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

Civil
Case No. 22/901 SC/CIVL

BETWEEN: Jules Barako
First Claimant

AND: Jenny Barako
Second Claimant

AND: Bank South Pacific Limited
First Defendant

AND: Joel Tarivuhavuha
Second Defendant

Date of Trial: ***2nd day of November, 2023***

Date of Delivery: **Draft judgment:** 17th July 2024

Final judgment: 28th August 2024

Before: ***Justice E.P Goldsbrough***

In Attendance: ***Molbaleh, E for the claimants***
Kalmet, A for the defendants

JUDGMENT

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1. In a claim filed on 11th May 2022, Jules and his wife, Jenny Barako, sought damages due to a road traffic accident involving Joel Tarivuhavuha and Jules Barako. The accident happened on 2nd November 2020 in the Fresh Wota area when the car driven by Mr Tarivuhavuha collided with Jules Barako. Jenny Barako was not with her husband then, so she was neither involved nor witnessed the accident.

2. The claim is based on negligence. Joel Tarivuhavuha (the defendant) was driving during his employment. His employer is the Bank South Pacific (Vanuatu) Ltd. (BSP). The claim is for a total of VT 20,222,400 broken down as damages for past earning capacity VT 2,500,000, loss of future earning VT 7,622,400, pain and suffering VT 3,000,000 and special damages of VT 1,000,000 for Jules Barako and VT 5,000,000 for Jenny Barako for taking care of her husband. Costs of VT 2,000,000 are also sought together with interest at 5% on the 'past earning capacity'.

3. In their defence, the driver and his employer assert that the claimant caused the accident. In the alternative, it is submitted that the claimant substantially caused the accident through inattention.

4. The claim also named a party QBE Insurance (Vanuatu) Limited, although it pleaded nothing against that party. That part of the claim was struck out for that reason.

5. The trial had been scheduled for trial beginning on 17 October 2023. Neither counsel had given notice to the other at least fourteen days before the trial under Rule 11.7 (4) (a) of the Civil Procedure Rules No. 49 of 2002 (CPR) for cross-examination of witnesses. The defendant gave notice on Friday, 13 October 2023, and counsel for the claimant on the day of the trial. Both sought relief for late service.

6. Evidence in chief for the claimant came in the form of sworn statements filed by Jules Barako on 11 May 2022, Jenny Barako filed on 15 July 2022, and Louise Anna Marry filed on 21 June 2023. Each witness was cross-examined.

The evidence on liability

7. Jules Barako described how he was crossing the road from the Low Price Store side to the BSP side. According to his evidence, two vehicles had given way to him to allow him to cross the road. As he was crossing the road, the defendant hit him with his motor vehicle. The two vehicles which indicated that they gave way to him were, he said, buses, both from different directions.

8. He was asked where the defendant's vehicle started and suggested that it began from the wrong part of the car park provided by the BSP bank. He described the vehicle as coming out of the 'way in' to the parking area, not from the 'way out'. He disagreed with the suggestion that the vehicle had been given the indication by other vehicles that they had given way to the car. His reason for that was that, according to him, he had already begun to cross the road and was in the middle of the road when the defendant started his manoeuvre. He disagreed with the suggestion that the vehicles he believed had signalled to give way to him had, in fact, signalled to give way to the defendant to drive.

9. After confirming that he had been hit by a BSP white vehicle, he went on to say that the car which hit him was parked close to the Low-Price Store and, before being taken from the scene, spoke to the defendant driver and asked him if he had seen hit before

the collision. His evidence given in cross-examination was that the defendant driver replied, "No, I did not (see you)." According to the claimant, this was said in the presence and hearing of a witness, Louise Anna Merry, who was later called to give her own evidence.

10. He could not explain why this evidence did not appear in his sworn statement. He questioned its importance as evidence.

11. Questioned about his medical treatment both by Pro Medical, which attended the scene and later at the hospital, he suggested that it was wrong to say he was free from adverse effects after only four months. He suggested that prior to the accident, he had been an otherwise healthy person with neither rheumatism nor diabetes and that any pain he now suffered was a result of the accident and not from any pre-existing conditions. He explained that he would still feel the effects as of the trial date, especially during the rainy and colder seasons.

12. Regarding his business affairs, he suggested that his wife had collected evidence from other business people and explained the lack of bank statements because the business operated on a cash basis. He explained that income was spent on living expenses and the purchase of materials to build their house, for which he had not produced receipts but which he had at home.

13. Anna Merry Louis was the second witness to give evidence for the claimant. She had been on the BSP side of the road. She described how the traffic at this time was not heavy and not very busy, and she saw Jules Barako, whom she knew, crossing the road from the other side and coming towards her.

14. Her attention was drawn, she answered in cross-examination, to the defendant's vehicle as it came out from its stationary position with the squeal of wheels. She described the driving as speeding. She saw the front left of the vehicle, which hit the claimant and caused him to fall.

15. She was, she said, only 4 metres from the accident and, after hearing the squeal of tyres, did not take her eyes off the claimant, who was close to completing his road crossing. She was adamant that he was closer to completing his crossing than at the Low Price side of the road.

16. She continued to confirm that, when he had parked beyond the Low Price store and closer to the Brother bakery, and returned to the scene, the defendant driver said to the

claimant: - "I am sorry, I did not see you." She disagreed with any suggestion put to her to the contrary.

17. In re-examination she indicated that it was the squealing of the wheels that had made her turn around and observe the driver defendant. She saw him swing around to get into the correct driving lane from where he had started off. She said that she called it the way in to the parking area because that follows the flow of traffic.

18. The final witness for the claimant was his wife, Jenny Barako. She testified that she was not present when the accident happened and could not therefore comment on it, but only on its effect on her husband and their lives together. She attributed his inability to perform certain tasks now to the accident and not to his advancing years.

19. In addition to taking additional care of him, she gave evidence of things that he used to assist her in the business which he can no longer do. Carrying a large gas bottle was but one example. She maintained that the injury caused to his leg still affected him. She described how the children (they have 7) help particularly with the building of the house as it is a family home. Five of the children are still at home. She described how she could no longer earn as she used to, given the additional responsibilities she now has without the assistance of her husband.

20. Owing to the unavailability of witnesses, the matter was adjourned until 2 November 2024 for the defence evidence. At the resumed trial, the witness, Mark Loren, gave his evidence before the defendant driver, given his limited availability to attend the trial. There was no objection to his evidence being received out of the usual order. According to his evidence, his statement had been recorded by an insurance company employee, given in Bislama but written down in English. He began by correcting his recorded name as not Mark Loren but Mark Mettesau. Whilst in his statement the witness referred to his statement being taken by an employee of the insurance company, other evidence suggests that might include employees not of the insurance company itself but of loss adjusters appointed by that company for the purposes of the claim. It is noted that photographs exhibited to the statement of the defendant bear the imprint of a local firm of loss adjusters.

21. Mark Mettesau had been working on the Low Price Store painting. He saw the BSP car come out not from the BSP parking area in front of the bank but from the side of the bank, apparently given a right of way by a bus. He described the pedestrian who was

hit as coming from behind a stopped bus. He then suggested that the bus had stopped, not to allow the BSP car any right of way but to allow a passenger to alight. He further suggested that there was a flashing of lights by more than one bus. He said "the Kia (BSP car) accelerated without seeing the pedestrian who came from behind the bus."

22. After describing the relative positions of each of the parties, he described how the pedestrian came from the BSP side of the road, not from the Low Price side of the road where he was sitting on his tin of paint.

23. He reassured the defendant that the accident was not his fault, but at the same time, saw other drivers approaching, seeking to 'have a go' at the young driver (the defendant). He had no recollection of the female witness and her child across the road. He then confirmed that there was indeed only one bus that signalled, not two.

24. Asked by the Court about paragraph 10 of his sworn statement and the conflict between whether there was one bus or two, he was adamant that he had told the person who took his statement of only one bus. "She wrote something else", he said.

25. Finally, Joel Tarivuhavuha gave his evidence. BSP employs him as an IT technician and visits the Fresh Wota branch as part of his duties. He has had a driving licence since October 2005 without incident. He gave evidence of leaving the bank, two buses signalling him to proceed, and slowly driving out into the main carriageway. Suddenly, he says, he saw the pedestrian and could not take any action to avoid him as 'in the agony of the moment' he did not know if swerving to the left or to the right would cause greater harm.

26. In cross-examination, he agreed that after he saw the two vehicles signal for him to move off, he moved off, insisting that the vehicles gave way to him and not to the claimant. As he had not seen him prior to the collision, he did not want to say whether the claimant had set off from the Low Price side of the road or the BSP side.

27. He maintained that he could not have seen the claimant prior to the collision. He felt this to be the case because of what the other drivers had told him to do with their signals.

28. Given that as part of his evidence, the defendant spoke of his vehicle rolling over in the event of a swerve to the left or right, he was asked by the Court to explain what he meant, and replied that a swerve to the left or right he might hit more pedestrians, not that his vehicle would physically roll over. As he had not been involved in any previous

driving incident, he was scared that if he turned left or right, he might cause more damage to other people.

Discussion- Liability

29. It is for the claimant to prove on the balance of probabilities his claim. He must show to the requisite standard that the defendant fell below the standard of a reasonable and prudent driver in the circumstances and that he fell below the standard required of a driver in his duty of care towards other road users. That the accident took place is not an issue here, nor that the defendant was driving his employer's vehicle during his employment. The issue here is whether the claimant has shown that the driver fell below a reasonable standard of driving.

30. The contrasting evidence is apparent. The evidence from the witness, Mark Mettesau, can be disposed of swiftly. He became confused during cross-examination. He insisted that his statement did not truly reflect what he had told the female employee of the insurance company, yet still signed and swore his statement. He had the claimant crossing from the BSP side of the road. He saw one bus or two buses, signalling the defendant to proceed. He made some bold assumptions about what the defendant driver would have seen or not seen and what the intentions of the two vehicles were when stopping to let the Kia proceed. Each of the assumptions set out in his statement favours the version put forward by the driver. Yet, when cross-examined, the witness agreed that the words recorded in the statement were not his own but the words of others. For those reasons, the evidence cannot be relied upon.

31. In his own testimony, the driver noted reliance upon the indications of other road users. He formed a view of what the signalling meant and did not withdraw from the two vehicles being present. He could not contemplate that the signalling could have been meant for the pedestrian and not for him. His manoeuvre, turning left into a main road, was inherently dangerous. He described his forward motion as slow and yet noted the 'sudden' appearance of a pedestrian in circumstances where he could not safely stop and where 'serving to the left or right' may result in further injury or even his vehicle 'rolling over'. There is an inherent contradiction in that evidence relating to speed.

32. In contrast, there is evidence from the witness to the accident whose attention to the vehicle was drawn by the squealing of tyres. That contradicts the evidence of the driver

driving at a slow speed but is consistent with a driver who suddenly sees a pedestrian and is faced with the dilemma of swerving to the right or to the left.

33. There is controversy as to where the defendant had been parked and, thus, where he set off from. That, it seems to the Court, is an irrelevant controversy given what is known to have taken place. The driver was intent on joining the carriageway furthest to him to go towards town. That meant a left turn across the traffic. Whether he began the manoeuvre from outside the front of the bank or to its left is immaterial.

34. On the evidence, I find that the 1st claimant was crossing the road from the opposite side of the road towards BSP and that he was well into the road before the collision. I further find that, when the collision occurred, the driver, who had begun his manoeuvre with squealing tyres caused by excessive speed, had not seen him. Crossing from the Low Price side of the road, the pedestrian was not hidden from view, but the driver failed to notice him.

35. I further find that the driver did say to the 1st claimant after the accident that he had not seen him and that he was sorry.

36. In those circumstances, I find that the claimant has demonstrated that the defendant driver was indeed negligent when driving away from the bank at speed and, at the same time, allowing his concentration to focus on other motor vehicles and not on other road users equally entitled to his attention.

37. I do not find that the driver had any liability towards Mrs Barako in the circumstances. She did not witness the accident nor is there any evidence of any trauma affecting her from the news of the accident. Her claim is for losses because she no longer has the help she used to get from her husband. That loss may be reflected in the damages to be awarded to her husband. It does not show a failure in any duty of care as between her and the defendant driver.

38. As it is not in issue, the employer is found vicariously liable for the actions of its employee.

Discussion – contributory negligence

39. Given the findings about the driving which caused the accident, it is clear that there was little, if anything save for being there, that the claimant did which contributed to the accident. He was faced with a driver attempting a difficult manoeuvre of crossing a

main road to turn left at an excessive speed from starting. Even the driver gave evidence that he came upon the pedestrian too late to avoid the collision. As an elderly person attempting to cross, the claimant did all that he could in the circumstances which faced him. He was not to know that this defendant would behave in such a reckless manner.

40. The Court finds no contributory negligence on the part of the claimant.

Observations

41. Before turning to quantum, two observations. It is clear that the recorded evidence of Mark Mettesau did not reflect his evidence as given in Bislama to the person who recorded it in English. Compared with his actual evidence, consideration of his recorded statement favours the defendant far too much. It is to be hoped that this is nothing more than a coincidence.

42. Attached to the 2nd defendant's sworn statement is a report from the company Promedical, which attended the scene of this accident and administered immediate medical attention to the claimant. Counsel were asked by the Court to explain how such a report was provided to them from this source other than with the express permission of the claimant. When counsel sought to file written submissions at the close of the evidence, they were required to address this issue.

43. The claimant does not address the issue, submitting that he now agrees that the report may be admitted into evidence. That submission fails to acknowledge the point, that at the time when the report from Pro Medical was provided to the defendant, there was no consent from the claimant.

44. Worse, counsel for the defendant who exhibited that medical report to the 2nd defendant's sworn statement does not even refer to the issue in his submissions.

45. Without consent, why is a medical report on a claimant attached to the sworn statement of a defendant? Counsel were obliged to address the issue after being asked to do so. The Court is left with the impression that the claimant had no say in whether or not the report on his condition and treatment was to be released to the defence. If it is the correct situation, this situation cannot be tolerated. It was for counsel to show that it was not the position. Still, as they have failed to make any submission on the point, and since the Court cannot include in a judgment an adverse comment on a non-party without

giving notice, the matter is adjourned to allow the non-party to file submissions should they wish to do so.

Adjourned hearing

46. At a further hearing, representatives from ProMedical attended and explained how, in their view, the copy of their report was not obtained from them. It was explained that the same report was provided to the hospital when the claimant was handed over for treatment. It was a copy of that version of the report that was exhibited in the evidence of the defendant. Further, albeit reluctantly, inquiries made of the 1st defendant suggest that it was the 2nd defendant's former manager who obtained the report directly from the hospital and forwarded it to the Loss Adjusters referred to earlier. They compiled the statement for the claimant, which statement was then signed of with the name Hurley Lawyers as having settled it.

47. Even now, the seriousness of exhibiting a statement attaching evidence illegally obtained has not dawned on the counsel responsible. Even if he has no interest in his own reputation, he should be concerned about the reputation of the firm whose name he attaches to the statement, and his duty to the Court. The same statement exhibits photographs not taken by the deponent, but by the same firm of loss adjusters who did not accurately record the evidence of the 2nd defendant's witness. Yet it was counsel who signed off on the statement as having been settled by them. They are obliged to accept responsibility for it.

48. To be clear, ProMedical have a very well set out policy about the release of documents and to their credit they could explain how this copy was not obtained from them. This is in stark contrast to the statement from the hospital. Some work is required inside the hospital and its record department about the confidentiality of medical records. Equally, the 1st defendant needs to educate its own staff about the limits on obtaining evidence to produce in litigation. In that, they should ultimately be guided by their counsel. That did not happen here.

Evidence – injuries and quantum

49. Evidence of injury came from the Pro Medical report, oddly produced into evidence as an attachment to the sworn statement of the defendant and the report of Dr Trevor Cullwick attached as JB10 dated 14 September 2022. The reports show that an open

fracture of the left tibia and fibula. The evidence from the 1st claimant, which I accept, is that he still suffers pain from the injury.

50. He was treated with an external fixator in place for four months which was thereafter removed. He was 68 years of age at the time of the accident. There is no doubt that the injury was serious and caused loss in addition to pain and suffering to the claimant. The amount payable with reference to the pain and suffering should be in the region of VT 1 million applying the guidelines for injury as adopted in this jurisdiction.

51. There is evidence that the claimant had to stop helping in his wife's business selling muffins and that she also had to stop because she was obliged to care for him whilst he was incapacitated. That caused a loss of income.

52. There is a claim for special damages of VT 1,000,000. It is not supported by evidence, a fact which the claimant admits in his submissions. An amount of VT 50,000 has been agreed upon between the parties

53. The loss of earnings are difficult to quantify given the cash nature of the business. The claim is for VT 2.5 million past lost earnings and VT 7,622,400 future loss of earnings. In submissions, the defendants have calculated loss of earnings during the 8 months of incapacity as VT 2, 587,000. I accept that figure.

54. The claim brought by Jenny Barako must be dismissed for the reason set out above.

55. The claim for costs is for VT 2 million. In submissions, that is reduced to VT 1.5 million. There is no suggestion that indemnity costs are payable, so that amount appears excessive on the standard basis.

56. Based on the figures set out above, the claimant will receive a total award of VT 3,637,000, not including any figure for loss of future earnings. As agreed between the parties, costs of VT 700,000 will also be awarded.

57. Given that the matter had to be adjourned to allow submissions from Pro Medical, counsel for the parties were invited to discuss the total damages which would flow from the findings. The actual orders, including what order should be made for costs, will be determined subject to any submissions made at the resumed hearing. Those discussions were unsuccessful after an offer of one million vatu was declined, and a counteroffer of two million was made but not accepted at first. By the time an indication of

acceptance was made, the offer had lapsed. The claimant asks this Court to determine the figure for loss of future earnings.

58. As stated above, there is not much evidence about what will be lost. Given that one is looking into the future, that is perhaps understandable, especially as the claimant is self-employed and works within the cash economy.

59. I consider the lack of evidence but also the agreed determination of the loss incurred over the eight months of incapacity. That figure of VT 2,587,000 can be used as a point at which to start. It represents an actual loss over a defined period. I also believe that the claimant could not be expected, even without this injury, to maintain a level of work compared to a younger person for too much longer, given his age. I further take into account that his wife must take on more responsibility herself. She has not made out her claim, but he is entitled to recover in these proceedings based on what he cannot do for her in the future because of this injury. Finally, I take into account that the business might never recover from the losses already incurred.

60. The claimant is awarded VT 3 million for future earnings loss.

61. The orders of this Court are, therefore, as follows. The claim brought by Jenny Barako is dismissed. Jules Barako is awarded damages of VT 6,637,000 and costs of VT 700,000 against the 1st and 2nd defendants jointly and severally, with interest at 5% per annum from the date of the filing of the claim, save in respect of the loss of future earnings which will attract interest at the same rate from the date of judgment, until payment in full. An enforcement conference is scheduled for 31 October 2024 to review compliance.

DATED at Port Vila this 28th day of August 2024

BY THE COURT

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E.P Goldsbrough
Judge of the Supreme Court

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