IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction) **Civil Case No. 139 of 2008**

BETWEEN: GUY BENARD
Claimant

AND: GARRY BLAKE NIGEL
First Defendant

AND: NIGEL MORRISON
Second Defendant

Hearing : 14 February, 2011
Before : Judge R. L. B. Spear
Claimant : Mr R Sugden
Defendant : Mr J Ozols

RESERVED DECISION

Introduction

1. The Claimant was, at that material time, a client of the Port Vila based law firm, *Ridgway Blake*. The Defendants are the partners of that law firm. This is a claim for damages arising from personal injury following the Claimant's fall in *Ridgway Blake's* car park on 24 April 2008.

2. The hearing was confined solely to the question of liability. Not only was there very recent evidence filed by the Claimant as to developments with his injuries, it was also clear that the medical assessment of those type of injuries was likely to require specialist medical assessment of a nature that might not, indeed, be available in Vanuatu. Mr Sugden informed the court that the claim as to damages had not been able to be finalized because of those recent material developments in respect of the Claimant's medical condition. Additionally, the Defendants have clearly not had the opportunity to have the Claimant's medical claims appropriately assessed.

Background

3. On 24 April 2008, Mr Benard (the Claimant) attended on his lawyer, Mr Morrison (the Second Defendant). After the interview, Mr Benard left *Ridgway Blake's* offices and walked down into the firm's car park only to find that his car had been blocked in by another client's motor vehicle. Mr Benard then walked back into the law firm's office to request that the offending motor vehicle be moved. He states that as he was walking towards the street along the up-hill edge of the car park, he lost his footing and fell over. This was on a small slopping section of the hard sealed surface of the car park that was partially covered with some vegetative matter; probably, a type of moss or lichen. Mr Benard's evidence is that the fall caused him immediate injury by way of a fracture of his right ankle as well as severe pain and suffering. Furthermore, he has sustained on-going, developing and continuing health problems that he attributes to the injuries that he sustained in the fall. They include lumbar restriction as well as the recent onset of diabetes.

The Evidence/Hearing

4. The court took account of sworn statements filed in the case by the following:-
   1) The Claimant dated 4 May 2009;
   2) Candice Benard dated 25 May 2009;
   3) Chane Si Lin dated 25 May 2009;
   4) Second statement by Claimant dated 5 August 2009;
   5) Wong Man Kan Jerome dated 23 December 2010;
   6) John Taleo dated 14 February 2011;
   7) Second Defendant Nigel Morrison dated 14 February 2011.

5. There have been four further sworn statements filed by the Claimant dated:
   1) 6 November 2009;
   2) 7 February 2011;
   3) 11 February 2011 (1); and
   4) 11 February 2011 (2).

6. Additionally, a report from a Dr. Rouvreau has been filed for the Claimant.

7. Those four further sworn statements by the Claimant and the medical report all relate to quantum and they were not considered at this hearing

8. Mr Ozols objected to certain parts of the evidence contained in the sworn statement of Candice Benard on the grounds that it was hearsay. His objection is well made out in so far as it went. However, the objection can only relate to that part of her evidence that identifies the particular area of the car park where her Father (Mr Benard) told her that he fell over. She was not there at the time that he fell. Her evidence in that respect can therefore only be evidence of what she was told and not as to the truth of the statement. I have ignored her evidence in that particular respect as no proper basis has been made out for considering it.

9. Mr Benard, John Taleo and the Second Defendant Nigel Morrison were called and cross-examined.

Legal Issues

10. It was accepted by counsel both for the Claimant and the Defendants that, by application of Article 95 of **The Constitution**, the **Occupiers Liability Act 1957** (UK) and the Law **Reform (Contributory Negligence) Act 1945** (UK) both apply subject, of course, to any domestic developments in this area of law either by statute or by case law.

11. It was indeed held to be so in **Hudson v Attorney' General [2001] VUSC 56** Coventry J.

12. I see no reason to depart from the conclusions, with respect, so ably reached by Coventry J in **Hudson** particularly as counsel for both parties in this case have recognized and accept the correctness of his Lordship's findings.

13. It is for Mr Benard to prove on the balance of probabilities that he suffered damage as a result of a breach by the Defendants of the duty of care that they owed to visitors to their business premises such as Mr Benard as identified by the Occupiers Liability Act 1957.

14. The duty of care is defined in s 2(2) of that Act is in these terms:-

> *"The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the*

premises for the purposes for which he is invited or permitted by the occupier to be there".

15. Where a breach of that duty has been proven together with resultant injury, it is for the Defendants (in this case) to prove on the balance of probabilities that the Claimant contributed to his injuries through his own carelessness.

16. Section 1 (1) of the **Law Reform (Contributory Negligence) Act 1945** provides:-

"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the Claimant's share in the responsibility for the damage".

Consideration

17. The evidence for Mr Benard that he slipped and fell over while negotiating an identified, small section of the car park was convincing. The Defendants were certainly unable to present any evidence that contradicted Mr Benard's evidence in that respect either in respect of the fact that he lost his footing and fell or as to the particular place in the car park where he said that he lost his footing. Mr Benard's evidence as to the exact place at which he fall was supported substantially by the evidence of Mr Taleo who just happened to be driving down the street passed the *Ridgway Blake* car park at that material time. Mr Taleo is an Assistant Commissioner of Police and he was a careful and impressive witness indeed.

18. The business premises of Ridgway Blake are located on a steep street in Port Vila. The office block (as such) has access directly from the street/footpath by one of two sets of steps leading up to a small balcony from which the front door of the law firm is accessed. Directly below the law offices is the car park that is accessed from the same street. It is capable of housing three cars parked side by side. If those three cars are parked at the back of the car park (that is, as far as possible from the street), there is space for other cars to be parked behind them. That is largely the situation that confronted the Mr Benard on this particular day.

19. When the car park is viewed from the street, the position of the relevant motor vehicles that day was: Mr Morrison's car at the back left; Mr Blake's car at the back center; and Mr Benard's motor vehicle at the back right.

20. When Mr Benard left the law offices after his appointment with Mr Morrison, he walked out into the car park and noticed that another vehicle had driven into the car park and stopped behind Mr Blake's car. Mr Benard walked further into the car park to ascertain whether this vehicle was also obstructing his car such that he could not reverse out of the car park. That became obvious to him and he then turned and started to walk back to the law firm's offices to arrange for the other car to be shifted. Mr Benard states that, as he was walking across the car park, at a point immediately beside the foundation wall of the building housing the law offices, he lost his footing and fell. He did not know at the time why he had fallen. He said he fell heavily and suffered immediate pain in his right ankle and generally to his right side.

21. The evidence of both Mr Benard and Mr Taleo is that Mr Benard fell over at a particular part of the car park, by the foundation wall of the law firm, which was clearly identified by the evidence.

22. On the application of Mr Sugden for the Claimant, and without opposition from Mr Ozols, the court took a view of the car park. It is always necessary that a court taking a view does not attempt to gather its own evidence. The principal purpose of a view is to gain some familiarity with the physical surroundings so that the evidence properly tendered can be better understood.

23. It must, however, be of significance that the very area of the car park where Mr Benard stated he lost his footing was still partially covered in part with some vegetative matter in the nature of lichen or moss at the time of the view. It is a small area which Mr Morrison acknowledged is in shade for part of the day because of the foundation wall and accordingly more susceptible to the growth of lichen, moss or suchlike on its surface.

24. The evidence was clear, to the point of being overwhelming, that this particular, small section of the car park where Mr Benard lost his footing presented two difficulties to those on foot. The first is that the hard surface (it appears to be bitumen or a hot mix of some nature) of the car park, just in this small section of less than one square meter slopes

down towards the road at a gradient well in excess of other sections of the car park. Additionally, it had some vegetative cover.

25. I am in no doubt that it was a combination of the vegetative cover over the sloping ground that created the environment which made that part of the car park very slippery and unsafe for those on foot. Indeed, Mr Morrison candidly acknowledged that there was lichen covering that part of the car park surface at the time of Mr Benard's fall. Furthermore, Mr Morrison candidly and responsibly acknowledged that the lichen (or whatever vegetative material it was) would have caused the hard surface of the car park to be more slippery than would otherwise been the case. I certainly accept that to be so.

26. Mr Sugden submitted that it was clear breach of the duty imposed on the Defendants effectively to keep their car park reasonably safe for visitors in the class of Mr Benard; that is, clients of the firm using the car park. In this respect, he pointed to the sloping hard surface of that part of the car park together with the vegetative cover which, he argued, simply aggravated the risk already presented by the sloping ground to those walking over the car park.

27. A report from a French engineer, Mr Wong Man Kan, endeavored to show that the slope of that particular section of the car park where the Claimant fell was of such severity that MR Benard would have fallen whether of not there was any vegetative cover. I have real difficulty with this evidence. However, bearing in mind the conclusions that I have reached as to liability, it is unnecessary to explore the engineer's evidence any further.

28. It is clear that the Defendants were the occupiers of the car park. Accordingly, and pursuant to section 2 of the Occupiers Liability Act 1957, they owed a duty of care to their visitors and, in particular, any clients who might use the car park incidental to their business with *Ridgway Blake*. That duty was to take such care in all the prevailing circumstances was reasonable to ensure that the car park was safe for those clients to walk to and from their car.

29. Mr Benard was a client, he had parked his car in the car park incidental to his appointment with Mr Morrison, and he should have been able to walk over the car park without being put at risk by an unexpected slippery surface.

30. I do not consider that the sloping surface of that small part of the car park, by itself, meant that it was not reasonably safe or that it presented an unreasonable risk to such foot traffic. The gradient did not appear to be of such severity that it presented a hazard for that reason alone. However, the unattended, partial vegetative covering of that sloping section of the hard surface made it unsafe as it left it very slippery. It was not a surface that an occasional user of the car park would expect to encounter. It is the type of hazard that an occupier could reasonably be expected to minimize or remove with regular inspection and maintenance. The failure to remove that vegetative cover and to leave that part of the car park surface in that slippery state amounted to a breach of the common duty of care required of the Defendants in this respect.

31. Accordingly, I find that the section 2 duty, owed by the Defendants to their clients, which included Mr Benard at the time, in relation to their car park, was breached in that respect.

32. Unquestionably, the Claimant has suffered injuries as a result of his fall caused by the breach.

Contributory Negligence

33. The second consideration is whether the Claimant contributed in some way to his injuries though his own fault or carelessness. In this respect, I do not consider that contributory negligence to any degree has been proven by the Defendants to the requisite standard.

34. I reiterate that, if the claim was based just on the uneven or sloping surface then a fall in those circumstances would deservedly be attributable, in large if not complete part, to the carelessness of the visitor. That is not the case here. The risk presented by the vegetative covering over that small sloping section of the car park would not have been obvious to Mr Benard and there is no evidence to suggest that he should have been on alert for it or that he could have conducted himself more carefully.

Decision

35. Accordingly, I find for the Claimant as to liability on its claim and against the Defendants as to contributory negligence.

36. What now remains is for the determination of the damages. In order to ascertain what steps needs to be taken from this point to resolve that final aspect of the case, there will be a conference of counsel with me at a time to be notified.

Dated at Port Vila this 31st day of March 2011

BY THE COURT