

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

**Civil  
Case No. 24/2868 SC/CIVL**

**BETWEEN: Kawilo Fong**  
**Claimant**

**AND: Republic of Vanuatu**  
**Defendant**

**Before: Hon. Justice EP Goldsbrough**

**In Attendance: Leo, C for the Claimant**  
**Tari, T, Jelinda for the Defendant**

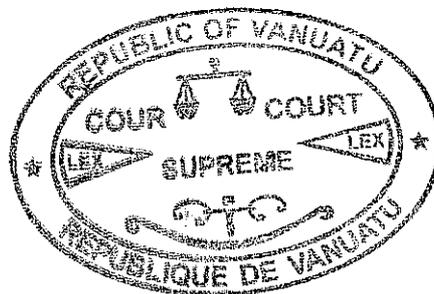
**Date of Hearing:**  
**Date of Judgment: 17<sup>th</sup> September 2025**  
**17<sup>th</sup> November 2025**

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**JUDGMENT**

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1. This is a claim for damages following the death in custody of Robert Moses. The matter is defended. The claim is based in negligence.
2. Robert Moses died on 7 March 2022 after being assaulted. He was a serving prisoner at the time and whilst it is not said that officers of the Correctional Services were responsible for the assault, it is said that they failed to exercise their duty of care towards him.
3. It is also pleaded that the Correctional Services treated the late Robert Moses in an inhuman cruel or degrading way because he was housed in unsuitable conditions.

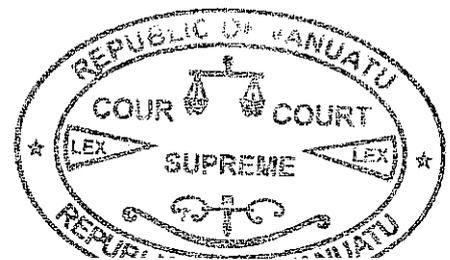


## Background

4. Robert Moses was placed in custody in 2019. He died in custody in 2022 as the result of an assault which was carried out by another inmate. He was declared dead by a hospital doctor, and his body was released from the mortuary to his relatives directly, not through the correctional services. Mortuary staff released the wrong body. When the mistake was discovered, the body was exhumed and later replaced with the correct body.
5. During his time in custody, the late Robert Moses was at times held in a modified shipping container which were at that time being used to house prisoners. That is no longer the case.

## Evidence

6. The only evidence presented in this case for the claimant is that of the claimant as Administrator of the Estate of the late Robert Moses. He was granted letter on 12 June 2023.
7. His evidence shows that the deceased was certified dead on 7 March 2022. That death was registered by the claimant in September 2022. The deceased had three surviving children.
8. The evidence is contained in a sworn statement filed by the claimant on 11 September 2024. The witness asked for several parts of that sworn statement to be deleted after he had seen other evidence presented on behalf of the defendant. One example of this is an alleged earlier assault in custody when other evidence showed that the deceased had already been released from custody. That evidence was withdrawn from the statement, and the claim was amended accordingly.
9. There is no evidence produced as to when the deceased was released from custody and then remanded back into custody. There is no evidence about the assault in custody, just that the deceased died of blunt force trauma. There is no postmortem report although the witness speaks of a postmortem being ordered.
10. In cross examination the claimant said that he based his belief that the deceased was in custody continuously from 2019 to 2022 because he never came to see him during that time. He agreed that he did not know what caused his death. He accepted an apology from hospital and mortuary

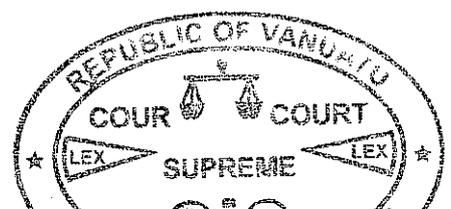


staff for the delivery to him of the wrong body. He agreed that the Correctional Services had not been responsible for the mortuary mix up.

11. His answer in cross examination as to the cost of the funeral and of the additional grief caused to the family by the mortuary mistake. He could not say for how long or even if the deceased as a prisoner was held in a container.
12. Evidence for the defendant came from the Director of Correctional Services. He was not available for cross-examination. Although he had been warned, for a second time as he had already missed an earlier trial date for similar reasons. He made the choice to travel overseas for work purposes. This was the second time that the same reason was given in this matter for his unavailability. An application to adjourn based on his unavailability was refused, given that this was a second occasion. An earlier application had been successful in July 2025 when the defendants were ordered to pay wasted costs of VT 10,000. Because he was not available to cross-examination after notice had been given that he was required, his evidence will be assessed with that in mind and given the appropriate weight because of his absence. That his evidence could not be test by cross examination makes it of less weight, although given that he mainly speaks from official records against which there is no contrary evidence, the effect on the case as a whole is lessened.
13. His evidence showed that the deceased was released from prison after serving a 17-month sentence on 26 November 2019. He was not in custody when the first alleged assault by guards took place in November 2019. He was then placed on remand on 27 August 2020 but then released on bail on 20 November 2020, but that bail was revoked on 3 January 2021. He remained on remand until an incident on 7 March 2022. Another detainee in High-Risk Cell 4 called out that there was a fight. Officers immediately attended and found the deceased laying on the floor bleeding. Not responding to attempted resuscitation, the deceased was taken to hospital where he was pronounced dead. A fellow detainee was sentenced after pleading guilty to intentional assault causing death in the Supreme Court on 16 December 2022.

### Discussion

14. After the amended claim was filed, the defendants made the decision not to file any amended defence. The amendment reflected the evidence then available which showed that the original



assault alleged to have taken place in 2019 in the Correctional Facility and for which guards were responsible could not have taken place as originally described.

15. As it is clear from the evidence that the deceased was assaulted and killed by a fellow prisoner, any suggestion that the Correctional Services were directly responsible for the assault is not an available finding.
16. To demonstrate negligence, the claimant must show that the defendant had a duty of care towards the deceased and that it fell below the required standard in exercising or carrying out that duty of care. There is no doubt that the state assume responsibility for a prisoner in its custody, and that is where the duty of care arises. The issue here is whether the state failed to exercise that duty of care in these circumstances.
17. In *Vanuatu Ferry Limited v RoV* [2024 VUCA 17], the Court of Appeal set out the applicable test for negligence. It said: -

In Vanuatu, the three-stage test set out in *Caparo v Dickman*<sup>1</sup> applies in considering whether a duty of care arises. The House of Lords, in that case, set out three requirements in establishing duty, first, reasonable foreseeability of harm to the claimant, second, proximity or neighbourhood between the claimant and the defendant and, third, whether it is fair, just and reasonable to impose a duty of care in such a situation. *Caparo* was considered by the United Kingdom Supreme Court in *Robinson v Chief Constable of West Yorkshire Police*<sup>2</sup>:

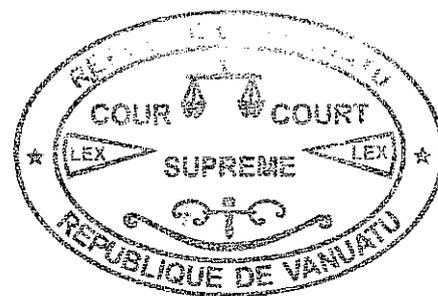
*“Properly understood, Caparo thus achieves a balance between legal certainty and justice. In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable.”*

18. The claimant has not put forward what steps it believes that the defendant failed to take or should have taken to further protect the deceased. It is reasonably foreseeable that one detainee may

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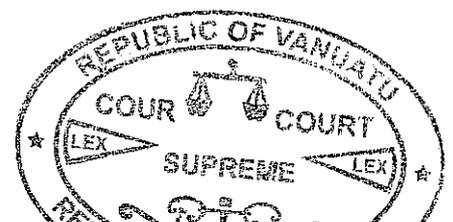
<sup>1</sup> [1991] All ER 568.

<sup>2</sup> [2018] UKSC 4



attack another. Correctional confinement is not necessarily conducive to gentlemanly behaviour. But what steps should be taken to protect another from harm. A risk assessment must be carried out. There is no evidence either way about this, nor any questions sought to be asked about this. When counsel for the defendant sought an adjournment of this matter because of the absence of the Director of Correctional Services, counsel for the claimant objected. He did not submit to the Court that it was important that the Director of Correctional Services be present for cross-examination. If such question were ever intended, that was the opportunity to ensure there was someone present to answer them.

19. There is evidence that officers were soon on the scene after the attack when the dry came, and immediate attempts at providing medical care. It is difficult if not impossible to imagine any higher standard possible without resorting to one-to-one supervision, something not available in most correctional facility worldwide, not just in Vanuatu.
20. It should not be necessary to point out that the burden of proving the negligence rests on the claimant, on the balance of probabilities.
21. A lot of emphasis was placed on the notion that the deceased had been held in inhuman conditions based on a newspaper article when the modified containers were criticised and eventually withdrawn from use. Yet the evidence of the length of time the deceased was housed in a container is lacking, as is any other information about the actual conditions. The death was a result of the attack on the deceased by another prisoner, and there is no evidence that the attack was a direct result of container life. It is a distraction and no more than that.
22. The principal complaint is against the Correctional Services Department. Nothing was pleaded against the mortuary or hospital services, and no response has been requested or filed by them. Indeed, it was only in answer to a question raised after cross-examination and by the Court that evidence was received that Correctional Services took no part in the mistakenly returned corpse. That should have been pleaded in order that the appropriate authority, even if it is the same Republic of Vanuatu had an opportunity to respond to it.
23. Considering all of the material presented, the claimant has not shown, even on the balance of probabilities, that the defendant did not exercise the appropriate standard of care when accepting



the duty or care that no doubt existed towards a detainee of the correctional services. As for the hospital and mortuary services and the return of the wrong corpse, given that they were not made aware of the claim against them and the denial of the opportunity to explain themselves, as the claim as pleaded suggested the responsibility was on the Correctional Service Department, it would not be fair to find that part of the claim proved. Clearly, on the evidence, no one on the part of the claimants sought to view the body prior to burial and so no distress was caused by seeing the wrong corpse. The funeral proceeded as if the actual corpse had been delivered to them, hence no more distress than would otherwise be caused by an unfortunate death. Subsequent events begin to be too remote for the relevant test to be successfully applied.

**DECISION**

24. The claim is dismissed. In different circumstances, an order for costs would be made against the claimant payable to the defendants but given the repeated failure of the principal witness for the defendant to attend this trial and then the failure of counsel for the defendant to file closing submissions on the matter, no order for costs is made.

**DATED this 17<sup>th</sup> day of November 2025**

**BY THE COURT**



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**Hon. Justice EP Goldsbrough**

