

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

Civil  
Case No. 22/2584 SC/CIVL

**BETWEEN:** Enid Tutuo Agwalasi & Zariella Agwaiasi  
Claimants

**AND:** Vanuatu Copra & Cocoa Exports  
First Defendant

**AND:** Henry Alexander Ford Hooker  
Second Defendant

**Before:** Justice Oliver A. Saksak  
**Counsel:** Mr Philip Fiuka for the Claimants  
Mr Abel Kalmet for the Defendants  
**Date of Hearing:** 19<sup>th</sup> July 2023  
**Date of Judgment:** 2<sup>nd</sup> February 2024

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## JUDGMENT

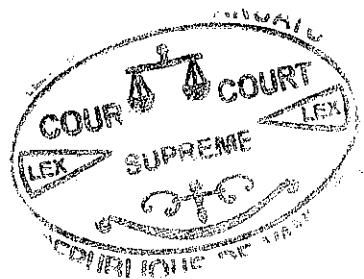
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### Introduction

1. This is a claim for damages for physical injuries sustained by a mother and her daughter when a loader owned by the First Defendant and driven by the second Defendant lost control and collided with the two claimants, causing serious physical injuries.

### Facts

2. The claimants are citizens of the Solomon Islands. Enid Tutuo Agwaiasi, the mother was working as a Nurse at the Northern District Hospital under contract by the Vanuatu Government. Her daughter Zariella Agwaiasi, was 20 years old and residing with her mother at the time.
3. On Wednesday 16 February 2022 at around 11:00am the claimants were walking together down the road from the Hospital towards the Fire Station in Luganville, Santo.



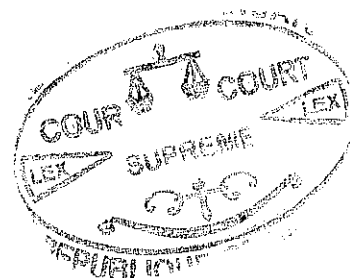
4. The second Defendant was employed by the first Defendant at the time as a driver of the heavy vehicle.
5. On 16 February 2022, the second Defendant drove the first Defendant's loader on instructions. He drove down the same road where the claimants were walking. He drove at gear No.2, the engine went off and the loader zigzagged down the road and crushed into the two claimants causing severe physical injuries.
6. Criminal charges were laid against the second Defendant in this Court to which he pleaded guilty to careless driving and was given a suspended sentence.
7. The claimants claim that the second Defendant was negligent in his driving. They claim monetary damages for their physical injuries, including pain and suffering.
8. They claimed general damages in the sum of VT100, 000,000.

### **Defence**

9. The Defendants denied negligence. They alleged contributory negligence. They claimed a defence of "agony of the moment".

### **Evidence**

10. The claimants have the duty of proof on the balance of probabilities.
11. The claimants relied on the evidence, oral and by sworn statements of the mother Mrs Enid Agwaiasi, Save Peter Bong, Cedrick Marmar, Daniel Ialualu, Doctor Samuel Kemuel and Doctor Agnes Auto.
12. The Defendants relied on the evidence of Dyson Wilson and Alexander Ford Hooker, the second Defendant in support of their defence.

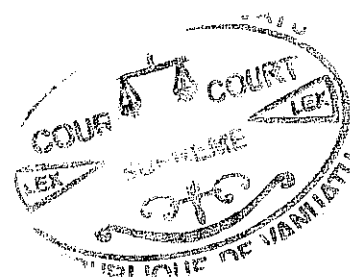


## Submissions

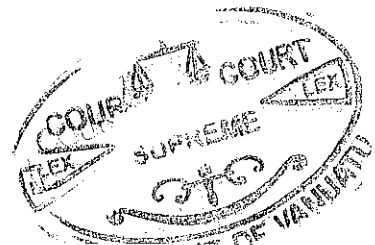
13. Counsel sought time to file written submissions and the Court allowed 21 days.
14. The claimants filed written submissions on 7 August 2023.
15. The Defendants filed late submissions on the 15 November 2023.
16. The claimants submitted that from the evidence 'the Court should find the Defendants guilty of negligence and to award general damages in the total sum of VT55,175,518, and special damages in the sum of VT1,847,863 with interests of 5% per annum, plus cost of the proceeding.
17. The Defendants submitted first that following the defence of "agony of the moment", no liability should be found. Alternatively if the Court found the second Defendant guilty of negligence, it should assess the claimants contribution at 33% and reduce their claims to VT7,332,890 for Mrs Agwaiasi and VT14,254,290 for her daughter, Ms Agwaiasi.
18. The Defendants submitted there should be no order as to costs.

## Considerations

19. The first issue for consideration is whether or not the accident on 16 February 2022 occurred as a result of the second Defendants negligence?
20. I consider the defence evidence for Mr Wilson and of the second Defendant himself are relevant to show negligence. First Mr Wilson referred to the Chief Mechanic's report confirming that the loader going downhill should be travelling on gear 1 and not gear 2 as the second Defendant did.
21. Mr Wilson told the Court what Mr Hooker had told him that he was travelling downhill on gear 2 and when he realised he was going too fast he tried shifting to gear 1 but instead put it on reverse. As a result the engine shut down and the loader continued downhill.

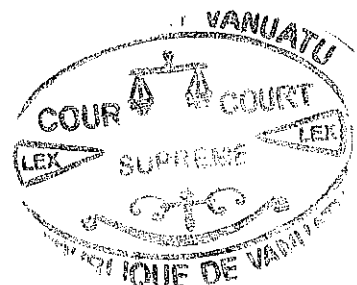


22. The Defendant himself in oral evidence admitted the same story he told his superior that he was travelling on gear 2. He never drove the loader on the road before. He did not see the two claimants well ahead of him. He did not use the horn to sound the warning. It was about 50 meters down the road to the point of impact or collision. He realised the vehicle was going too fast downhill. He wanted to shift into gear 1 but put it on reverse instead, shutting down the engine.
23. From 50 meters away, this was not a case of "agony of the moment". The second Defendant was clearly negligent. He has ample time to take necessary and prudent action to avoid the collision and going off the road. He failed to do so.
24. I find the second Defendant clearly negligent in his driving. He drove on clear instructions of the first Defendant who is vicariously liable for his tortious and criminal actions.
25. The Defendants alleged the loader's bucket and the palm leaves had blocked or hampered the second Defendant's views of the claimants. Those submissions are rejected. I take judicial notice having travelled down that road many times in a high vehicle and find this to be far from reality. The palm leaves could in no way be the cause of the collision.
26. I therefore reject the defendant's denial that there was negligence. Similarly I reject the defendant's submission that the accident occurred in the 'agony of the moment'. This was not a case where the loader's engine stopped and bang, the collision happened and the vehicle going off the road. No, it happened some 50 meters further down the road after the vehicle continued to roll downhill without the engine or power, zigzagging twice off the road before finally hitting the two claimants and falling off the road with them.
27. I find no contributory negligence on the part of the two claimants. They were innocently walking on the footpath, they looked back and saw the vehicle some 4-5 metres away and gave way to avoid being hit, but they were hit and hurt by the loader in the process.
28. The second defendant admitted he did not sound the horn to warn the claimants. He admitted the horn could still be blown despite the engine shutting down. He was not a prudent driver.



29. The second issue is whether or not the collision cause physical injuries to the claimants?
30. The evidence of Doctor Samuel Kemuel and Doctor Agnes Auto show very serious injuries sustained by the two claimants. Their evidence and analysis of the injuries were not challenged or rebutted by the defendants.
31. The Defendants have acknowledged that Mrs Agwaiasi sustained:-
- a) Right leg injury by laceration to the Medial malleolus deep to the bone;
  - b) Right ankle injury outer soft tissue, swelling and abrasions;
  - c) Grossly deformed left leg confirmed as adistal fibula comminuted fracture; and
  - d) Lateral talor shift
32. The defendants have also acknowledged that Ms Agwaisai sustained:-
- a) Horizontal 6cm laceration on the back of the head deep to the bone;
  - b) Multiple left hemi facial lacerations (facial);
  - c) Left periorbital unilateral eachymosis with clinical base of skull fracture,
  - d) Threatened distal right leg complex open fracture partially degloved, grossly contaminated and deformed, comminuted tibial fracture with lateral displacement and angulation and distal fibula fracture with 80% displacement and angulation; and
  - e) Distal left leg fracture, distal tibia and fibula fracture with lateral displacement and angulation.
33. I accept the defendant's calculations of damages. Mrs Enid Agwaiasi to be as follows, but disallowing the 33% for contributory negligence:-

a) For right ankle injuries	VT 5,801,600
Lacerations and abrasions	+ <u>VT 2,755,000</u>
	<u>VT 8,556,600</u>



- |  |  |
|--|--|
| b) For left ankle injuries                       | VT 3,935,320                             |
| And left leg fractures                           | + <u>VT 4,440,000</u>                    |
|  | <u>VT 8,375,320</u>                      |
| <br>   |  |
| c) For Pain & Suffering with<br>Stress & anxiety | VT 4,000,000 (as submitted by claimants) |
| <br>   |  |
| d) For loss of earnings (x 13 fortnight) =       | VT 847,340                               |
| Total damages                                    | = <u>VT 23,627,126</u>                   |

34. For Ms Zariella Agwaiasi, she has Judgment for :-

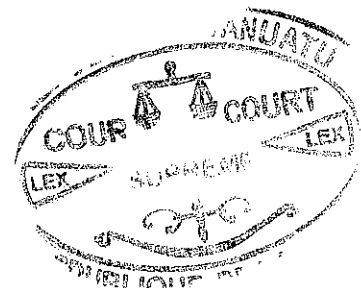
- a) Head Injuries – VT 457,209
  - b) For Facial lacerations – VT 2,033,520
  - c) For left eye injury – VT 584,600
  - d) For left leg injury – VT 5,801,600
  - e) For right leg injuries – VT 14,245,000
  - f) For Pain & suffering and stress – VT 4,000,000 (as submitted by claimants)
- Total Damages = VT 27,121,929

35. For Special damages as submitted by the claimants, I accept the amount of VT 1,847,863.

36. I assess the total damages awarded to the two claimants to be in the total sum of VT 52,597.018.

37. I therefore enter Judgment in favour of the two claimants against the first and second Defendants jointly and severally for the following sums:-

- a) For Mrs Enid T. Agwaisai – VT 23,627,126 as general damages, and as special damages, the sum of VT 1,847,863
- b) For Ms Zariella Agwaiasi – VT 27,121,929 as general damages.



38. There will be no interest if the defendants pay the damages within 30 days from the date of the Judgment. In the event of failure, interest recoverable shall be 5% per annum from the date of filing of the proceeding.
39. As for costs, the defendants shall pay the claimants costs of and indicated to the action on the standard basis, as agreed or taxed.

**DATED at Port Vila this 2<sup>nd</sup> day of February 2024**

**BY THE COURT**

  
Hon. Oliver A. Saksak

Judge

