

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

Civil Appeal
Case No. 21/3787 COA/CIVA

BETWEEN: **Yvette Bulememe**
Appellant

AND: **Republic of Vanuatu**
Respondent

Coram: *Hon. Chief Justice V. Lunabek*
Hon. Justice J. Hansen
Hon. Justice R. White
Hon. Justice O. A. Saksak
Hon. Justice D. Aru
Hon. Justice G. Andrée Wiltens
Hon. Justice E. Goldsbrough

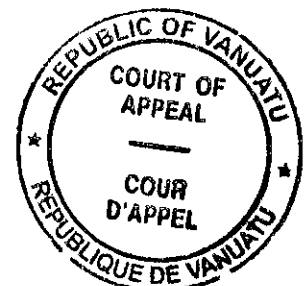
Counsel: *Mr Eric Molbaleh for the Appellant*
Mr Sammy Aron for the Respondent

Date of Hearing: *9 February 2022*

Date of Judgment: *18 February 2022*

JUDGMENT

1. By her amended statement of claim, the appellant sought damages for negligence against the Republic of Vanuatu. In its original form, the claim had sought damages against the perpetrator of an unlawful killing, the claim being brought by the mother of the deceased. In the amendment process, the claim against the perpetrator was withdrawn and the claim against the present respondent in negligence was substituted. There is no issue on this appeal about the original claim against what was the original defendant and its dismissal.
2. After the amendment had been made and the Republic became the one and only defendant in this matter, an application to strike out the claim was brought and, eventually, heard. The primary Judge upheld that application, holding that the appellant had not pleaded facts which could establish that the Republic owed her a duty of care. It is against the decision, made on 24 November 2021, that this appeal is brought.



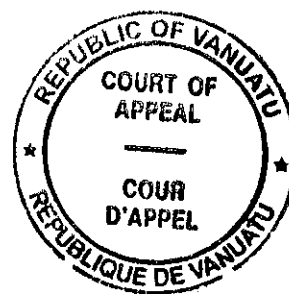
Background

3. John Etienne Samuel is properly described as a serial offender. He is presently serving a sentence of imprisonment of twenty three years for intentional homicide. Prior to the intentional homicide, he had been convicted in August 2012 of having sexual intercourse without consent with a 5 year old girl (in March that same year) and prior to that he had been convicted, in June 2009, of a similar offence against a 15 year old girl (committed in February 2003). The killing of the appellant's daughter took place whilst the offender was released from Correctional Services on licence, otherwise known as on parole, on the sentence imposed in August 2012. His sentence of 23 years was imposed by this Court in November 2019 on a sentence appeal brought by the Public Prosecutor (*Public Prosecutor v Samuel* [2019] VUCA 76), the original sentence having been 18 years imprisonment. The offence took place after the victim refused to have sex with the offender and threatened to report him to the police.
4. After initially bringing an action against Mr Samuel, the appellant eventually sought to bring an amended claim against those responsible for either granting the offender parole or supervising that parole. It is significant to note that from the pleadings, it was never clear which was the case although during the hearing of this appeal it appeared to this Court more likely to be the latter rather than the former. This point is referred to later in this judgment when it will be further considered with the class or classes of person to whom it is suggested that a duty of care is owed.
5. The amended claim at paragraph 6 sets out:-

"The claimant contend that prior to the date of her daughter the second defendant negligently failed in his duty of care in"

For the purposes of this appeal we take it that the claimant contends that prior to the death of her daughter the second defendant failed in its duty of care in

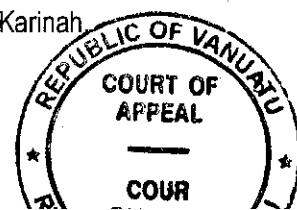
6. The appellant then goes on to specify the particulars of negligence which are said to be:-
 - a) *Failing to have known or foreseen that the First defendant (Mr Samuels) will pose a due risk to the community, in particular girls [in the] same group age as the claimant's daughter;*
 - b) *Failing to supervise diligently the whereabouts of for the first defendant when released from parole [so] as to prevent the claimant's daughter from being murdered;*
 - c) *Failing to instigate [a] proper look out as to prevent the killing of the Claimant's daughter.*



7. The claimant then alleges that the killing took place due to "negligence on part of the second defendant (now Respondent) and therefore in breach section 47 (a) (b) (c) (d) (f) (g) (h) of the Correctional Services Act. The Correctional Services Act makes no provision to establish a private right of action for failure to follow its provisions should it be thought that this was intended to be the actual cause of action.
8. Thus, the claim appears to attack the decision to release the offender on parole and subsequently to have been negligent in post release supervision, including the common law negligence claim with a claim for breach of statutory duty.
9. It is also necessary to consider what appears within the amended claim prior to paragraph 6 since that is where one would expect to find details of the nature and extent of the duty of care said to be owed by the Republic. For the sake of simplicity, paragraphs 1 to 5 of the amended claim are here set out in full, as filed.
 - a) *"The Claimant can be sued and be sued in his own name.*
 - b) *The first defendant can be sued and be sued in his own capacity*
 - c) *The second defendant is to be sued pursuant to section 7 of Government Proceeding Amendment's Act. The state is liable for the act of the 1st defendant.*
 - d) *The claimant is the biological mother of the deceased late Maccoe Annie Aicha aka KARINAH.*
 - e) *Sometimes October 2018, the Claimant daughter late Karinah on [her] way to a bus to Montmartre School was strayed away by the first defendant to a secluded area at Teouma and kill[ed].*
10. Vicarious liability as pleaded in 3 above was never the subject of any subsequent submissions by the appellant and may be safely disregarded hereafter. The reference to the Government Proceeding Amendment Act appears to be a reference to the State Proceedings Act 2007 which replaced the Government Proceedings Act 2007 following the amendment of the latter in 2010.

Discussion

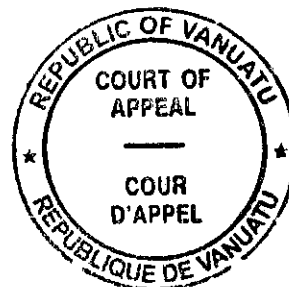
11. The application to strike out the amended claim was based on a failure to disclose a reasonable cause of action in alleging negligence without pleading the relevant duty of care owed. In the alternative, that no facts were disclosed, should a duty of care be established, indicating that the breach of duty had caused the death.
12. Sworn statements setting out the position of the supervising officers were filed but otherwise the application was considered and determined on the basis of written submissions after it was established that the appellant had been appointed executrix of the late Karinah



13. As already noted, the trial judge found that the appellant had failed to plead facts which could establish the necessary duty of care on the part of the respondent. In the reasons for the decision on strike out, the judge also attempted to deal with the alleged breach of statutory duty, and the question as to whether the claim sought to review the actual decision to release on parole in addition to the allegation of perform its subsequent duty in a negligent way.
14. None of those consideration would have been necessary, had the claim been properly pleaded. Even on the hearing of this appeal, similar, confused submissions are made. That is hardly surprising, given that what are headed "Appellant's Submissions on Appeal" are in fact almost identical to the submissions filed in answer to the application to strike out, up until paragraph 51 and the subsequent three paragraphs.
15. The question on appeal is not whether the claim should be struck out, but whether, in determining to strike out the claim on the application of the defendant, the trial judge was in error. There is nothing contained in the submissions from the appellant on that question, simply a repetition of the material put before the trial court on the application to strike out.
16. To establish a duty of care it is necessary to consider what has been set out in other authorities. In *Caparo v Dickman* [1990] 2 AC 605 Lord Bridge set out the now familiar three stage test. A duty of care will exist if there is
- a) *foreseeability of harm;*
 - b) *a relationship of proximity or neighbourhood;*
 - c) *the situation is one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.*
17. All three stages of the test must be pleaded and then established through evidence for an action to be successful. For the appellant there is pleaded the question of the foreseeability of harm. What is lacking is any specificity in terms of proximity and finally whether it is fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.
18. In terms of proximity, whilst on the one hand, the appellant submits that it would be possible at trial to show how the relationships between the parties could lead to a finding of a sufficient proximity, in further submissions the appellant asserts that the duty of care is owed to "the young vulnerable girls and children girls of any age". At one point that class of persons is elevated to include all women.
19. It is also whilst making these submissions that the appellant strays from criticism of the supervision of the parolee to the decision to release on parole by the Parole Board. The decision

to release on parole is itself not pleaded in the amended claim, only negligent supervision, a factor also discussed in the reasons for the decision to strike out.

20. A decision to strike out in circumstances as described herein will not normally be made if it is possible to cure the defects in the pleadings by reasonable amendment. If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.
21. We have considered this option, and find that, given how even at this hearing, the appellant appeared unable or unwilling to identify the class or classes of person to whom a duty of care might properly be owed, and also whether the appellant's real issue was with the Parole Board or the supervising officers, the appellant is unlikely to be able to amend sufficiently to identify a class of persons to whom it would be correct to impose a duty of care on the respondent or which act it was sought to challenge.
22. In particular, the appellant fails to identify the special or exceptional relationship necessary to establish the duty of care without which further consideration of the claim becomes unnecessary. Counsel referred only to the deceased being related in some way to the perpetrator through her father, hence the conclusion that any further amendment to the amended claim would not find the appellant in any more favourable position.
23. Whilst this Court was referred to *The Home Office v Dorset Yacht Co Ltd* [1970] UKHL 2 where it was held that there was a special relationship between the defendant and the plaintiff which exposed the plaintiff to a particular risk of damage over and above that shared by the public at large, the Appellant in this case has not attempted to establish that special relationship but relies merely upon the much broader category of women in general, or elsewhere vulnerable girls suggesting a group sufficiently broad that no court will impose a duty of care.
24. It is perhaps worthy of note that it is not only this appellant that has difficulty in establishing a duty of care in similar circumstances. Whilst we were not referred to authorities in other jurisdictions save *Dorset*, given that there is no local authority on the point, that may have been a useful starting point for counsel to consider. In the United Kingdom, Australia and New Zealand the same issue has arisen and similar difficulties of establishing a duty of care have been encountered: see, for example, *Hill v Chief Constable of West Yorkshire* (1989) AC 53; *Couch v Attorney General* [2008] NZSC 45, (2008) 3 NZLR 725; *X v State of South Australia* (2005) 91 SASR 258. Those cases indicate that generally a duty of care is found in analogous circumstances only when the relationship between the plaintiff and the defendant is exceptional or special.

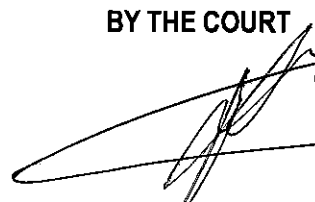


Decision

25. The appeal is dismissed. Costs of and incidental to this appeal are ordered to be paid to the respondent by the appellant. We set them at VT75.000, to be paid within 28 days.

Dated at Port Vila this 18th day of February 2022

BY THE COURT



Chief Justice V. Lunabek

