

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

Civil Appeal
Case No. 21/1032 SC/CIVA

BETWEEN: **Jean Claude Emelee**
Appellant

AND: **Allan Matas Kelekele**
Respondent

Date: 13 June 2022
Before: Justice V.M. Trief
Counsel: Appellant – Mrs M.N. Ferrieux Patterson
Respondent – Mrs P.K. Malites

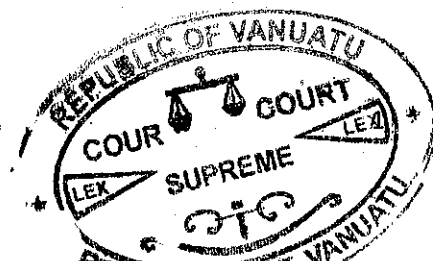
JUDGMENT

A. Introduction

1. This is an appeal from the Magistrates' Court decision that held the Appellant Jean Claude Emelee liable in negligence for a motor vehicle collision and awarded the Respondent Allan Matas Kelekele VT714,825 damages for the damage caused to his bus.
2. Counsel agreed that this matter proceed by way of written submissions and then the Court make its decision on the papers. Both counsel filed submissions. This is the decision.

B. Background

3. On 18 November 2019, a collision occurred at Kalsakau Drive behind BSP bank involving Mr Emelee's grey Nissan Navara truck registration number 20024 and Mr Kelekele's Toyota 'box bus' registration number 17961.
4. Mr Kelekele filed a claim in negligence in the Magistrates' Court seeking VT714,825 special and general damages for repair of the door of his bus and for 7 days' loss of income whilst the bus was being repaired.



5. A defence and reply to defence were filed.
6. The agreed facts were that:
 - i) Mr Emelee had parked his truck behind BSP Bank, Port Vila facing the sea-front area;
 - ii) That there were other vehicles parked on both sides of Mr Emelee's truck; and
 - iii) Mr Kelekele was driving his bus along Kalsakau Drive heading towards the Port Vila Market.
7. Mr Emelee reversed his truck and banged into the right side of Mr Kelekele's bus, from the bottom of the front passenger door and along the width of the larger back passenger door. He stopped, exited the truck and spoke with Mr Kelekele. There were many by-standers.
8. At trial, the Magistrates' Court heard from the following witnesses for Mr Kelekele:
 - i) Police officer Corporal William Seru;
 - ii) Mr Kelekele himself; and
 - iii) Marco Calo, a passenger in Mr Kelekele's bus when the accident occurred.
9. The Court heard from Mr Emelee's witnesses as follows:
 - i) Mr Emelee himself; and
 - ii) Police officer Josiah Enrel, who was standing nearby when the accident occurred.
10. By judgment dated 2 March 2021, Kanas Joshua SM found in favour of Mr Kelekele, awarding VT714,825 damages and costs. The Senior Magistrate found that Mr Emelee owed a duty of care which he breached by not giving a signal or warning that he was reversing or stopping to give way to Mr Kelekele. Further, that Mr Emelee knew that he had caused an accident and that Mr Kelekele's bus was damaged as a result of the accident. The Senior Magistrate held that there was no contributory negligence by Mr Kelekele.
11. The Magistrates' Court did not consider Corporal Seru's report as it was made 2 months after the accident. That report was based solely on the account given him by Mr Enrel. The Court held that Mr Enrel's account had a likelihood of bias.

C. Grounds of Appeal

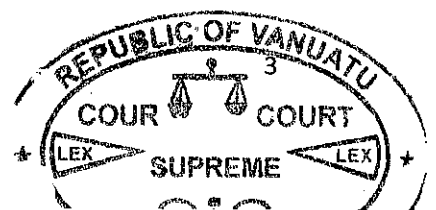
12. It was submitted for Mr Emelee that the Senior Magistrate had erred in rejecting Corporal Seru's account and finding bias on the part of Mr Enrel, and in assuming responsibility by Mr Emelee when he had not made any such admission and had denied liability.



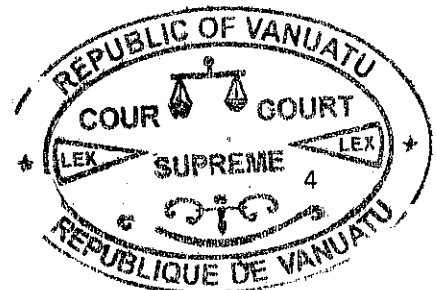
13. Secondly, it was submitted that the Senior Magistrate erred by misapplying the "but for" test where there were conflicting findings of the Court "in its record of the incident leading to [Mr Emelee's] claim for damages".
14. The third and fourth grounds of appeal were that the Senior Magistrate erred in assessing that there was no contributory negligence by Mr Kelekele when he was never parked at the seafront but was driving "market house direction" along Kalsakau Drive therefore he must have driven from a "non-entry" point from the Sound Centre area, and did so without right of way and the resultant damage to the bus was highly suggestive of the higher probability that Mr Kelekele was travelling above the speed limit for the parking area. It was submitted that it was far more likely that the accident was caused by Mr Kelekele's actions rather than Mr Emelee's actions of reversing his truck.
15. Fifthly, it was submitted for Mr Emelee that the Magistrates' Court erred in failing to record the fundamental error in the particulars of negligence in para. 5 of the Claim, which was never amended, and no inference was drawn as to the reliability of the Claimant's recollection of the incident which differed between the Claim and para. 1 of the Reply to Defence.
16. Sixthly, it was submitted that the Magistrates' Court erred in not giving due consideration to the alternative quotation provided for the bus repairs.
17. Finally, it was submitted that the Magistrates' Court erred in awarding VT714,825 damages without any justification set out in the decision as to how that quantum was assessed.

D. Discussion

18. Corporal Seru's report of the accident was rightly rejected. He confirmed in cross-examination that he made his report on 6 January 2020 of the accident which occurred on 18 November 2019. He confirmed that he was not there at the accident and made the report based on Mr Enrel's account. He accepted that his report was hearsay.
19. In addition, both Mr Emelee and Mr Enrel gave evidence that prior to the accident, they were at a rugby meeting at the sea-front area. The inference was available to the Senior Magistrate to draw that Mr Enrel was likely to be biased in his evidence. There is no merit in the first ground of appeal.
20. In applying the "but for" test, the Senior Magistrate stated that Mr Kelekele must show the Court that but for Mr Emelee's act to reverse out, he would not have dented his bus. She rejected Corporal Seru's report, inferred bias by Mr Enrel and recorded that Mr Emelee admitted in Court that he only told Mr Kelekele that he would repair the damage caused to get out of the situation rather than as an admission of guilt. Further, that Mr Emelee had given his contacts to Mr Kelekele after telling him that if he (Mr Kelekele) got all the paperwork they would sort it out. The Senior Magistrate held that Mr Emelee knew that he had caused an accident resulting in damage to the bus. She concluded that but for Mr Emelee's action to reverse the truck, Mr Kelekele would not have had damage caused to his bus.



21. Even if the Senior Magistrate incorrectly applied the "but for" test, she had already found that Mr Emelee owed a duty of care to Mr Kelekele which he breached by not giving a signal or warning that he was reversing or stopping to give way to Mr Kelekele. This finding was on the balance of probabilities when the accident occurred. What Mr Emelee said or did after the accident did not factor in this finding, which was not challenged on appeal. The second ground of appeal fails.
22. Mr Kelekele had the right of way. I take judicial notice that traffic in that portion of Kalsakau Drive goes both ways and that the entry-way just after Jill's Café has always been one which vehicles can enter and exit through. More importantly, there was no evidence led at trial that Mr Kelekele did not have the right of way. Even if Mr Kelekele had entered Kalsakau Drive from the Sound Centre area (and this was not put to him in cross-examination), at the point where the accident happened, he did have the right of way.
23. It was also submitted that the resultant damage to the bus was highly suggestive of the probability that Mr Kelekele was travelling above the speed limit. There was also no evidence led at trial as to the speed limit within Kalsakau Drive. Accordingly, there is no merit in the third and fourth grounds of appeal. It follows that the Senior Magistrate did not err in her finding that there was no contributory negligence by Mr Kelekele.
24. The fifth ground of appeal is misconceived. It was submitted that the Magistrates' Court erred in not drawing an inference about Mr Kelekele's recollection of the accident from the way that the Claim was pleaded, which was only corrected in the reply to the defence. The erroneous pleading in the Claim was corrected in the reply to the defence. I reject the submission that it required amendment of the Claim. I also reject the submission that an inference arose from the pleadings about Mr Kelekele's recollection of the incident. Any inferences had to be drawn from the evidence, not the pleadings.
25. As to the sixth and seventh grounds of appeal, the only quotation for the bus repairs in evidence was tendered by Mr Kelekele – from Asco Motors for VT440,175 costs of repairs. He deposed that the repairs have not been done due to the delays by Mr Emelee. There was no alternative quotation in evidence therefore no error by the Magistrates' Court. Mr Kelekele also gave evidence in cross-examination that he claimed 7 days loss of business income for when the bus would undergo repairs at Asco Motors. He was not challenged as to the 7 days claimed or the rate of VT10,000 per day. Mr Kelekele's evidence is accepted that the bus will need to be with Asco Motors for 7 days for the repairs to be made. This is future damage which is reasonably anticipated as a result of Mr Emelee's wrong.
26. It is accepted that no reasoning is set out in the Magistrates' Court judgment as to how the quantum of damages was assessed. This is now corrected on appeal by setting aside that order for damages and substituting an order for VT520,175 general damages (VT440,175 cost of repairs and VT70,000 prospective loss of business income whilst the bus is undergoing repairs).



E. Result and Decision

27. The appeal against liability is dismissed.
28. The appeal against the award of damages is allowed. The order for damages in the Magistrates' Court decision dated 2 March 2021 is set aside and substituted by an order that the Appellant pay the Respondent general damages of VT520,175 (VT440,175 cost of repairs and VT70,000 prospective loss of business income whilst the bus is undergoing repairs) (the 'judgment sum') **by 4pm on 27 July 2022.**
29. The Appellant is to pay the Respondent interest on the judgment sum until payment in full has been completed, at the Supreme Court rate of 5% per annum.
30. The Appellant is to pay the Respondent's costs of the appeal, as agreed or taxed by the Master. VT30,000 is to be deducted from the sum agreed or taxed as the Appellant was successful on the aspect of the appeal relating to the quantum of damages awarded. Once settled, the costs are to be paid within 21 days.

F. Enforcement

31. Pursuant to rule 14.3(1) of the *Civil Procedure Rules*, I now schedule a Conference at **7.50am on 27 July 2022** to ensure the judgment has been executed or for the judgment debtor to explain how it is intended to pay the judgment debt.
32. For that purpose, this judgment must be served on the Appellant.

**DATED at Port Vila this 13th day of June 2022
BY THE COURT**

VM Trier
Justice Viran Molisa Trier

