparative way. I think the closest case is *Alphonse*. The others involve more serious injuries.
18. The claimant seeks VT1,500,000 for pain and suffering. The defendant submits that is excessive and a figure of VT100,000 is appropriate,
19. In the circumstances I would have thought that VT500,000 would be appropriate.

#### *Loss of amenities of life*

20. I must have regard to the things that the claimant, as a 32-year-old woman, can no longer do and which she was accustomed to doing prior to the accident.



21. Being able to do physical activities with her children is a significant loss. She can no longer play handball, although there was no detail offered as to how long she had played or with what frequency. Because of her limp I take it that her movements are restricted and that limits her in a variety of other ways. She can no longer do household chores but that hardly sounds like much of loss. There is the loss of employment with apparently no such prospects in the future, but in my view this is largely covered by the claim for loss of prospective earnings.
22. As for comparable cases Mr Boar refers to *Obed v Kalo (supra)*. He submits that VT7,000,000 is appropriate for loss of amenities of life.
23. Mr Nalyal submits that any award should be minimal because she continued to work after the accident and was mobile. He suggests that part of her difficulties stem from her obesity.
24. Any assessment is dependent on confirmation that the shorter left leg and limp were caused by the accident. However, there does not appear to have been a significant loss of amenities, and I consider that VT200,000 would be appropriate.

### **Special Damages**

#### ***Medical Expenses***

25. As noted the only receipts produced are in relation to the x-rays amounting to VT9,388. That amount has been properly proved as being reasonable and necessary.

#### ***Prospective loss of earnings***

26. Relying on *Obed v Kalo (supra)* Mr Boar submits that the claimant is entitled to VT5,244,000. The calculation is on the basis that at the age of 32 she would have a further 23 years until retirement age. If she was paid VT20,000 per month (that was the expectation even though she was paid VT18,000 at

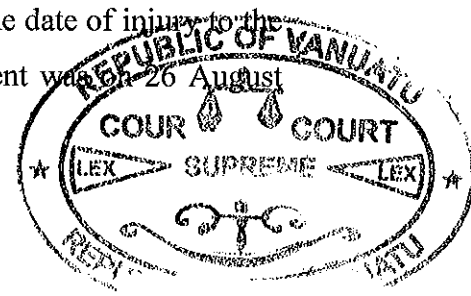


the time of the accident) that would mean an annual figure of VT240,000. The total would be VT5,520,000, which would need to be discounted by 5 percent for life's uncertainties.

27. Calculated at VT18,000 per month, which I consider to be the correct rate, it would be VT4,719,600.
28. In response Mr Nalyal submits that there is no guarantee that she would have worked for another 23 years. He submits that, having regard to the medical reports, it could be that the claimant is suffering from other difficulties that are unrelated to the accident. It is possible that she is not working now because of her obesity. She was working after the accident and there is no reason for her stopping work.
29. On reflection I find that I am in some difficulty when it comes to assessing loss in relation to her employment. It would have been helpful if the claimant had appeared and been cross examined. It is unclear as to when she returned to work and for how long. I do not know whether the knee surgery (unavailable in Vanuatu) would alleviate her difficulties and enable her to return to work. The difficulty seems to be with standing for long periods. Some medical opinion on the issue of whether the reasons for her not working are solely attributable to the injuries suffered in the accident would also be helpful.
30. While I could take the view that the onus is on the claimant to make out her claim, and the evidence called is simply insufficient, I also consider, as a matter of fairness, that the claimant should be given the opportunity to present further evidence on the issues raised. I say that because she is plainly entitled to some relief and it may well be that further evidence is available.

### *Loss of earnings*

31. As a general rule loss of earnings are calculated from the date of injury to the date of assessment. According to the claim the accident was on 26 August



2004, although in his submissions Mr Boar refers to 1 September 2004. I will assume that the earlier date is the correct one. The defendant's sworn statement refers to being charged in relation to events on that earlier date and all the medical reports refer to that.

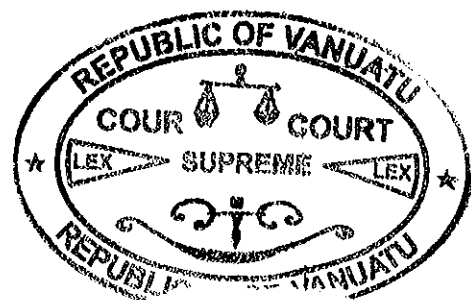
32. At the time of the accident she was being paid VT18,000 per month. She was discharged in March 2007. Mr Boar submits that she is therefore entitled to VT1,080,000.
33. On the evidence it seems to be unclear as to how long she was out of work or the date that she resumed work after the accident. I am therefore unsure if Mr Boar's calculation is correct.

***Costs of special equipment***

34. No receipts have been provided and therefore I am not satisfied that any loss in this regard has been established.

***Loss of pension rights***

35. Mr Boar submits that under s 38 of the Vanuatu National Provident Fund Act [CAP. 139] a person may withdraw the contributions made at age 55. The contribution is 8 percent of the salary received. Over 20 years that would mean VT384,000, which is the amount claimed.
36. I did not understand Mr Nalyal to be contesting the right to make such a claim, even though it does not appear to feature as a separate item in any of the cases cited by counsel. Instead he raises the same issues of whether she stopped working and is now unable to work for reasons unrelated to her accident.
37. Once again I would be helped by further evidence and at this point am unable to make a determination.





## Conclusion

38. I have indicated that I consider that general damages in the amount of VT700.000 would be appropriate.
39. In respect of special damages I would allow the VT9,388 for the x-rays but I am unable to reach any final determination on the sums claimed in respect of loss of earnings and loss of pension rights. I would require further information on the following matters:
- How many days was the claimant in hospital after the accident?
  - How many days was she off work?
  - When did she return to work?
  - When did she finally stop work?
  - Was she obese at the time of the accident?
  - Was her shorter left leg and limp caused by the accident?
  - Is the reason for her being unable to work a result of the accident, or are there unrelated health issues?
40. If counsel are able to reach agreement on these issues, and provide me with answers, then I would be in a position to finalise my assessment as to damages. However, if no such agreement can be reached, or there is a need to call further evidence then unfortunately I will have to refer the matter back to the Registrar for re-allocation.
41. Finally, on the question of interest I note that the Court of Appeal in *Enterprise Roger Brand v Hinge (supra)* commented on 12 percent interest being the maximum rate and there needed to be justification for it being imposed. In the present case I can see no justification for interest at 12 percent and I consider 5 percent per annum to be appropriate.

**DATED at Dunedin this 28th day of October 2010**

BY THE COURT

  
.....  
J. MACDONALD

