

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

Civil Case No. 14/268

BETWEEN: Ory Covo
Claimant

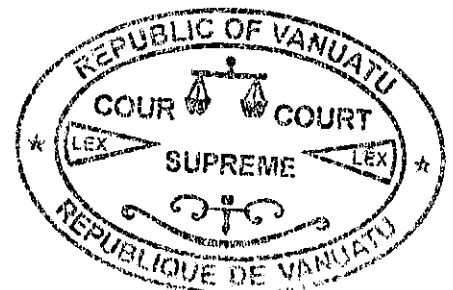
AND: Nicholas Ritsinias
Defendant

Date of Hearing: 30 April 2021
By: Justice G.A. Andrée Wiltens
Counsel: Mr N. Morrison for the Claimant
Mr M. Hurley for the Defendant
Date of Judgment: 20 July 2021

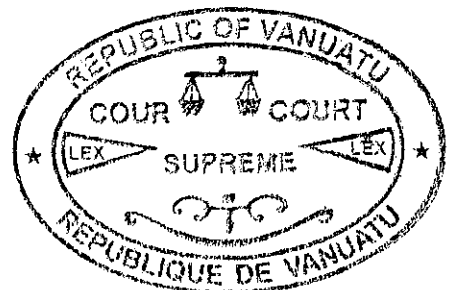
Judgment

A. Introduction

1. On 29 November 2013 Mr Ritsinias was driving to his place of work, Vila Marine, on Mele Road, Efate. To enter the premises Mr Ritsinias had to negotiate a left turn across on-coming traffic. He did not successfully negotiate that turn taking into account the prevailing traffic conditions, and cut across an on-coming motorcycle ridden by Mr Covo causing Mr Covo to crash into the Toyota truck driven by Mr Ritsinias. Mr Covo endured numerous serious injuries as a result of Mr Ritsinias' negligent driving, and sued for damages by way of an Amended Claim filed on 18 February 2017.
2. The Amended Claim sought damages in respect of:



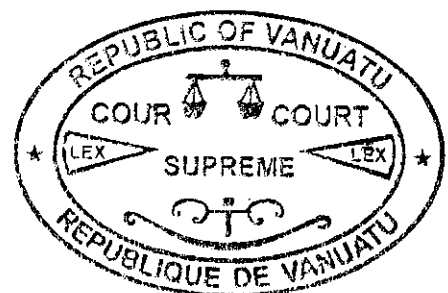
- Personal injuries;
 - Attendant care costs;
 - Loss of income (past);
 - Loss of income (future); and
 - Medical expenses.
3. Responsible counsel have resolved those claims but for the claims in respect of personal injuries and loss of income (future). Accordingly, this decision will deal only with the two remaining heads of claim which remain in dispute.
4. The evidence relied on was produced by consent in the form of the following:
- (i) Sworn statements by:
 - Covo Hava
 - Covo Ben Artsy
 - Tal Malfira
 - Polina Khovoshko
 - Jeremy Dick
 - Eyal Tendler
 - Dia Covo.
 - (ii) Medical reports by:
 - Dr Evan Dryson
 - Ms Jenny Wong
 - Dr Ross Mellick
 - Dr Sophia Lahz
 - The discharge notes and medical records from St George Hospital, New South Wales.
 - (iii) Actuarial reports prepared by:
 - PFS (Mr P Muir)
 - The Bottom Line (Mr J Warmington) (x 2)
 - Sedgwick (Mr N Mangelsdorf)
 - Supported by additional information sought by Mr Hurley and provided by Mr Morrison.
 - (iv) Submissions from Mr Morrison (x 2) and from Mr Hurley
5. There is no issue as to Mr Ritsinias' liability. That was initially determined by Justice Fatiaki in his judgment of 6 December 2018 and confirmed by the Court of Appeal in its judgment of 10 May 2019.
6. Although the hearing of this matter took place, briefly, on 30 April 2019 with the production of the statements and reports referred to above, there was still in play at that time an offer of



settlement. As well, counsel sought further time to file their submissions. Now that all the relevant information is with the Court, what follows is my assessment of the quantum of damages Mr Covo is entitled to receive from Mr Ritsinias.

B. Damages for Personal Injuries

7. Firstly, I must set out that the medical reports must carry more weight than the statements by members of Mr Covo's family and friends as they are independent and without emotional attachment.
8. Both parties rely for guidance on the 15th Edition of the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases ("the Guidelines") from the United Kingdom ("UK"). Previous versions of the Guidelines have been used by the Supreme Court of the Republic of Vanuatu to assist in assessing damages for certain injuries. None of those previous cases can be usefully compared, in terms of the injuries occasioned, with the injuries suffered by Mr Covo.
9. Until such time as there is sufficient Vanuatu precedent case law, it seems appropriate to have regard to the UK situation in the way the Courts have in the past, and then making allowances for the conditions that prevail in the UK as opposed to Vanuatu. Those differences have led to the Guidelines indications of awards being reduced for Vanuatu claimants by between half and one-third.
10. Mr Morrison has reduced his claim under this head to a schedule reflecting the injuries occasioned to Mr Covo and attaching to each specific injury the high end figure set out in the Guidelines. In that way he identified 22 separate injuries, and sought to equate that to an overall award of GBP 653,155 in damages. I will deal with those rather than the 31 individual injuries referred to in the Claim.
11. Mr Hurley frankly acknowledged the injuries suffered by Mr Covo. However, he sought to identify factors which reduced the seriousness of each injury so that the total award should be a much lesser figure. He also submitted that there were elements of double-counting involved in the claim. Further, he pointed to the danger of simply itemising all the injuries, making an allowance for each and then totalling up those amounts to arrive at a final figure. He pointed to the caution set out in the Guidelines as to this as having application in this case.
12. Mr Hurley submitted the damages to be properly awarded amounted to between GBP 145,545 and GBP 280,685. He then further submitted that the differences between UK and Vanuatu warranted a reduction from the Guidelines by something closer to 50% than 33%. Finally, he submitted a further reduction on the basis of a global consideration of reasonableness as per the authority of *Sadler v Filipiak* [2011] EWCA Civ 1728.

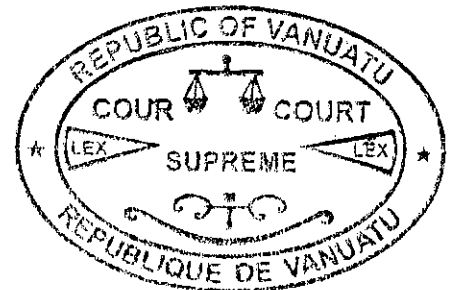


13. I agree with Mr Hurley's submissions that each award must be considered from both perspectives, i.e. the claimant's and the defendant's. In the end, the result must be a reasonable award having regard to both perspectives.

14. I now deal with the 22 individual injuries identified.

(a) Brain Injury

- (i) In terms of the Guidelines Brain Damage is classed as "very severe", "moderately severe", "moderate", "less severe" or "minor." Mr Morrison sought damages at the lower level of "moderate", but at the top of the range, namely GBP 36,740 to GBP 77,410. Mr Hurley advanced submissions that the appropriate level was "less severe," but that award should be set at the bottom of the range of GBP 13,070 to GBP 36,740.
- (ii) I accept Mr Hurley's analysis as being the more appropriate as to the correct level. However, Mr Covo's injuries do not sit at the lowest of the relevant range. What needs to be considered are: the extent and severity of the initial injury, the extent of any continuing and possibly permanent disability, the extent of any personality change, and the issue of depression.
- (iii) In considering those aspects I have regard to the statements filed in support of the claim by family and friends of Mr Covo, as well as the various opinions by the medical experts. There is no doubt Mr Covo is a changed man after surviving the accident. His memory and cognitive functions are permanently altered with diminished capacity to live his life as he did prior to the accident.
- (iv) Dr Wong attests to that and points to Mr Covo's issues in now dealing with stress, his poor concentration, loss of motivation and stamina, and his increased fatigue. Although Dr Wong concluded Mr Covo's general intellectual ability is now in the main in the average range, there is clear evidence that prior to the accident his abilities were at a higher level.
- (v) Dr Wong described Mr Covo's brain injury as "mild traumatic". However, the more in-depth analysis of this injury, in my view, was completed by Dr Lahz who carefully scrutinised the more than 850 pages of medical records from St George Hospital. She detailed the injury as "Traumatic brain injury – likely mixed traumatic and vascular aetiology (in the setting of emergency surgery for life threatening aortic vascular injury) – residual cognitive and behavioural changes affecting memory, new learning, speed of information processing and executive function i.e., initiative, planning, organization, mental flexibility and problem solving."
- (vi) Dr Wong considered: "My suspicion is that the primary traumatic brain injury was not severe, this being corroborated by Ms Wong's psychometric assessment, the

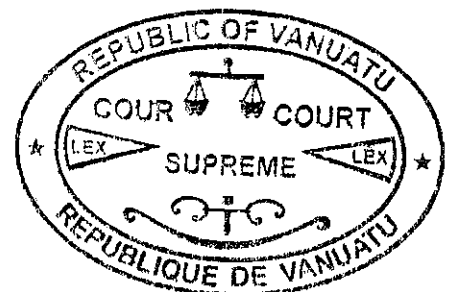


findings of which were consistent with relatively mild traumatic brain injury." She noted that Mr Covo did not "require neurosurgical management of the (primary) brain injury with extra ventricular drains and intracranial monitoring, suggestive of a mild as opposed to more severe brain injury."

- (vii) I noted also that Dr Mellick considered Mr Covo's brain injury as "... a serious one involving a brain injury associated with prolonged unconsciousness and a significant retrograde amnesia." There can be little doubt the injury was complicated by the bilateral subdural hygromas, as reported by Dr Dryson.
- (viii) On the basis of the above, I assess Mr Covo's brain injury in the category "less severe", and not "moderately severe." Within the range, I assess a reasonable award for this injury to set at GBP 32,500. Had there been associated depression or some indication of epilepsy, the award would have been set at the very top of the range as set out in the Guidelines. Although Dr Wong made mention of Mr Covo's scores suggesting mild depression, I accept Mr Covo's own assessment that he is not depressed.

(b) Chest injuries (x 3)

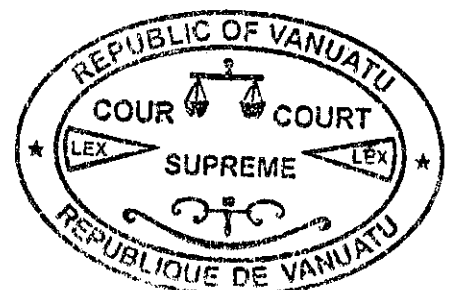
- (i) The Guidelines set out seven different categories of chest injuries. Mr Morrison sought damages in respect of Mr Covo's dissection of the aorta, the traumatic haemothorax and his rib injuries. At the top of each range Mr Morrison submitted awards of GBP 85,880 and GBP 46,780 (x 2) were appropriate. Mr Hurley submitted that there was a significant overlap between the injuries and therefore an element of double-counting. He further submitted a lower level of damages was appropriate due to Mr Covo's recovery.
- (ii) I noted that Dr Dryson was more concerned with orthopaedic injuries, although he made mention of the major issue confronting Mr Covo on admission to St George Hospital was the leaking aorta. He reported operations to repair that were done on 1 December and again on 11 and 12 December 2013. He reported also that Mr Covo was treated for pleural effusion and that he suffered multiple left rib fractures.
- (iii) Dr Wong identified that Mr Covo had been diagnosed with traumatic haemothorax, contusion of lung without open wound into thorax, dissection of thoracic aorta and closed fracture of multiple ribs. She made mention also of pseudoaneurysm proximal to subclavian artery and right pleural effusion requiring ICC. She noted that the initial stent inserted on 1 December 2013 to repair the leaking aorta showed on-going graft leak and therefore required further surgery which occurred on 11 and on an emergency basis on 12 December 2013. Earlier, on 5 December 2013, Mr Covo had left-sided haemothorax and right-sided effusion necessitating intercostal drains.



- (iv) Dr Lahz commented on the numerous radiological investigations undertaken. Some in particular are relevant. On 1 December 2013 a spiral angiogram revealed "complete bilateral lower lobe collapse" with a left-sided intercostal catheter inserted. There was a CXR that day which also indicated a bilateral pulmonary infiltrate, most markedly in the left lower lobe where there was consolidation; and a small right pleural effusion.
- (v) Dr Lahz listed the various diagnoses of Mr Covo's injuries. She described the aortic dissection as an extremely complex vascular injury. She reported the rib fractures and bilateral pneumothoraxes as resolved.
- (vi) In my view, the aorta dissection injury has caused significant and on-going impairment of function for Mr Covo. Not only must he take great care to avoid disrupting the graft, he is required to take aspirin for the remainder of his life. Both aspects will affect Mr Covo for the remainder of his life. He is also at risk of having to undergo repeat vascular procedures as well as having to be vigilant that the bypass continues to pulsate. Accordingly, I accept the aorta dissection is properly claimed as a traumatic injury to Mr Covo's chest as submitted by Mr Morrison.
- (vii) The traumatic haemothorax injury and the injury to Mr Covo's ribs are in a different category. Both injuries appear to have been satisfactorily resolved. Accordingly, in my view, both are at the lowest level of such injury classifications.
- (viii) Accordingly, in respect of the aorta dissection, I consider a reasonable award to fall within the range of GBP 56,100 to GBP 85,880. There is no permanent damage, but there is impairment of function. I set the damages award at the level of GBP 70,000, the approximate mid-point of the range.
- (ix) In respect of the traumatic haemothorax and rib injuries, I do not agree with Mr Hurley that there is double-counting. Each of the injuries is quite separate and requires separate awards. However, the level of the award for each injury is set at GBP 3,500 – the approximate mid-point of the relevant range.

(c) Liver and Spleen

- (i) The Guidelines deal with injuries to the digestive system, under which Mr Morrison points to the liver injury being damage caused by the traumatic injury akin to penetrating stab wounds or serious seat belt pressure cases. He submitted this injury warranted an award of GBP 10,750. He additionally sought GBP 7,380 for the non-lasting injury to Mr Covo's spleen.
- (ii) Mr Hurley considered there was double-counting also involved in this aspect of the claim, and further submitted a lower level of seriousness properly attaches to both injuries. He submitted the appropriate awards were at the level of GBP 3,710, as



the only references in the medical reports refer to multiple lacerations and soft tissue injuries. He considered no specific treatment was required and it appears both injuries are satisfactorily resolved.

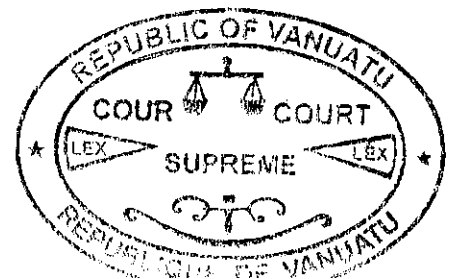
- (iii) I note that Dr Wong recorded Mr Covo's injuries as including: "contusion of lung without open wound into thorax" and "contusion of spleen". Further, Dr Lahz lists his injuries from the hospital records as including liver laceration and splenic contusions. Interestingly, Mr Covo did not include either injury when explaining to Dr Lahz what he was able to discern.
- (iv) Accordingly, I consider Mr Hurley's submissions to carry weight. Mr Morrison, in my view, has chosen an incorrect level at which to pitch the awards for these injuries. On the other hand, I am satisfied that each injury is separate and warrants an award. The level I set as reasonable for each injury is GBP 4,000.

(d) Vertebrae fractures

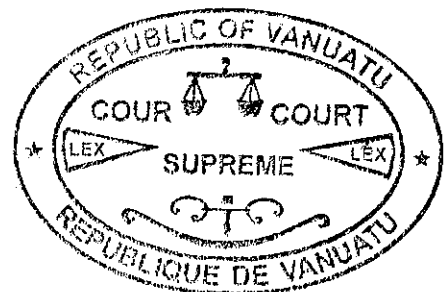
- (i) The Guidelines deal with back injuries as severe, moderate or minor. Within each gradation there are a number of sub-clauses to consider. Mr Morrison sought to place Mr Covo's vertebrae fractures in the moderate range with some residual disability and a risk of osteoarthritis with some on-going pain/discomfort. The damages to be awarded were submitted to be at the top of the range of GBP 23,680 to GBP 33,080.
- (ii) Mr Hurley referred to the fact that the injury has resolved without the need for operations and submitted that, although Mr Covo reported intermittent pain after lifting or injudicious activity, Dr Mellick and Dr Lahz both confirmed a full range of movement of Mr Covo's back which was described as stable and in no need of bracing. Mr Hurley accordingly pointed to a lower level of award as being appropriate.
- (iii) I consider there is no other referable evidence to consider. I agree with Mr Hurley's assessment that a lower level of award is reasonable. The appropriate range is GBP 2,090 to GBP 6,730. The award is accordingly set at GBP 6,500.

(e) The left scapula and left clavicle

- (i) The Guidelines set shoulder injuries into the categories of severe, serious, moderate, minor and fracture of the clavicle. Mr Morrison has submitted Mr Covo's fractured left scapula sits in the serious category, with a range of appropriate award running from GBP 10,890 to GBP 16,380. Mr Hurley submitted it was the equivalent of a fractured clavicle, with a range of GBP 4,390 to GBP 10,440. He also submitted there was double-counting involved in dealing with these injuries individually as opposed to jointly.



- (ii) In favour of Mr Morrison's submissions is the fact that Mr Covo suffered pain in his neck and shoulder with residual weakness of grip and a degree of restriction of his left shoulder movement. Dr Dryson noted both injuries separately and advised that Mr Covo still suffered pain in his left shoulder two years after the accident. The shoulder also "made noises" on movement. Dr Dryson reported Mr Covo had 45° external rotation of the left shoulder, with the norm being 90° - he considered that to be significant impairment which he equated to 50% impairment.
 - (iii) Dr Wong also listed these as separate injuries. She noted that Mr Covo complained of restrictive movement of his left (dominant) arm. Dr Lahz also lists both injuries and confirmed that Mr Covo told her about both injuries. Dr Lahz further reported that the left shoulder injury was managed conservatively in a sling for an indeterminate period. Dr Lahz recorded that there were intermittent symptoms in Mr Covo's left shoulder, where he was often aware of scapular crepitus. Mr Covo considered the shoulder did not feel right although it was not painful. He thought it weaker than prior to the accident.
 - (iv) Mr Hurley made mention of Mr Covo's previous rotator cuff injury of some five years previously. I do not see that as relevant in this context. I do not accept Mr Hurley's submission of double-counting. Each injury must be considered on its own.
 - (v) The Guidelines require an assessment to be made in relation to where within the range the patient's fractured clavicle sits, taking into account the extent of the fracture, level of disability, residual symptoms, whether the injury is temporary or permanent and whether union is automatically displaced. A final note is added, that unusually in serious cases, a higher range (that which Mr Morrison advocated) may be appropriate.
 - (vi) In my view, both injuries can reasonably fit into the higher category advocated by Mr Morrison. However, I consider they should sit near the mid-point of that range. Accordingly, for both injuries a reasonable award is set at GBP 13,000.
- (f) Left arm and left upper limb
- (i) The Guidelines differentiate between amputation and other arm injuries. In this instance, Mr Covo suffered injury to his left arm which Mr Morrison submitted resulted in permanent and substantial disablement (both functional and cosmetic). He additionally sought an award at the simple fracture of the forearm level.
 - (ii) Mr Hurley submitted this to be a double-counting and pointed to the fact that Mr Covo had made an effective and substantial recovery. He submitted a lower mid-level of award was appropriate.



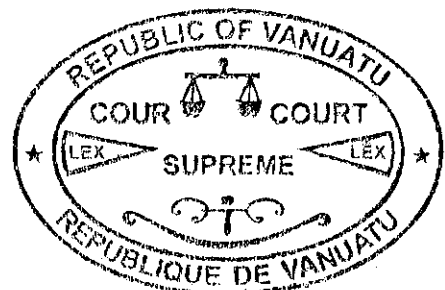
- (iii) Dr Dryson reported a left radius and ulna comminuted fracture, which required open reduction and internal fixation. Dr Wong also reported a closed fracture of radius and ulna, lower end and a closed fracture of proximal end of ulna. Dr Lahz in her report explained a complex operation to the left forearm occurred on 4 December 2013 involving the insertion of plates and screws. There was a second operation required on 23 December 2013. Dr Lahz reported a further operation in mid-2015 to deal with weakness of the forearm due to non-union of the fracture. That resulted in increased strength in Mr Covo's hand, his dominant left hand.
- (iv) I am satisfied there are two distinct injuries, which each require to be dealt with. These injuries were serious and long-lasting, although now largely resolved with some residual weakness of function. I have no regard to the cosmetics of these injuries as scarring is dealt with later. The reasonable award for each injury sit in the range of GBP 16,380 to GBP 33,430 as "less severe" injuries. I award GBP 32,500 for each injury.

(g) Right Wrist

- (i) The Guidelines deal with wrist injuries as a separate category. In this instance, Mr Morrison and Mr Hurley agree that the injury can be classified under the "less severe" classification with a range of GBP 10,750 to GBP 20,900 due to the persisting pain and stiffness occasioned to Mr Covo.
- (ii) A reasonable award would place this injury at the mid-point of the range at GBP 15,500.

(h) Left middle finger

- (i) The Guidelines have a large number of differing classifications for injuries of this type. Mr Morrison originally submitted the appropriate category was "severe fractures to fingers" which include leading to partial amputation and may result in deformity, impairment of grip, reduced mechanical function and disturbed sensation. Mr Hurley submitted the injury better defined as serious injury to ring or middle finger, which includes fractures or serious injury to tendons causing stiffness, deformity and permanent loss of grip or dexterity. It also includes total loss of the middle finger. In his response submission, Mr Morrison conceded Mr Hurley's analysis was correct.
- (ii) The injury is to Mr Covo's dominant hand. There is residual deformity according to Dr Lahz, with a risk of osteoarthritis in the future. The injury is permanent.
- (iii) The reasonable award must fit into the range of GBP 12,700 to GBP 13,940 and merits being at the top end of that range. Accordingly, for this injury I award GBP 13,000.



(i) Right hand 5th metacarpal

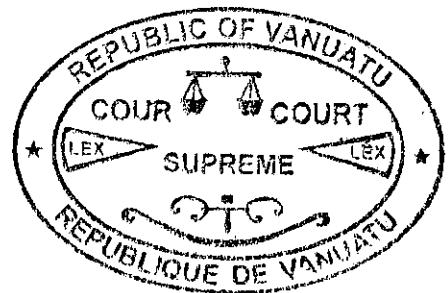
- (i) The Guidelines sets the level for this type of injury at up to GBP 4,055. Mr Morrison and Mr Hurley agree this injury fits within this classification.
- (ii) The deformity present in this finger was not caused by the accident Mr Covo was involved in with Mr Ritsinias – it resulted from a previous accident. The injury to be compensated is a fracture with no residual numbness but a slight reduction in strength.
- (iii) The reasonable award for this injury is set at GBP 2,000.

(j) Right distal and right elbow

- (i) The Guidelines set out the appropriate awards for these injuries as between GBP 5,630 to GBP 16,380 for a "simple fracture of the forearm" and between GBP 13,360 to GBP 27,320 for "less severe elbow injuries".
- (ii) Mr Morrison sought an award for both these injuries at the top of each range. Mr Hurley impliedly submitted there was double-counting involved as he accepted the elbow injury but did not address the distal specifically.
- (iii) Dr Lahz commented that Mr Covo's right elbow lacked the last few degrees of extension. Mr Covo had reported to her mild pain with both flexion and extension. Dr Lahz considered there was a permanent small fixed flexion deformity at Mr Covo's right elbow due to the manner it healed. As a result, she opined Mr Covo to have ongoing mild mechanical symptoms and motion limitation of his right elbow. Mr Covo also reported no on-going symptoms with his right wrist, which functioned without pain or stiffness. However Dr Lahz considered Mr Covo to be at risk of post-traumatic wrist arthritis with evolving joint pain and stiffness.
- (iv) These are clearly two separate injuries, and each needs to be considered. The elbow injury is the more serious and warrants an award of GBP 22,500. The distal injury can be adequately but fairly dealt with an award of GBP 6,000.

(k) Left knee

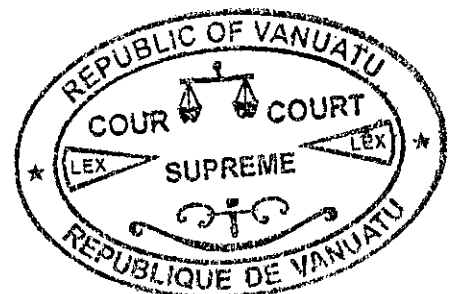
- (i) The Guidelines deal with knee injuries on a number of levels. In this instance, counsel agree the appropriate scale is between GBP 22,340 and GBP 37,070.
- (ii) Mr Morrison submitted Mr Covo's knee injury was at the top of this range. Mr Hurley submitted it was at the bottom of this range.



- (iii) Mr Hurley accepted Dr Lahz's conclusion that Mr Covo's accident had resulted in an unstable left knee, unlikely to improve and likely to evolve into post-traumatic osteoarthritis. However, he pointed to Dr Lahz's comment that the knee did not interfere with normal activities, and to Dr Dryson's view that Mr Covo had full range of movement, no fluid in the joint, no ligamentous laxity and no muscle wastage over the knee. Mr Hurley accepted that the injury was serious with a strong likelihood of degenerative damage which will result in remedial surgery being required, as opined by Dr Lahz.
- (iv) A reasonable award from both perspective is at just above the mid-point of the range. Accordingly, I set the award for this injury at GBP 32,500.

(l) Right and left feet

- (i) The Guidelines deal with "pain disorders" which are of longer standing and unspecific. In this regard, a category is identified as "Complex Regional Pain Syndrome" ("CRPS") which is characterised by intense burning pain which can make moving or even touching the affected limb intolerable.
- (ii) Mr Morrison submitted the pain to Mr Covo's feet were not severe but moderate manifestations of CRPS meriting an award in respect of each foot in the range of GBP 23,910 to GBP 44,790.
- (iii) Mr Hurley accepted significant nerve damage to both of Mr Covo's feet due to burns. While accepting that Mr Covo required medication to deal with this, and will continue to do so, Mr Hurley noted the subsequent significant improvement in respect of this aspect of Mr Covo's injuries. Mr Hurley submitted this injury could properly be described as moderate and at the low end of the scale. He submitted strongly that the Guidelines did not intend that the pain be treated separately in respect of each foot.
- (iv) I noted the pain initially was intense in both feet according to Dr Dryson. I note also the comment by Mr J. Dick that Mr Covo preferred to roll on his stomach across a coral beach rather than walk on the beach. However, Mr Covo subsequently explained to Dr Lahz that he could tolerate walking and standing and was observed by her to be able to walk, tiptoe and on his heels. Dr Lahz described these injuries as severe with "terrible" pain in both feet.
- (v) I disagree with Mr Hurley. The pain was in both feet. If there had been pain in only one foot, only one award would have been appropriate. There is no proper basis to combine the feelings in both feet as a single injury. I consider Mr Morrison has correctly identified the category of an appropriate award. However, the awards do not reasonably sit at the very top of that range.



(vi) I award GBP 35,000 for each foot.

(m) Nasal, Impact Scars and Minor Injuries

(i) These are three separate injuries, on which counsel agreed as to the appropriate scale of damages for each injury within the Guidelines. The difference between counsel is that Mr Morrison sought to claim at the top of each scale and Mr Hurley at the bottom.

(ii) Accordingly, Mr Morrison sought respectively GBP 2,690, GBP 19,390 and GBP 2,090. On the other hand, Mr Hurley sought the appropriate figures be assessed respectively at GBP 2,160, GBP 6,680 and GBP 1,170.

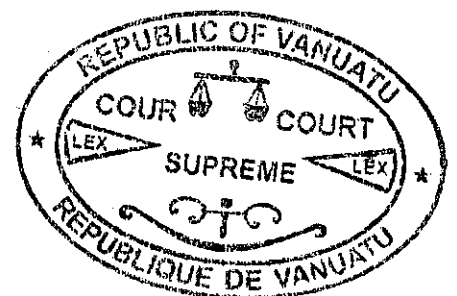
(iii) The broken nose was not unusual and was reported by Dr Lahz as having no residual symptoms on examination. I assess a reasonable figure for this injury to be GBP 2,200.

(iii) The numerous scars from the accident and subsequent medical interventions as reported by Dr Lahz are serious, albeit not facial or obvious when Mr Covo is fully clothed. Mr Covo appears to not be overly concerned with the physical deformities nor does he complain of any physical discomfort. I assess a reasonable award to be GBP 15,000.

(iv) The additional injuries claimed, were minor and of short duration. The reasonable award for this is set at GBP 1,500.

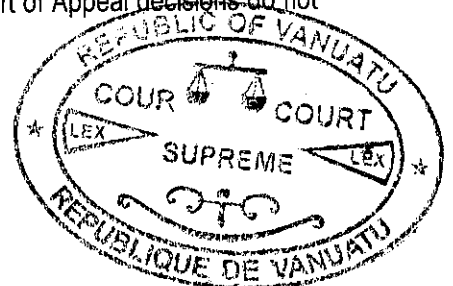
15. Based on the above, I summarise the awards in respect of each of Mr Covo's injuries under the heads claimed by Mr Morrison as follows:

<u>Injury</u>	<u>Award</u>
1. Brain	32,500
2. Chest – Aorta	70,000
3. Chest – haemothorax	3,500
4. Ribs	3,500
5. Liver	4,000
6. Spleen	4,000
7. Vertebrae	6,500
8. Scapula	13,000
9. Clavicle	13,000
10. Left arm	32,500
11. Left upper arm	32,500
12. Right wrist	15,500
13. Left middle finger	13,000



14. Right hand (5 th metacarpal)	2,000
15. Right Distal	6,000
16. Right elbow	22,500
17. Left knee	32,500
18. Right foot	35,000
19. Left foot	35,000
20. Nasal	2,200
21. Scars	15,000
22. Minor injuries	<u>1,500</u>
GBP	<u>395,200</u>

16. The Guidelines, as mentioned previously, caution that care must be taken to avoid any overlap between injuries. The case of *Sadler v Filipiak* confirms that the addition of individual figures is an inappropriate method of assessing the overall damages. The Court must stand back and take a holistic view.
17. In my assessment, adopting the same rationale as in *Sadler*, a reasonable totality award for Mr Covo's injuries would be GBP 336,000.
18. As the previous Vanuatu authorities have done, there must now be an adjustment to that sum to take into account the variances between UK and Vanuatu. The cases indicate that can mean a reduction of between 33% and 50%. Unsurprisingly, Mr Morrison submitted the lower figure should be adopted; Mr Hurley advocated for the higher figure.
19. I note that the first cases to look at this issue (*Solzer v Garae* and *Bastien v Michoutouchkine*) were heard in the early 1990s. The Chief Justice adopted a similar 50% reduction in the 2014 case of *Karie v Toyota Tsusho (Vanuatu) Limited* and *Tchivi v Lapi*. Further, the Court of Appeal has not varied from that approach in 2005 (*Enterprise Roger Brand v Hinge*), in 2016 (*Kennedy v Taria*) and in 2018 (*Telecom Vanuatu Limited v Tari*).
20. The lesser 1/3 reduction awarded was initiated by Tuohy J in 2007 (*Alphonse v Tasso*) and in 2008 (*Obed v Kalo and North Estate Timber Limited*). Spier J took a similar approach in 2013 in *Bernard v Blake*. Thereafter I followed this line of authority in 2020 in the cases of *Rovo v Republic of Vanuatu* and *Nicholas v Yamak*.
21. The role of the individual affected by the injuries must be a relevant consideration in my view when assessing the required reduction. In this case, what must be compared is the position of an expatriate foreign exchange dealer living in the general Port Vila area with a similar person residing in the United Kingdom. The differences in living standards and expectations do not warrant, in my view, a reduction of 50%. In Mr Covo's case, I set the reduction from the Guidelines at one-third or 33%.
22. I do so on the basis that the previous authorities are far from clear in establishing precedent. The Supreme Court cases are merely helpful guides. The Court of Appeal decisions do not

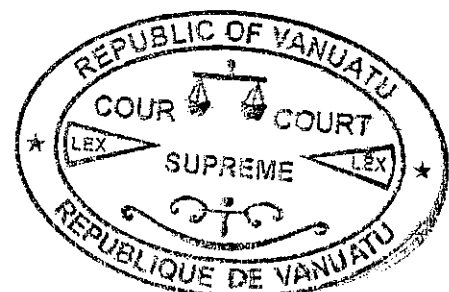


spell out that 50% is the appropriate reduction – they simply do not alter the lower Court determinations.

23. On this basis, the award of damages for Mr Covo's personal injuries is set at a global figure of GBP 336,000, less one-third i.e. GBP 112,000; namely GBP 224,000. That is to be multiplied by the current exchange rate of 1 - 153, making the award VT 34,272,000.

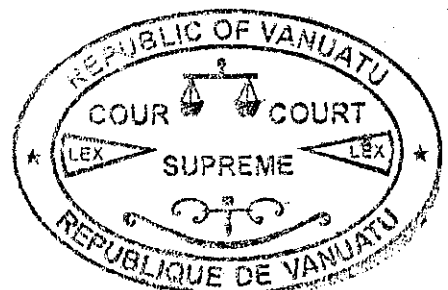
C. Future Economic Loss

24. In relation to this aspect of the case there are relevant observations by the medical experts and also by the accountants/actuaries, which I now summarise.
25. Dr Dryson made his comments in relation to future economic loss following his assessments of Mr Covo in November 2015. He considered Mr Covo was not able to resume his job as a currency trader, due to the high level of cognitive demand involved. The accident was also considered to leave Mr Covo less outgoing and confident, less enthusiastic and that was part of a personality change. However Dr Dryson considered Mr Covo is fit for work of a physical nature not involving heavy lifting or stretching, for approximately 20 hours per week.
26. Dr Dryson considered Mr Covo's cognitive impairment to likely be permanent. He further considered the orthopaedic injuries to largely recover with only minor impairments. However, over time, it was likely that osteoarthritis would develop in Mr Covo's left shoulder, right elbow and left knee. As a result, Dr Dryson considered Mr Covo might well need to retire at the age of 50 years.
27. Dr Wong also saw Mr Covo in November 2015 and recorded the difficulties encountered when Mr Covo returned to his former employ, namely memory loss and impairment, stress, poor concentration, loss of motivation and stamina, difficulty in providing information/explanations and fitness/fatigue. She considered Mr Covo was unsuitable for work involving management of client funds, business funds or contracts, and unfit to be the sole signatory on contracts.
28. However Dr Wong commented that Mr Covo is not totally unfit for work or totally incapacitated. Indeed she considered a sustained return to the discipline of work may assist in Mr Covo's recovery. Dr Wong considered Mr Covo could possibly cope with 20 hours part-time work of a relatively low-level complexity.
29. Dr Wong considered that Mr Covo has a higher than average probability of having to retire several years before reaching 65 years of age, his issues with memory and fatigue tending to deteriorate with age.
30. Dr Mellick saw Mr Covo in November 2015. He recorded Mr Covo's attempted return to his previous employment and the difficulties encountered. Despite that Mr Mellick considered

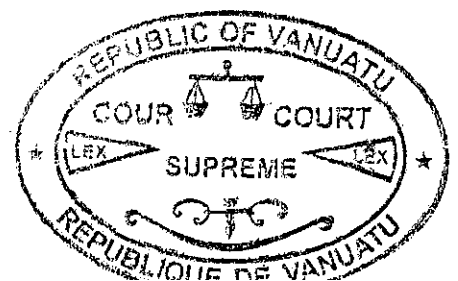


that Mr Covo would be able to obtain some employment not involving the need for the same type of mental function he was unable to perform.

31. Dr Mellick recorded that Mr Covo was unable to resume his former business role due to his impaired mental functioning, in particular in relation to memory and a loss of drive. However Mr Covo is not incapacitated for all work and only some employment possibilities are permanently excluded. What might be suitable duties are roles which require less cognitive functioning than Mr Covo was previously capable of. Dr Mellick considered there was nothing to indicate Mr Covo would not be able to perform suitable duties until he was 65 years old.
32. Dr Lahz also saw Mr Covo in November 2015. She considered Mr Covo to be presently unfit for his usual managerial employment "...due to his cognitive and psychological symptoms. His employment incapacity is due to the accident suffered. Dr Lahz agreed with Dr Wong's assessment that Mr Covo has residual work capacity for less demanding office-based roles, low stress work, fewer (or longer deadlines), reduced requirement for multitasking, tasks not requiring retrieval of large amounts of information etc. She further agreed that Mr Covo is now best suited to part-time work.
33. Dr Lahz considered that it more likely than not that Mr Covo will retire 5 to 10 years earlier than if the accident had not occurred. She considered Mr Covo to be at risk of post-traumatic left wrist arthritis with evolving joint pain and stiffness. He has slight diminution of movement in his left shoulder and is at risk of injury and thrombus formation in the event of direct trauma to his left forearm. He also has ongoing mild mechanical symptoms and motion limitation at the right elbow. There will also likely be evolving pain and stiffness in Mr Covo's left middle finger. His left knee will inevitably have enduring post-traumatic osteoarthritis. In the long term Mr Covo will probably require a total left knee replacement.
34. Mr Muir, from Professional Solutions, a fellow of the Actuaries Institute of Australia, produced 2 reports dealing with Mr Covo's loss of income; the first in June 2017, and the second in January 2021. The difference between the reports, apart from the effluxion of time, is that Mr Covo's business in Port Vila was sold in the interim. As a result, his attempt to resume his former work role, problematic as that was, was ended due to the sale in July 2019.
35. Mr Muir confirms Mr Covo's previous earnings pre-accident with Goodies Money Exchange was US\$ 3,500 and VT 350,000 per month. That was later reduced to VT 150,000 per month as from 1 June 2017.
36. Mr Muir took into account a number of factors to come to his assessment of future loss of income from June 2017. These included the accident was unlikely to have affected Mr Covo's longevity/mortality. He assumed an annual interest of 4.5%, with annual inflation of 1%. The period of lost income was taken to be until Mr Covo turned 65 years old. The resultant computation came to US\$776,600 plus VT 44,375,000.

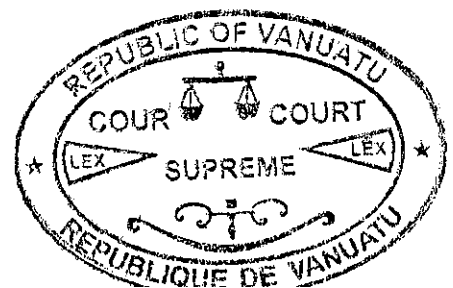


37. Mr Muir's second report calculated Mr Covo's loss of future income as from 1 January 2021, taking into account the additional information available. He did so, on the basis that he understood Mr Covo was totally disabled from working and unable to take up meaningful income generating activities. He relied on the same underlying assumptions as in his previous report, save that he reduced the annual interest rate to 2.75%, and took into account the fact that Mr Covo was now older. On that basis Mr Muir calculated Mr Covo's future loss of income at US\$730,800 plus VT 73,080,000 .
38. Mr Covo's counsel further produced two reports from Mr Warmington, accountant, from Bottom Line Business Solutions. The first was dated 16 February 2021 and second was dated 30 April 2021. The first report was undertaken to confirm the first analysis by Mr Muir using the additional information available to Mr Warmington in Vanuatu rather than simply relying on what Mr Covo was able to recall for Mr Muir in Sydney.
39. The majority of Mr Warmington's report deals with loss of past earnings. He then explained that he is not a qualified actuary, and analysed both Mr Muir's reports. Mr Warmington introduced the concept of statutory discount rates applied in personal injury cases. He considered that 3% was a conservative discount even though the rate varied between different Australian States (3% - 5%) and even though in the UK the discount was set at -0.25%.
40. Mr Warmington used two different models to review the final assessment by Mr Muir. He arrived at very similar figures, and accordingly concurred with Mr Muir's assessment.
41. Following Mr Warmington's report further disclosure was sought by Mr Hurly and provided by Mr Morrison. This was then used, together with Mr Muir's reports, as the basis for a contrary view by Mr Mangelsdorf, accountant, from Sedgovick Forensic Advisory Services. It was dated 26 April 2021.
42. Mr Mangelsdorf commented in relation to both past and future economic loss. Only the latter is relevant. Mr Mangelsdorf agreed with the notional retirement age for Mr Covo being 65, although he left the final determination to the Court. In relation to the statutory discount, Mr Mangelsdorf was instructed to use 5%, consistent with New South Wales and Queensland as well as the Supreme Court decision in *Obed v Kalo Civil Case No.06/221*. He agreed this was a matter for the Court to finally determine. He further pointed to an apparent omission by Mr Warmington regarding taking into consideration the vicissitudes of life, which he considered warranted a further discount on a global basis.
43. Mr Mangelsdorf then calculated Mr Covo's loss of future earnings based on a 50% reduction in earning capacity, and again based on an 80% reduction. The lower reduction resulted in a figure of VT 62,876,526; the higher reduction resulted in a figure of VT 100,662,442.
44. Finally, there is a further report to consider, that of Mr Warmington dated 30 April 2021, in which he comments on the report by Mr Mangelsdorf. He points to the difference, between his



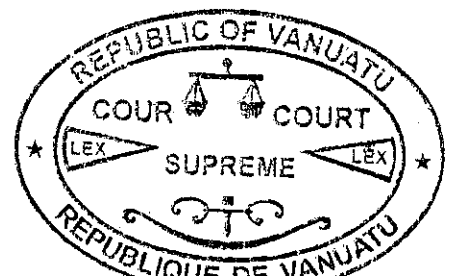
own calculations (based on Mr Muir's work) and that of Mr Mangelsdorf are really due to the different assumptions adopted.

45. In his submissions, Mr Morrison accepted the correct date from which Mr Covo's future income loss is to be calculated as from 30 April 2012. I agree with that.
46. Mr Mangelsdorf provided calculations in respect of a 50% disability. That did not assist me, as there is no evidence that Mr Covo is affected to that degree/extent. It is true that Mr Covo cannot likely undertake full-time work, but that does not equate to a 50% reduction from his pre-accident income – it will be much greater.
47. I conclude that Mr Covo is able to undertake a limited range of part-time work which unfortunately is likely to be remunerated at a low rate. In support of that conclusion, the medical analysis of Mr Covo's ability to work in a lesser capacity is well demonstrated by the fact that he returned to work in mid-2017 and continued to do so until mid-July 2019. His performance was below average.
48. Mr Morrison provided evidence, unchallenged, that Mr Covo could earn just over VT 80,000 per month if he found such part-time (20 hours per week) employment in Israel, where he currently resides. That part-time salary would equate to a 90% diminution from his pre-accident salary. I consider that to be a fair assessment of Mr Covo's current and future work prospects.
49. The medical reports have made plain that Mr Covo is likely to be so affected by the aftermath of the accident that he will not be able to continue in employment through to the usual retirement age. I find it more likely than not that Mr Covo will be able to work only until he attains 55 years.
50. As is usual in circumstances such as this, Mr Covo will be receiving a lump sum much earlier than he would receive his income from working over a long period. Accordingly there must be a reduction made to take this into account. The statutory deduction in other jurisdictions varies and there is no similar provision in Vanuatu to give guidance.
51. Mr Muir's calculations assumed 4.5% interest and 1% inflation. Mr Warmington does not comment on inflation but asserts instead that 3% ought to be deducted on a conservative basis. Mr Mangelsdorf was instructed to use 5% as part of his calculations, which is the rate adopted by Tuohy J in *Obed v. Kalo*. However, I see no good reason to depart from the rate put forward by Mr Muir, the only commentator with actuarial experience and expertise. I have no doubt he is fully aware of the position within the varying states in Australia, and I accept his independence.
52. A further consideration arising from the fact that Mr Covo will receive a lump sum, is that once the figure is calculated and paid, there is no opportunity to re-calculate to take into account unexpected events. Accordingly the vicissitudes of life is a further factor that must be put in



the mix. Mr Morrison submitted that due to his experience Mr Muir should be taken as having taken that into account in his calculations. However, in relation to this aspect, I cannot accept that submission. It is a matter of proof, which is lacking. Accordingly, I accept Mr Hurley's submission that this consideration merits a further 15% deduction.

53. My methodology for calculating of the loss of future income is accordingly:
- (i) From 1 May 2021 until February 2036, due to the injuries caused by this accident, Mr Covo is incapable of earning 89% of his previous foreign exchange dealer income. However, by working part-time in non-stressful and uncomplicated work he is capable of earning something in the order of 11% of his previous income;
 - (ii) Once he has attained 55 years of age and continuing through until the usual retirement age of 65, Mr Covo will likely have been forced to retire due to his injuries and accordingly unable to earn any income;
 - (iii) The calculations involve the loss of Mr Covo's previous annual income of US\$42,000 plus VT 4,200,000;
 - (iv) Once those calculations are all added together, there must then be a discount applied of 3% for inflation, followed by a further discount of 15% to take into account the vicissitudes of life.
 - (v) The easiest manner to make these calculations is to convert both forms of Mr Covo's previous income to Vanuatu vatu. For that purpose I adopt an exchange rate of 1:108.6 in respect of US dollars to Vanuatu vatu.
54. Annually Mr Covo earned US\$42,000 which equates to VT 4,561,200 p.a. He further earned VT 4,200,000. Those sums accumulate to VT 8,761,200 p.a.
55. 89% of that sum equates to VT 7,797,468. That must be multiplied by 14.75 years, which comes to VT 115,012,653.
56. That sum then needs to be added to by 100% loss of VT 8,761,200 times 10 years. This second amount comes to VT 87,612,000; and together the sums total VT 202,624,653.
57. That amount then needs to be reduced by 3% p.a. which the UK Ogden Tables (8th Edition), appended to Mr Warmington's second report, requires multiplication by -17.08%. That calculation comes to a reduction of VT 34,608,290 in round figures. Deducting that from the previous total comes to an interim total of VT 168,016,363.
58. Finally, the 15% for vicissitudes of life also needs to be deducted. That is VT 25,202,454, and when deducted leaves a total amount of VT 142,813,909.
59. I fully accept my calculations may be erroneous, which is why they are set as laboriously as they are. I am acutely conscious that I have no actuarial training or skills. Accordingly leave is



given to both counsel to revert to the Court regarding my attempts at coming to the appropriate figure.

D. Interest

60. Mr Morrison sought interest on the award for personal injury damages @ 5% p.a. from the date of the accident. Mr Hurley submitted that an approach similar to that taken in *Kennedy v. Tari* [2016] VUCA 33 should be adopted; namely, that interest should be applied only to a portion (approximately 1/3) of the award due to the complexities and impreciseness of the calculation.
61. There is no doubt that the damages now awarded accrued from the date of the accident, namely 23 November 2013. The Court has done its best to assess the appropriate quantum of damages, and whether that was complex and/or imprecise does not, in my view require yet further assessment of the interest properly payable to Mr Covo from the date of the accident.

E. Costs

62. Counsel agree that the costs of and incidental to this litigation be paid by Mr Ritsinias. The amount of those costs, if not agreed between counsel, is to be assessed by the Master.

F. Result

63. Mr Covo is awarded damages in the sum of VT 34,272,000 in respect of his personal injuries resulting from this accident. He is also entitled to interest on that sum at the rate of 5% p.a. from 23 November 2013 until the damages has been paid in full.
64. Mr Covo is awarded the sum of VT 142,813,909 as damages for loss of future earnings arising from this accident. He is entitled to interest on that sum at the Supreme Court rate of 5% p.a. as from the date of this judgment until that amount is paid in full.
65. Mr Covo is entitled to his costs. Once settled, by agreement between counsel or by the Master, they are to be paid in 21 days.
66. There will be a further conference at 8.30am on 12 August 2021 for Mr Ritsinias to advise the Court that the awards have been paid or that arrangements have been entered into to enable that to occur. Alternatively, enforcement of the judgment will follow.
67. For that reason, a copy of this judgment must be served on Mr Ritsinias with a proof of service filed in due course.

Dated at Port Vila this 20th day of July 2021

BY THE COURT


Justice G.A. Andrée Wiltens

