

BETWEEN: Hilda Lini

Claimant

AND: Telecom Vanuatu Limited

First Defendant

AND: Wilson Kapus

Second Defendant

Date of HEARING: *5th July 2022*
Date of Judgment: *12th July 2022*
Before: *Justice Oliver A Saksak*
In Attendance: *Mr Garry Blake of Ridgway Blake Lawyers for the
Claimant
Mr Mark Hurley and Corrine Hamer of Hurley
Lawyers for the Defendants*

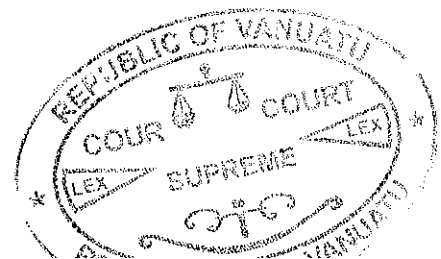
JUDGMENT

Introduction

1. The Claimant Ms Hilda Lini issued proceedings against the First and Second Defendants jointly and severally seeking damages to be assessed by the Court.
2. The Claimant alleges the second defendant, as driver for the First Defendant's Min-bus was negligent and careless in his driving when he collided with the claimant on 28th July 2016.

Facts

3. Ms Lini was walking down the Gauchet Road at Anamburu area to catch a bus at the main road connecting the VMF Camp to Seven-Star Area.
4. Between 3:00-4:00pm that day at the road junction by the Emile Lakeleo Nakamal Ms Lini signaled to a bus travelling from the Seven Star area to stop so she could collect her grand-daughter from school.
5. The bus stopped and as Ms Lini was crossing the road, she noticed the mini-bus driven by the second defendant on the other side coming towards her. She waved her hand to get the driver's attention to stop to enable her to cross the road. As she was crossing the road,



the minibus hit her and Ms Lini fell down hitting her head on the pavement. The force of the impact knocked her unconscious for a time.

Defence

6. The defendants denied liability for the accident. In the alternative the defendants assert Ms Lini contributed to the accident for failing to take reasonable care herself while crossing the road.
7. The defendants argued the claimant's contributing negligence should be assessed at 35%.

The Trial

8. The trial on 5th July 2022 was for the Court to receive evidence to determine only the issue of liability.

Issues

9. The defendant raised 3 issues:
 - a) Whether the motor vehicle accident on 28th July 2016 occurred as the result of any negligence on the part of the second defendant?
 - b) If yes to the first issue, should there be any discount to the amount of damages to be awarded by reason of the claimant's contributing negligence for failing to take reasonable care while crossing a busy road?
 - c) If yes to the second issue, what percentage should be allowed for the claimant's contributing negligence?

The evidence

10. Ms Lini, the claimant gave evidence herself on oath. In her examination in chief Ms Lini identified and confirmed the contents of her sworn statement dated 12th July 2019. The sworn statement was tendered into evidence as Exhibit C1. The relevant evidence in relation to her ages at the time of the accident and the date of deposing of statement, and her account of when and how the accident occurred, and the impact and how she was taken to hospital are stated in paragraphs 1-8 inclusively.

11. In cross-examination Mr Hurley asked questions and Ms Lini answered as follows:-

Q: Accident occurred in 2016?

A: Yes

Q: You see the date of filing of sworn statement is 2019?

A: Yes

Q: Refer to page 13- the statement was sworn on 12/07/2019?

A: Yes

*Q: That was 3 years after the accident. Was that the first time you had written down your
Recollection of what happened?*

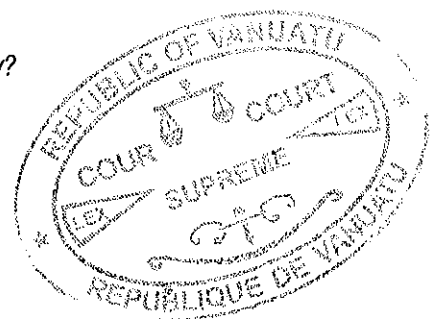
A: I wrote many but this is one of them and the first one to be shared.

Q: Refer to paragraph 6_ You lost consciousness?

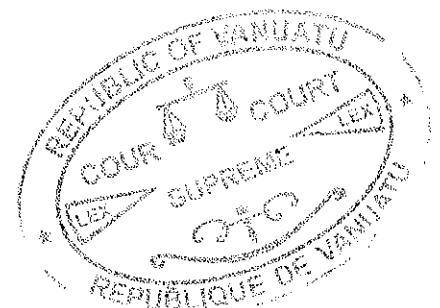
A: Yes

Q: Do you accept because you lost consciousness, it affected your memory?

A: Yes



Q: Last year about late October or early November 2021 you had a stroke?
A: Yes, end of October.
Q: How did that stroke affect you?
A: Before the stroke I had 5 symptoms of stroke. This one had effect on my right hand, right foot and right side.
Q: It affected your speech also?
A: Yes, very slow.
Q: Shown photographs and explained these were taken in March 2021. Do you agree they depict the same road on which the accident occurred?
A: Yes
Q: The photograph showing a road to the right, is that the road? (Tendered as Exhibit D1).
A: Yes, it is Rue Gauchet
Q: That is the road you came down to pick up your grand-daughter?
A: Yes
Q: A bus came from 7-star. You signaled for it to stop for you?
A: Yes, I was waiting on the other side because of traffic.
Q: In July 2016 was there a lot of overgrowth on the right side?
A: yes
Q: How many people were there with you?
A: I was by myself but some people were around the kava business on the corner.
Q: A bus came from 7-star area and you signaled for it to stop?
A: Yes, there were 2 buses coming at the time. I signaled to them to stop as I was crossing the road.
Q: And one of them stopped?
A: I don't know as I was knocked down by then.
Q: You don't remember the colour of the bus?
A: No
Q: So your intention was to cross the road to catch the bus from 7-star area and before the accident you did not set the TVL Mini bus at all?
A: I saw it earlier as a vehicle, not as TVL. I thought it had stopped to allow me to cross. I was only concern with the bus.
Q: This bus did not stop before the accident?
A: I don't remember seeing them stop. I just indicated that I wanted to cross the road Because there is another road to the Binihi Nakamal.
Q: That Mini bus did not stop after the accident?
A: I thought it had stopped temporarily so I could cross. I put up my hand just slightly to indicate. He did not put up his hand, so I just crossed.
Q: So you thought the mini-bus had stopped temporarily?
A: Yes
Q: Is it possible the bus had stopped?
A: I don't know.
Q: So you were struck and you lost consciousness?
A: Yes, I lost consciousness.
Q: When you came back, there were people around you?
A: Yes
Q: You remember the driver of the mini bus came to you to ask if you were okay?
A: No he never did.
Q: It is possible one of the people there who spoke to you was the driver?
A: Yes, but I don't know.
Q: And someone asked to take you to hospital?
A: Yes that was a student.
Q: Is it possible it was the driver?
A: No, he did not ask me, if he did, I would remember.



12. Mr Blake re-examined as follows:

Q: *Where were you when you recovered?*

A: *On the Gauchet Road*

Q: *Were there many people there?*

A: *Yes, but I remember one of them from Pro-medic-my relative.*

Q: *Did you know all the people around you ?*

A: *No*

Q: *What did you mean when you said your memory is slow?*

A: *It takes me time to remember names, sometimes it is quick, sometimes much slower.*

Q: *You said TVL bus temporarily stopped or you thought it stopped?*

A: *Because sometimes something make it slow down.*

Q: *You thought it stopped, what is your memory?*

A: *It temporarily stopped.*

Q: *How long did you live in the area?*

A: *Since 1977*

Q: *How often did you cross the road there?*

A: *Every day.*

Q: *Did you ever have any accident there?*

A: *No.*

13. The second witness for the claimant was Samson Tabi. He gave evidence under oath. In examination in chief he was asked to identify and confirm his sworn statement filed on 2nd may 2019 exhibited as C2 without objection.

14. Mr Hurley cross-examined him at length with the help of Ms Nicholls as translator in relation to his sworn statement and in particular in relation to the photograph tendered by the defence as Exhibit D1.

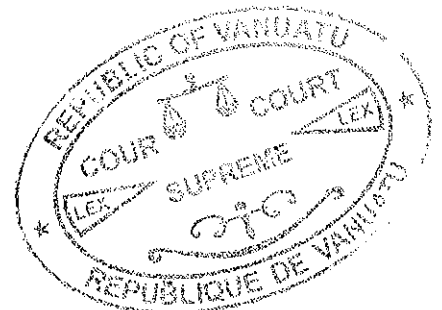
15. It is unnecessary to set out any part of this witnesses' evidence because in the course of his cross-examination by defence counsel, Mr Tabi became very confused when he was questioned extensively in relation to Exhibit D1, a document he was not the maker of and being very unfamiliar as a simple villager. That affected his ability to give an independent, fair, and reliable evidence about what he himself saw on 28th July 2016, the date of the accident. His evidence was therefore unreliable and unsafe to be relied upon, and as submitted by Mr Hurley, the Court will not consider them having weight or any probative value.

The Defendant's evidence

16. The second defendant Wilson Kapus gave oral evidence on oath. In examination in chief he was shown his sworn statement dated 11th September 2019 which he identified and confirmed. It was tendered into evidence as Exhibit D2 for the defence.

17. Mr Blake cross-examined the defendant as follows:-

Q: *Date of Accident is 18th July 2016, what time?*



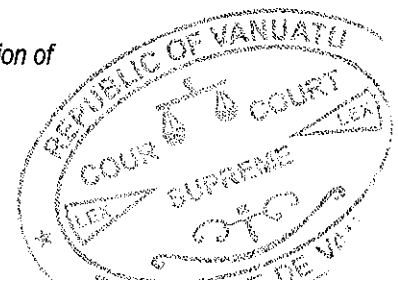
A: yes, between 3-4pm
 Q: What was the weather like?
 A: Sunny and clear?
 Q: What was the road like?
 A: Tarsealed
 Q: Any potholes?
 A: some
 Q: Was traffic heavy?
 A: 2 buses were coming from the left side.
 Q: Were there many vehicles on your right side?
 A: No
 Q: Was there any vehicle in front of you?
 A: No
 Q: How far until you could see the next?
 A: Nothing Further
 Q: Any vehicle behind you?
 A: None
 Q: So only 2 buses on the left, no one in front of you or behind you?
 A: Yes
 Q: Why do you say you drove at 30kms?
 A: Because speed dropped when I got to the flat place.
 Q: Did you check you speed?
 A: Yes
 Q: Referred to Exhibit D1 taken in March 2021: where did your bus hit Ms Lini?
 A: On the road junction coming down.
 Q: No cars in front or behind you, yet you say you did not see Ms Lini?
 A: Yes
 Q: Referred to Incident Report (Annexure WK1), when did you make it?
 A: On the same day
 Q: You just said you did not see the lady- which is true?
 A: This one in the statement (or report)
 Q: Refer to paragraph 5 and 8 of statement where you said "I did not see the claimant..."
 You lied? Which is right, the Report or paragraph 8?
 A: I saw 2 buses on the left side, one stopped.
 Q: Did you see the claimant before you hit her?
 A: No
 Q: You said in the Report you saw her looking at the parked bus- so must have seen her.
 Did you see her or not?
 A: Yes

Note [I noted and recorded that the witness took time to answer and that he was looking restless].

Q: Why then did you swear on oath paragraph 8?
 Now you tell us you did.

Note: [I noted and recorded again that the witness took time to respond]

Q: You don't want to admit you are careless?
 A: No
 Q: You've lied to assist your case?
 A: [No response- restless]
 Q: Paragraph 8- you did not see her, but you did see her?
 A: No, I did not see her.
 Q: Go back to Incident Report, last paragraph- Read to witness
 A: Witness explained the sketch plan: "A" shows his direction. "B" shows direction of



Ms Lini. "C" shows where bus stopped and "D" shows point of impact and collision.

Q: You saw Ms Lini didn't you? And you did not brake?

A: No, I did but I hit her.

Q: You stopped and talked to driver on the other side? And you took off and hit Ms Lini?

A: Yes

Q: So you were being careless?

A: 2 buses on the left, I looked at the bus, I did not see Ms lini, when I took off, I hit her.

Q: You weren't looking properly?

A: Yes, I saw the bus, I looked and went forward, I hit her.

Q: At 30kms per hour your managed to stop but she was under the bus? You could not have done that?

A: No, it just stopped.

Q: You weren't going at 30kms per hour- it is just a made up story?

A: [No response]

Q: Ms Lini said she thought you'd stopped when she crossed then you hit her?

A: No

Q: You were looking at the bus on the other side and then was shocked when you hit her?

A: Yes

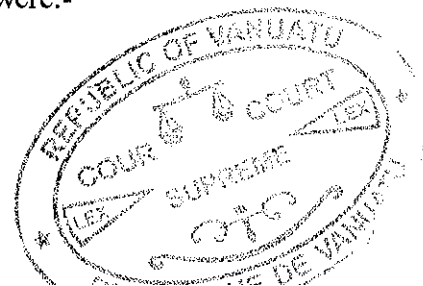
Q: You have been lying to the Court or being careless as to the truth?

A: [no response]

18. Mr Hurley did not re-examine the defendant.

Submissions

19. Mr Blake submitted that from the evidence of both the claimant and the second defendant we have two starkly contrasting versions but that the Court, on the balance of probabilities should believe Ms Lini's version as honest, truthful and reliable. Counsel further submitted that there was nothing in her response as to what Ms Lini saw and how she acted to show she was careless or lacking any due attention to contribute negligently to the accident.
20. Mr Hurley submitted first in relation to the first issue of whether the second defendant was negligent the claimant had to establish that:
- The defendants owed her a duty of care,
 - The defendants breached that duty, and
 - The claimant suffered loss for damage as a result thereof.
21. Counsel further submitted that Ms Lini's credibility should be assessed in light of her evidence in cross that-
- She lost consciousness for a period of time following the accident.
 - She suffered a stroke in October 2021, and
 - That she had no evidence that she recorded her recollection of the accident prior to filing her statement on 12th July 2019.
22. Two other factors Mr Hurley invited the Court to make findings on were:-
- Did the second defendant stop prior to the accident? And

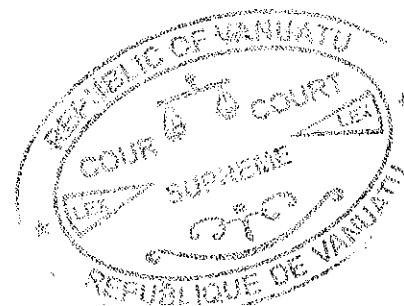


- Did he go over to Mrs Lini after the accident to see if she was okay and offer to take her to hospital?

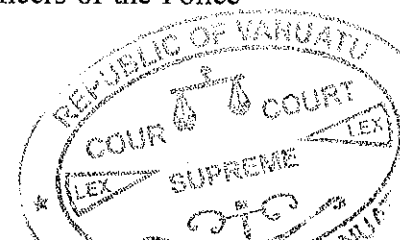
23. Mr Hurley submitted that from the evidence the Court should find the second defendant did not stop prior to the accident to allow Ms Lini to cross the road. That was because the second defendant did not see Ms Lini in the same way Ms Lini did not see him before crossing, therefore in doing so, Ms Lini was careless and should be guilty of contributory negligence assessed at 35%, the facts giving rise to the second and third issues.

Discussion

24. First, I explain the purpose of going to great pains by recording in full in this judgment the cross-examinations of both Ms Lini and the second defendant.
25. Without the evidence of Samson Tabi, the evidence of Ms Lini stands alone as against the second defendant's evidence. And indeed as submitted by Mr Blake we have 2 starkly contrasting versions. The question is which of the two stories the Court should believe as being consistent, honest truthful and reliable.
26. From the cross-examinations of both Ms Lini and Mr Kapus we can see clearly which of the two was consistent, honest, truthful and reliable witness.
27. First I examine Ms Lini's evidence. In paragraph 6 of her sworn statement of 12 July 2019 she saw 2 buses coming from the direction of 7-star. She put her hand up to indicate she wanted to catch a bus. She started walking out on to the road not having reached the middle.
28. Then she saw the mini bus owned by TVL coming from her left going in the direction of 7-star. It stopped about 2.5 meters away from where she was standing. Seeing it had stopped, she believed (from the stopping) the driver must have seen her.
29. That was her evidence after about 3 years from 28 July 2016 when she deposed to her sworn statement on 12 July 2019. In October 2021 Ms Lini suffered a stroke which Mr Hurley submitted affected her memory.
30. However despite the stroke and even after another 3 years after the sworn statement was made Ms Lini did not resile from her position. In cross, she said she saw 2 buses coming from the 7-star. She indicated for them to stop. She crossed the road. She saw the mini bus coming from her left but raised her hand, and the mini-bus stopped temporarily, allowing her to cross. In the process of crossing the mini bus hit her and she fell down unconscious.
31. When Mr Blake re-examined Ms Lini as to her memory as to whether she thought the mini bus had stopped, without any hesitation Ms Lini answered "*It stopped temporarily.*"
32. Ms Lini's memory had not been affected by the fall or by her stroke. She maintained consistency, was honest, truthful and reliable.



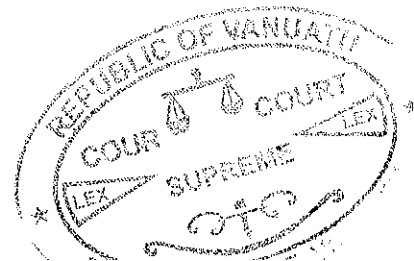
33. Turning to the second defendant's evidence. First his evidence confirms Ms Lini's that there were 2 buses coming from the direction of 7-star at the time.
34. Mr Kapus made an Incident Report (Annexure WK1). He explained in cross Arrow A showing the direction he was travelling. His speed was 30kms per hour. Arrow B shows the direction of Ms Lini walking towards the parked bus as shown by C, and D shows the Collision between his bus and Ms Lini. Then he concluded the Report saying:-
" *the lady was looking at the park (sic) bus and did not (sic) aware on (B) vehicle travelling.*"
35. In paragraph 8 of his sworn statement Mr Kapus said he did not see the claimant and did not stop to allow her to cross. Mr Blake cross-examined Mr Kapus as recorded under paragraph 17 herein. Mr Blake pointed to the inconsistency between the quoted passage above [para.34] and para 8 of his statement and asked Mr Kapus which was true. Mr Kapus said in answer to the question that the conclusion in the Incident Report was the correct version.
36. Then Mr Blake went further by asking:
" *you said in the Report you saw her looking at the parked bus so you must have sen her. Did you see her or not?*" Mr Kapus answered "yes", meaning he saw Ms Lini. But as noted and recorded, Mr Kapus took time to answer this question and he was uncomfortable and restless.
37. Mr Blake pressed the defendant further on the Incident Report showing he saw Ms Lini contrary to paragraph 8 of his statement, Mr Kapus finally admitted he saw Ms Lini, that he braked but he had hit her, that he stopped and looked at the driver of the bus on the other side and upon taking off he hit Ms Lini. He admitted he was not looking carefully or properly.
38. From his demeanor in the witness box in cross, it became obvious to me Mr Kapus was not a truthful and honest witness. His evidence lacked credibility and they contained many inconsistencies.
39. From his own evidence Mr Kapus said there were no traffic in front of him or behind him. To say therefore that he could not see Ms Lini ahead of him from 2-5 metres away is not capable of being the truth. And to say that there were overgrowths on the side as shown in Exhibit D1- even with the overgrowths, the view is clear all the way beyond Peter Chan Store to the junction at the Covenant Church. I take judicial notice of this factor as a regular user of this road of up to 6 times per week, apart from the clear evidence from Exhibit D1. There was therefore nothing in front of the mini bus blocking or hiding Ms Lini from being seen by Mr Kapus when the accident occurred on 28th July 2016.
40. Mr Kapus sought to rely on a map he produced showing the location of the accident- see page 2 of WK1. That map is unreliable as there was no evidence when it was made and by whom. Further if the map was made by himself it is not an independent map for the Court to accept. It should properly have been done by the Traffic officers of the Police Department.



41. Mr Kapus annexed to his statement the Traffic Police Abstract Report dated 29th July 2016 but even that document is not reliable (a) because Mr Kapus was not the maker of it, and (b) without a sketch map of the place of accident, it is based on hearsay evidence of Mr Kapus and should not be allowed as having any probative value to defendant's case.
42. What in reality Mr Kapus did when he did not stop his vehicle at the place of accident and call the police to come over and take an independent sketch plan amounted to him attempting to conceal evidence showing that he was in the wrong.
43. Section 17 of the Road Traffic Control Act [Cap 29] requires every driver involved in an accident causing personal injury or damage to property must immediately stop his vehicle. The very purpose of that is so the police can attend and take sketch maps showing where exactly the accident instantaneously occurred.
44. Although there was some evidence he did stop after the accident, he did not call the police straight away to attend the scene. Ms Lini had been knocked down unconscious, there was an injury but Mr Kapus failed to follow what the law required him to do. In the circumstances he had therefore failed his legal duty of care.
45. His own Incident Report in which he records Ms Lini looking at the parked bus is clear indication and evidence that Mr Kapus had seen Ms Lini in the act in which he described. It could not mean or infer any other way or possibility.

Findings

46. I find Mr Kapus has lied in paragraph 8 of his sworn statement. I find that on the evidence of Ms Lini on the balance of probabilities that Mr Kapus had seen Ms Lini crossing the road, that he stopped temporarily to allow her to cross but was careless and negligent when he looked at the other driver, and allowed his vehicle to move forward hitting Ms Lini.
47. To say that he did not stop but kept his speed of 30kms per hour was not the truth as the damage and injuries caused to Ms Lini would have been more serious than what occurred on 28th July 2016.
48. I therefore find that the second defendant was solely and wholly responsible for the accident on 28th July 2016 that resulted in Ms Lini falling and hitting her head on the road causing her to be unconscious.
49. I am unable to find any evidence to show any carelessness or undue care on the part of Ms Lini to find her liable for contributory negligence as alleged by the defendants.
50. It is not necessary for me to determine whether or not Mr Kapus stopped after the accident and talked with Ms Lini offering to take her to hospital as being an irrelevant point.



Conclusion and Result


- 51. I am satisfied on evidence that the defendants owed a duty of care to the claimant, that they breached that duty of care and caused loss, damage and suffering to the claimant as a result thereof. I therefore answer the first issue in the affirmative. For the second issue there was no contributory negligence by the claimant, and the third issue simply falls away.

- 52. I find the second defendant responsible for the accident in the course of his employment, thus making the First Defendant vicariously liable as well.

- 53. Accordingly I grant judgment in favour of the claimant against the First and Second Defendants jointly and severally as to liability, and damages to be assessed.

DATED at Port Vila this 12th day of July, 2022

BY THE COURT


.....
Oliver Saksak
Judge

