

IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU  
(Civil Jurisdiction)

Civil  
Case No. 15/75 SC/CIVIL

**BETWEEN:** **Marco Nicholas**  
Claimant

**AND:** **Harrison Yamak**  
First Defendant  
**Kiki Toma**  
Second Defendant

*Date of Hearing:* 7 October 2020  
*By:* Justice G.A. Andrée Wiltens  
*Counsel:* Mr H. Vira for the Claimant  
No appearance by of for the Defendants  
*Date of Decision:* 22 December 2020

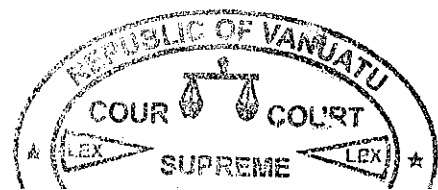
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**Judgment**

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A. Introduction

1. This hearing was scheduled following the granting of summary judgment as to liability on 5 June 2020. That left open for determination the issue of quantum of damages. The delay in completing the case was the financial inability of Mr Nicholas to obtain up to date medical and other reports. Even now the information available to the Court is much less than desired.
2. Counsel previously acting for the Defendants filed a Notice of Ceasing to Act the day prior to the adjourned hearing, presumably for want of instructions. Counsel was aware of the hearing and had been afforded the opportunity to attend and represent her clients. However, there was no appearance by or for the Defendants at the hearing. Accordingly, the matter proceeded on the basis of formal proof with a sworn statement filed by Mr Nicholas and written submissions by Mr Vira.



## B. Background

3. Following a criminal trial, in 2013 both Mr Yamak and Mr Toma were convicted of intentionally assaulting and causing permanent injury to Mr Nicholas. The evidence is that the defendants kicked Mr Nicholas in the face, punched him to the face and ribs and used an iron bar to perpetrate the assault to the head which caused a blow out fracture of the right eye socket. He was rendered unconscious as a result of the unprovoked attack.
4. A medical report prepared at the time by Dr Leona reported the following findings:
  - A subconjunctival haemorrhage;
  - Proptosis of the right eye;
  - Numbness in the area of the infra-orbital nerve;
  - A deep laceration over the medial canthus of the right eye; and
  - A comminuted fracture of the medial supra-orbital roof. A fragment has depressed the brain, with iscerebrospinal leakage. The fracture also involves the right frontal sinus and lateral aspect of the nasal septum.
5. Subsequently, in 2015, Mr Nicholas sought to recover the costs of his medical treatment here in Vanuatu, having been hospitalised in Port Vila Central Hospital for 14 days; and also the costs incurred in New Zealand, where he was sent to complete his medical treatment.
6. Mr Nicholas continues to have on-going repercussions as a result of the beating meted out to him.

## C. Evidence

7. Mr Nicholas has filed a sworn statement, which I summarise as follows:
  - He is currently 28 years of age and has never attended school. He commenced work in construction from the age of 12 years, earning VT 10,000 a fortnight. He has not worked since this incident occurred in May 2013.
  - Prior to the incident he enjoyed playing soccer and diving for fish. He is now unable to do that, although he is still able to swim. He feels unable to socialise or take part in village activities.
  - Immediately after the beating he spent 2 weeks at Port Vila Central Hospital, before being flown to New Zealand for further medical treatment which took approximately a further month. He did not have to pay for that treatment - it was funded by the Vanuatu Government.
  - His current life continues to be significantly affected by what occurred. He appended 3 medical reports – for which he paid VT 1,010 (there is an invoice only

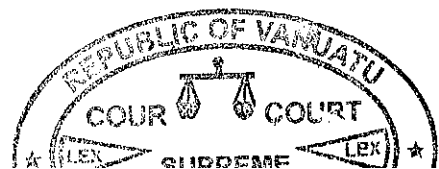


for VT 510). He could not afford the general check-up fee of VT 15,000. Accordingly he relied on a previous 2014 medical report by Dr Leona to the effect that his deficit after treatment is in the order of 45%.

- He continues to have nightmares, continuous dizziness, and intermittent appetite. He tends to easily forget and experiences a bleeding nose from time to time. He can no longer walk in the sun and is unable to hold down a steady job even as a gardener or home helper. He maintains he is unable to find a wife and says his livelihood is seriously downgraded.
  - He claims further, without any supporting evidence, to have spent considerable amounts on getting to and from the hospital. He claims further, without supporting evidence that his life expectancy has been shortened.
8. A nurse at the ENT Clinic provided the first medical report. It is dated 4 August 2020 and reports no loss of hearing. There is a scar on Mr Nicholas' nose and to the right side of his eye. There is also deviation of the posterior right nasal septum. It is further reported that movement triggers his chronic ailments, which include dizziness, nausea and blackout. His severe headaches are said to lead to red eye, tearing and is relieved only after a nap. He is said to require constant observation.
  9. The second medical report is dated the same date and is also by a Nurse, this time an Eye Practitioner. Mr Nicholas' visual acuity is reported as 6/15, which is not improved by the utilisation of pin holes over the eyes. He has off and on tearing and inflammation of both eyes.
  10. The third medical report is dated 28 August 2020, also from Port Vila Central Hospital. The author is Dr Bule. The examination requested of his oral health revealed multiple dental decay, especially to the upper front teeth and the lower back molars. There was dental infection on the lower right and left molars. The X-Ray taken indicated no previous treatment had been provided, even though the 2013 assault had involved the upper and lower jaws. It concludes: "It is possible that the teeth giving him problems at the moment may have been weakened at the time of the assault and have gradually deteriorated since then."

#### D. Elements of the Claim

11. Mr Nicholas sought VT 30 million in general damages.
12. He also sought VT 1,010 for special damages in respect of the medical expenses and relied on *Sorina v Dara* [2019] VUSC 47 a case where VT 400,000 was sought without any supporting evidence. In that case an estimate of VT 50,000 was awarded, largely for the costs of transportation. Mr Nicholas resides at Erakor Village and was required to travel to Port Vila to attend his medical appointments. Mr Vira submitted a similar award was warranted in this case.
13. Under the head of pain and suffering, it was pointed out that he had spent 14 days in hospital in Port Vila and a further month in New Zealand. The photographs show his distress and undoubted pain and discomfort throughout that time. The medical reports also add to that overall picture. Mr Vira relied on *Rovo v Republic of Vanuatu* [2020] VUSC 138 where loss of the ability to play sport and swim in the sea resulted in an award of VT 500,000. It was submitted a similar award was warranted in this case.



14. The medical report from Dr Leona indicates that following treatment, Mr Nicholas has a permanent deficit of 45%. There is no evidence to the contrary.

15. The final aspect claimed was Mr Nicholas' reduced visual acuity, in his right eye, and the fact both eyes tear up regularly. Mr Vira submitted that the UK Judicial Studies Board Guidelines (10<sup>th</sup> Ed) indicated a suitable sum in the United Kingdom for this type of injury is GBP 9,000. He submitted that sum be halved and then converted, and he calculated that to be VT 664,420.

16. In total, Mr Vira submitted that VT 1,214,420 should be awarded.

E. Discussion

17. While liability has already been established, I have no difficulty in re-iterating that Mr Nicholas' present predicament is wholly due to the reprehensible conduct of the two defendants, save for his present dental issues. I am not persuaded they can be linked back to the 2013 incident.

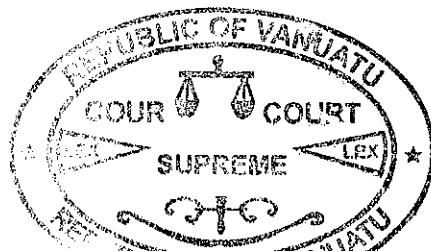
18. I am also not concerned with the medical expenses incurred in New Zealand, as they were not met by Mr Nicholas and he has no Claim in respect of that.

19. In my view, Mr Vira has undersold his client's case. I consider the following to more fairly deal with the various components of the damages claimed.

20. The UK Guidelines for the Assessment of General Damages in Personal Injury Cases (15<sup>th</sup> Ed, 2019) is more up-to-date than that relied on by Mr Vira. I considered the injuries inflicted and the fact that Mr Nicholas must live at 55% of his former self for the remainder of his life. Accordingly, I consider the following to have application to this case:

- Moderate brain damage – cases in which concentration and memory are affected, the ability to work is reduced, where there is a small risk of epilepsy, and any dependence on others is very limited. The range is indicated to be between GBP 36,370 and 77,410. In Mr Nicholas's case I adopt a position below the approximate mid-point of the range at GBP 50,000;
- Fracture of Nose – displaced fracture where recovery is complete but only after surgery. The range indicated is between GBP 3,370 and 4,350. In Mr Nicholas' case I adopt the figure of GBP 3,500; and
- Eye – cases of serious but incomplete loss of vision in one eye without risk of loss or reduction of vision in the remaining eye, or where there is constant double vision. The range indicated is between GBP 20,210 and 33,600. In Mr Nicholas' case I adopt the figure of GBP 21,000.

21. The current exchange rate is in the order of VT 147 to GBP 1. Further, as has previously been done in Vanuatu, the UK guidelines have been reduced by one-third to take into account the various differences between UK and Vanuatu living standards and expectations. Accordingly, by my calculation, the above matters come to a total of VT 7,300,000.



22. I accept Mr Vira's submissions as to pain and suffering and loss of amenities, and I set the appropriate figure for those damages at VT 500,000. In setting that figure I have particular regard to *Rovo's* case, the extent of the injuries caused, and the young age of Mr Nicholas.
23. Mr Nicholas was earning VT20,000 per fortnight prior to the incident. He has been unable to find employment since the incident, and his lack of education would no doubt be a factor in that. However, he has effectively been denied the opportunity to earn VT 500,000 per annum, once inflation is brought into the equation. As the damages for loss of income will be a lump sum, I consider it fair to set his loss of income at that level over a 20 year period. In reality he may have been able to work considerable past 48 years of age. The amount I set for this is accordingly VT 10,000,000.
24. Mr Nicholas has produced only one receipt for medical expenses. However, there must be more and I am prepared, as was the Chief Justice in *Sorina's* case to estimate his actual expenses, not just for medical expenses but also for transportation costs. From his home at Erakor to the Hospital would be VT 400 return. Accordingly for special damages, I award VT 20,000 damages.
25. Mr Nicholas apparently requires close monitoring. In order to do that, either the person undertaking the task is paid by Mr Nicholas or is unable to find alternative employment. Accordingly damages are awarded under this head, again contemplating the need to balance the lump sum at this time against the length of care Mr Nicholas will require, are set at VT 5,000 per month for 20 years, which by my calculation amounts to VT 1,200,000.

Lastly, there is the matter of interest which must be taken into account. For past economic loss, interest is payable from the date of the cause of action to the date of judgment (rounded down from 7.5 years) at 5% p.a. I calculate that to be VT 4,200,000.

#### F. Result

26. I accordingly summarise the awards of damages:

(i) Non-economic loss:

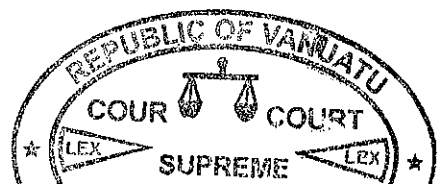
Permanent disability	VT 7,300,000
Pain & suffering/Loss of amenities	VT 500,000

(ii) Economic loss:

Loss of earning capacity	VT 10,000,000
Compensation for actual expenses	VT 20,000
Need for monitoring by friends/family	VT 1,200,000

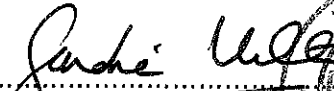
(iii) 5% Interest

On the economic loss, from 26 May 2013 to 22 December 2020	VT 4,200,000
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27. I can ascertain no basis to differentiate between the defendants. Accordingly I enter judgment in the sum of VT 11, 610,000 against each of them on the basis that they are equally liable. Interest will also be payable on the judgment sum until fully paid, at the Supreme Court rate of 5% p.a.
28. Further Mr Nicholas is entitled to the costs of this action. I set that at VT 60,000. That too is to be split equally between the defendants. The costs are to be paid within 21 days.
29. A further conference is scheduled for 8am on 20 January 2021 for the defendants to each advise the Court: (i) that he has paid the judgment sum and costs awarded, or (ii) to explain how he intends to do so. If there is no satisfactory conclusion, the file will be transferred to the Master for immediate enforcement action to be pursued.
30. In order for this to occur, a copy of this judgment must be served on each defendant, with a proof of service provided.

**Dated at Port Vila this 22nd day of December 2020  
BY THE COURT**

  
Justice G.A. Andrée Wiltens

