

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

Civil
Case No. 21/3112 CVL

**BETWEEN: Sandra Rory and
Philito Rory**
Claimants

AND: Lennox Vuti
Defendant

Trial Dates: 22nd November 2022 and 8th December 2022

Before: Justice S M Harrop

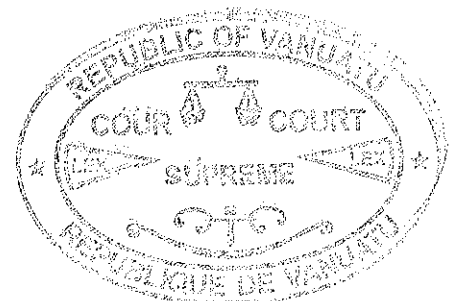
Counsel: Mr B. Livo for the Claimants
Mr J. Tari for the Defendant

Date of Judgment: 16th December 2022

Reserved Judgment

Introduction

1. In September 2017 the claimants Ms Rory and Mr Rory, who are siblings, entered into a form of hire purchase contract with Credit Corporation (Vanuatu) Ltd to purchase a black Nissan Microbus registration number B18259 (the bus), for VT 4,600,000. They paid a VT 700,000 deposit and began making regular payments to meet the balance.
2. They operated the bus offering public transport in Port Vila.
3. Unfortunately on 1 May 2020 the bus, driven by Mr Rory, was involved in an accident on the Nambatu Lagoon Road. He was following a white Hi-Ace bus registration number 18928. Behind Mr Rory was a vehicle, registration number 17176, being driven by the defendant Mr Vuti.



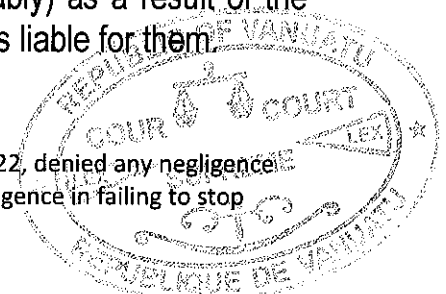
4. Mr Vuti's vehicle, which Mr Rory says was being driven at excessive speed, collided with the rear of the bus. The impact caused the bus to collide with the rear of the white bus in front. The bus suffered damage both to its rear and to its front.
5. In this proceeding the claimants claim damages for various kinds of loss said to have arisen from what they say is Mr Vuti's negligent driving. In their amended claim filed on 4 February 2022 they seek special damages of VT 1,437,800¹, damages for loss of business earnings of VT 3,510,000 and general damages of VT 200,000, together with interest and costs.
6. Mr Vuti accepts that he caused the accident. Although he denies driving at excessive speed or being intoxicated by alcohol, he accepts that he was negligent² in failing to avoid the collision i.e. he accepts he failed to keep a proper lookout and to ensure, having regard to the prevailing conditions, that he was travelling at a safe distance behind the bus such that he could stop safely if necessary. Mr Vuti does not claim there was some intervening cause, such as unexpected brake failure in his vehicle.
7. It is not necessary to consider further the indications in the evidence that Mr Vuti was intoxicated or that he was driving at high speed (notably the fact that Mr Rory's bus hit the bus in front indicates the force of the impact from behind); the point is that his collision with the rear of the vehicle in front indicates that he was driving too fast in the circumstances. Findings that he was driving at high speed and/or that he was intoxicated would not add anything to the claimants' case; they need only prove negligence of one kind or another. They need not prove more than one kind of negligence, gross negligence or alcohol-fuelled negligence.
8. Mr Vuti denies that all of the replacement parts for which costs are claimed by the claimants were in fact damaged in the accident. He also claimed that because the vehicle was on hire purchase it ought to have been insured and that insurance should have covered all of the repair costs. As to the claim for loss of business income Mr Vuti says there has been none because he says the bus was able to keep operating its passenger service straight after the accident and continue to do so. He says that in May 2020, not long after the accident, he saw Mr Rory picking up passengers and doing business with the bus.

Issues

9. There being no dispute that Mr Vuti negligently caused the accident and therefore the damage to the bus, the issue in this case is the extent to which the losses claimed were caused directly or indirectly (and reasonably foreseeably) as a result of the damage incurred by the bus in the accident, so that Mr Vuti is liable for them.

¹ At trial it became clear that this sum should be reduced to VT 838,500.

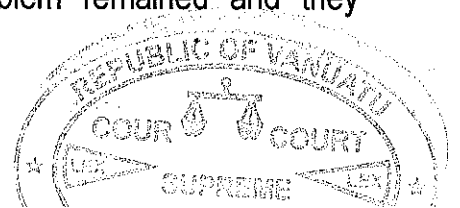
² Although Mr Vuti, in his defence to the amended claim, filed on 21 November 2022, denied any negligence Mr Tari accepted, when I queried this at the outset of the case, that Mr Vuti's negligence in failing to stop safely was the operative cause of the accident.



10. Although under the hire purchase contract the bus is, pending payment in full, apparently still in the name of the finance company, the claimants clearly have a financial interest in the bus and therefore standing to claim for the losses arising from damage to it. They say (and it is not disputed) that leaving aside one payment of VT 599,300 by the insurance company (and some loss of income compensation for the five days the bus was in the garage) they have met all of the repair and parts costs out of their own pockets.

Repair and parts claims - VT 838,500

11. By far the largest invoice incurred by the claimants was that from Fixt Qwik dated 24 November 2020 for VT 899,300. It related to the extensive panel repair work and related repairs. The claimants paid VT 300,000 being the insurance excess and the insurance company paid the balance VT 599,300.
12. There can be no doubt that Mr Vuti is liable for this VT 300,000.
13. The balance of the claim for special damages is VT 538,500. This is comprised of seven invoices, four from Carpenter Motors, one from Bodiam Engineering Limited, one from Maltalele Auto Repair and one from Asco motors (to provide a quote for the initial repair).
14. Ms Rory provided evidence that all of these invoices had been paid by the claimants personally and she was not challenged in cross-examination as to that or as to the need for those costs to be incurred as a result of the accident. She was clear in her second sworn statement that all of these costs were incurred because of the damage caused in accident. Mr Tari submitted that beyond the VT 300,000, the balance of the claim for repair costs should be dismissed because of the absence of specific receipts. I reject that submission: there was unchallenged evidence from Ms Rory that the claimants paid the additional VT 538,500 on top of the VT 300,000. This
15. Ms Rory confirmed, contrary to Mr Vuti's contention that, the bus was purchased new in 2017 and not secondhand.
16. I note also that Mr Rory attached to his statement of 12 October 2021 "a table detailing the parts that we have changed and repaired as a result of the accident". He was not required for cross-examination on that or any other aspect of his evidence so his list of parts damaged in the accident was unchallenged.
17. After the initial panel and related repairs were carried out, Ms Rory explained that there was still a noise coming from the "differential". That is why she purchased the differential bearing from Bodiam Engineering Ltd on 1 December 2020. After that was fitted by Maltalele Auto Repair, the noise problem remained and they



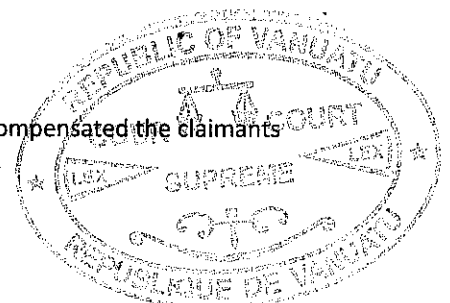
recommended a full RR axle housing and differential replacement. That work was then done by Carpenter Motors, resulting in the significant invoice for VT420,000.

18. Accordingly, despite Mr Vuti's pleading that not all of the parts obtained were needed as a result of the accident, I am satisfied they were and that the costs were properly incurred by the claimants. None of the work claimed for would have been necessary were it not for the accident caused by Mr Vuti's negligence. Mr Vuti may be unfortunate in the sense that although the primary and most obvious damage was the panel damage to the front and rear, there turned out to be further underlying damage which took some time and further investigation to find. That meant additional costs were incurred.
19. It is not unusual with vehicle repairs for relatively minor damage to a part to require replacement of the whole part, at quite considerable expense relative to the amount of damage. Nor is it unusual for there to be beyond that which "meets the eye". Having negligently caused the accident and the damage to the bus, the extent of the costs ultimately incurred by the claimants is simply Mr Vuti's misfortune. It is not a reason why he should not be liable for the cost of repairing all the damage he caused, both directly and indirectly. He has to "take his victim as he finds him".
17. I therefore uphold the special damages claim for VT 838,500 in full.

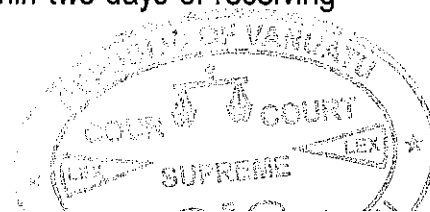
Loss of Business Income

20. In principle, the owners and operators of a commercial vehicle such as the bus may recover damages for the loss of its use caused by damage incurred in a collision for which the defendant was responsible. The claimants here are entitled to recover the financial loss they have suffered as a result of not being able to use the vehicle for commercial purposes to earn income.
21. The claim under this head is quite substantial, VT3,510,000. That is calculated at the rate of VT 10,000 per day for the 351 days³ the bus was, according to the claimants, unable to earn income.
22. During the trial on 22 November it became apparent to me that the evidence supporting this head of the claim was deficient in that it was based solely on a loss of earnings, estimated at VT10,000 per day. Loss of gross earnings is not a measure of the loss caused by being unable to use the bus; that is a starting point but account must always then be taken of the costs that would have been incurred in earning that income had the bus been operating. The claimants may only recover the loss of profit, not the loss of gross revenue.

³ Later reduced by five days in recognition of the fact that the insurance company compensated the claimants for loss of business income for the five days the bus was in the garage at the outset.



23. Accordingly, in the interests of justice, I gave Mr Livo the opportunity to file a further sworn statement from Ms Rory before closing the claimant's case. Of course is a matter of fairness I gave Mr Tari the opportunity to file evidence in reply, to call any defence witnesses he wished to call and the opportunity to cross examine Ms Rory on this issue, if he wished to do so.
24. Before discussing the resulting further evidence on this topic, it is necessary to resolve the question of the justification for a claim for loss of business income for such a lengthy period. Mr Vuti claims the claimants were not deprived of the loss of use of the bus at all. But the claimants say that they could not use the bus commercially for the whole of that lengthy period.
25. The only evidence Mr Vuti could point to in support of his position was seeing the vehicle apparently being used to transport passengers not long after the accident in May 2020. Ms Rory was questioned about that. She was adamant that Mr Vuti did not see the bus operating commercially. The only travelling the bus undertook during the whole period of approximately 13 months was to repair places and return to their home. She said that when the parties met in the Pompidou area her husband and her brother were in the bus but there were no paying passengers. They had come in the bus to see if the issues about its damage could be resolved with Mr Vuti.
26. I asked Ms Rory why, if the bus was physically capable of carrying passengers, it could not be used to earn an income. Her answer was that it was not in a roadworthy state. They continued to have a "big noise" issue from the rear of the vehicle until this was finally resolved in June 2021. It was just too noisy to expect paying passengers to put up with.
27. The Covid 19 pandemic contributed to the delay; there were longer than usual delays in obtaining the necessary parts so the required work could be done.
28. I accept the evidence of Ms Rory. I do not accept the assertion of Mr Vuti that the bus was able to and did earn income straight after the accident or indeed at any time between 2 May 2020 and 15 June 2021. This is not a case where the claimants would have been happy to sit back and not earn an income from the bus in the expectation that they would recoup their loss from Mr Vuti eventually. On the contrary, they had a significant financial obligation to Credit Corporation. Not earning an income from the bus made it very difficult for them to meet that obligation so they had a considerable incentive to resume earning income from the bus as soon as that was possible.
29. Ms Rory said that the bus accident had caused her to work without pay, in effect, because all of her salary had to go towards the loan repayments and to meeting the repair costs for the bus. I note that she obviously had difficulty meeting the last few instalments on the VT420,000 invoice from Carpenter Motors, which corroborates this. Although she was able to pay VT360,000 of this within two days of receiving



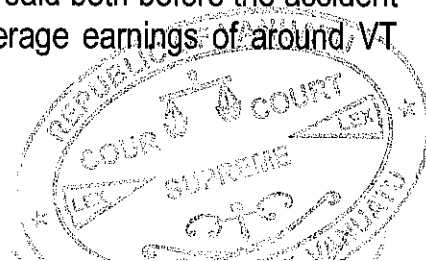
the invoice on 27 May 2021, she was not able to finally pay it off until 10 November 2021.

30. Mr Rory, who I reiterate was not cross-examined so his evidence was unchallenged, said in his more recent statement that the accident had changed their normal way of living. Because of the loss of bus income he had to leave to work overseas on the seasonal employment scheme in Australia to help pay their instalments due to the finance company. He was as a result overseas between 21 December 2020 and 2 September 2022. I also accept his evidence.
31. I am in no doubt that the claimants got the bus back into service as soon as they could, because it was very much in their financial interests for that to happen.
32. I therefore accept that the claimants have established a valid claim for loss of business income for the period from 2 May 2020 to 15 June 2021 (346 days, taking into account the five days in the garage).
33. I now turn to consider the further evidence received after the first day of the trial.
34. Ms Rory filed a further sworn statement on 25 November 2022. She keeps good records of the income and expenses for the bus; she said she updates the record sheets at the end of every business day. Ms Rory confirmed that there were always at least VT10,000 takings each day and that that would be a fair average to use.
35. Ms Rory said the monthly expenses for the bus business are VT 215,000, so they would have amounted to VT 2,622,257 over the 346-day period. This covers the bus driver's salary, replacement of engine oil, air and oil filters, brake pads and mechanic costs, VNPF for the bus driver and the loan repayment to Credit Corporation (VT 140,000).
36. In addition, Ms Rory detailed the claimants' annual expenses which (I infer in the most recent year) amounted to VT 280,646, equating to VT 257,257 for 11 months. This includes new tyres, a replacement battery, lower and upper arm replacement, power steering belt, replacement of nuts, insurance, road tax, permit, business license, Public Works Department roadworthy certificate, fire extinguisher and public Land Transport Association fee.
37. So, from the gross loss of revenue of VT 3,460,000, Ms Rory accepts the total of VT 2,879,514 (VT 2,622,257+ VT 257,257) must be deducted for the expenses the bus business would have incurred had the bus been operating, leaving a loss of profit of VT 580,485.
38. Mr Vuti filed a detailed sworn statement on 6 December 2022 and one from David Amsen. Mr Amsen is a qualified mechanic who said he had been working in that business since 1998. He repaired Mr Vuti's vehicle after the accident. He described



the damage as minor and noted that the radiator which is located right in the front of the vehicle was not damaged at all. It had sustained a bend to the front protective metal bumper and some damage to the bonnet. He was able to straighten both without any new parts being fitted. His work only took half a day and the cost to Mr Vuti was only VT 5500.

39. While I accept Mr Amsen's evidence as far as it goes, it has no impact on the claimants' evidence. The limited extent of the damage to Mr Vuti's vehicle does not mean there was not much more substantial damage to the bus. The reason the evidence was called was to support indirectly Mr Vuti's contention that the bus was not as badly damaged as the claimants say it was. I have already rejected that contention. I am satisfied that the repair and parts costs incurred by the claimants were all necessarily incurred as a result of the accident caused by Mr Vuti.
40. Mr Vuti made a number of points, some in the nature of submissions (which I consider nonetheless), in his sworn statement.
41. He first posed a number of questions about whether the bus was truly new rather than secondhand but none of this was put to Ms Rory who was clear that the bus was purchased new. Questions are not evidence. The sole evidence comes from Ms Rory and I accept it on this issue. Indeed, in general, I found her to be a credible, reliable and thorough witness able to provide ready responses and detail during her cross-examination.
42. Mr Vuti suggests there is an obvious conflict of interests in relying on a record of earnings provided by the claimants themselves. I accept that but on the other hand they are in the best position to provide such evidence and there was no, or at least no successful, challenge in cross-examination to Ms Rory's evidence about loss of earnings. Mr Vuti could have, but did not, call a witness who had looked through the details of expenses provided by Ms Rory and offered expert comment.
43. It is also relevant that the effect of Ms Rory's more recent evidence is to reduce the claim for loss of earnings from VT 3,460,000 to VT 580,485, a substantial reduction. The claim is now only about 17% of what it was. I am satisfied it is a reasonable and documented claim.
44. Mr Vuti said the claim for VT10,000 daily takings was "highly exaggerated" and referred to media articles and Shefa Land Transport Association information about the substantial reduction in income as a result of Covid 19. The problem is that is not direct evidence and whatever the general position may have been for other buses, Ms Rory when cross-examined rejected Mr Vuti's assertions as "not true". She was adamant that buses were making money during the period affected by Covid 19. When questioned by me on this issue, she said both before the accident and since June 2021 the bus business has had average earnings of around VT

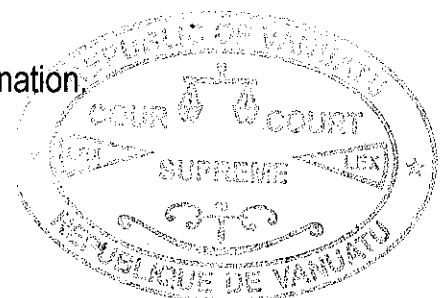


10,000 each day. She pointed out that this bus is a 15-seater and therefore able to make more money than most. Again, I accept Ms Rory's evidence on this issue.

45. Mr Vuti also challenged some aspects of the expenses claims. He is entitled to raise these points but again this is not expert evidence as he does not operate a bus business. He did not call an independent witness with expertise in this area to give evidence contrary to that of Ms Rory.
46. Overall I have no hesitation in accepting the evidence of Ms Rory about the loss of business income and I am satisfied that under this head of their claim the claimants are entitled to judgment for the VT 580,485 they seek.

General Damages

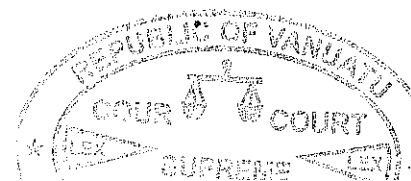
47. The final part of the claim is VT 200,000 for general damages. The particulars pleaded are:
 1. *Distress and anxiety after defendant cause lost to the claimant's vehicle while the vehicle was still under loan at the credit Corp (Vanuatu) Ltd and the arrears are ending up when the vehicle was at the garage.*
 2. *The claimant's family suffered financially, because the claimant have to use their own money to pay for the loan and pay for the parts(sic)."*
48. This claim was supported by the evidence of Mr Rory which was not challenged. He said in his statement of 12 October 2021: *"We had suffered a lot because the bus was still under loan at the Credit Corporation. During the time, when the bus was undergoing repair, we could not make any earning from so we have to find other's ways to earn money to repay the loan."*(sic).
49. In his statement of 28 October 2022 he added: *"I want to say that this accident has change our normal way of living because there is no more bus service operation, we suffered financially, so I have to leave to work overseas on sessional employment scheme to help pay the loan and sustain my family. I travelled in the 21 December 2020 and return on 02 September 2022."*
50. In her statement of 28 October 2022 Ms Rory said: *"This accident has caused me to work without pay because all my salary has to go towards the loan repayment and repair of the bus."*
51. She was not challenged about this evidence in cross-examination.



52. Mr Tari submitted there was no pleading and evidence supporting this claim but clearly there is, as I have set out.
53. I have no hesitation in accepting the evidence from each of the claimants as to the effects of the accident on the business and on them personally. They were significant, with Mr Rory having to leave to work overseas to help meet the loan repayments and support his family and Ms Rory having to put all of her earnings towards the loan.
54. The consequences the claimants suffered were real and felt over quite a period of time. They were reasonably foreseeable as likely to result from the extensive damage suffered by the bus, an income-earning asset, in the accident caused by Mr Vuti. It is entirely foreseeable that a bus operator may have an outstanding loan resulting from the purchase of the vehicle; although there is no evidence before me, I expect that would be the rule rather than the exception in Port Vila.
55. It has long been established that general damages may be awarded as an adjunct to special damages in cases of damage to property⁴. In a commercial context, general damages may be awarded for loss of use of an asset and for business interruption. It is important that the claimant should not be compensated twice, so care must be taken to avoid any overlap with special damages, such as I have already awarded here for loss of business profits.
56. Although historically courts were reluctant (unless the claim was for a breach of contract to provide for peace of mind and freedom from distress) to award damages for distress and anxiety in a purely commercial context, particularly where the claimant is a company⁵, a more flexible and fair approach has been adopted in recent times. Increasingly, the courts have recognised that, especially with small businesses, the reality is that they are run by people who can and do suffer significant distress and anxiety when their business is adversely affected by someone else's negligence. However, a cautious approach is generally taken and that is reflected in the level of awards.
57. This claim for general damages is not purely for distress and anxiety although that is certainly part of it; it is indirectly also for the unquantified financial consequences the claimants suffered in having to meet the loan repayments in other ways and in being forced to make life choices as to how to manage that. I have already noted that these consequences are neither unusual nor unforeseeable for somebody in Mr Vuti's position.

⁴ See the discussion in Todd, *The Law of Torts in New Zealand*, 4th edition, 2005 Brookers Ltd, Wellington at 26.3.02.

⁵ See *Bloxham v Robinson* (1996) 7 TCLR 122 (CA), *CBD Motors Ltd v Concrete Properties Ltd* (2004) 5 NZ CPR 22 and *Anderson v Davies* [1997] 1 NZLR 616.



58. Having reflected on all of the evidence and taking into account the special damages for loss of business profits already awarded, I am satisfied that an award of VT150,000 for general damages is appropriate.

Result

59. On their claim against the defendant I find in favour of the claimants on each of the heads of claim.

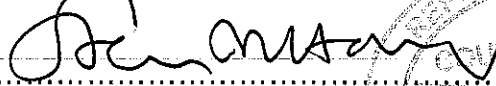
60. I enter judgment for the claimants against the defendant in the sum of **VT 1,568,985**, made up of repair costs of VT 838,500, loss of business profits of VT 580,485 and general damages of VT 150,000.

61. The claimants seek interest on the judgment sum at 5% per annum from the date of judgment. I uphold this claim.

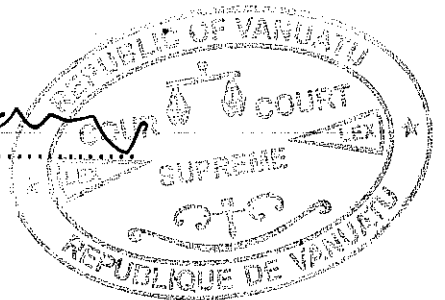
62. The claimants are entitled to costs against the defendant. Mr Livo⁶ sought VT 80,000 together with disbursements of VT 20,000 for the filing fee and the trial fees of VT 15,000. I award these costs and disbursements as claimed.

Dated at Port Vila this 16th day of December 2022

BY THE COURT



Justice S M Harrop



⁶ as clarified in his brief further closing submission on 14 December 2022.