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

CIVIL CASE No. 146 OF 1994

Between : Harold Qualao of P. O. Box 462 Port Vila, Efate, Republic of Vanuatu.

Plaintiff

And : The Government of the Republic of Vanuatu.

Defendant

Mr Mark Hurley for the Plaintiff.
Mr Ishmael Kalsakau for the Defendant.

RULING

This is an oral application to call evidence by reply under Order 38 R. 9 (g) of the High court Rules 1964. On 2nd December 1998, at the close of the Defendants' case, Counsel for the Plaintiff, Mr Mark Hurley, on behalf of his client, applied orally seeking leave of the Court to re-call the Plaintiff/Witness, namely, Harold Qualao to reply to three specific evidence raised by the Defence witnesses and not put to the Plaintiff's case.

The three pieces of evidence are set out as follows:

First, Plaintiff Harold Qualao was called to give evidence. Although he was cross-examined by Defence Counsel no particular nurse was identified as having said or seen particular things. As an example, staff nurse Ruth Kaltavara gave evidence that on 27th August 1993, at 10.30 pm, after Jack Qualao return from the operation, his parents were in

the room. It was not put to Qualao under cross-examination that he saw staff nurse Kaltavara when he return to the hospital.

Second, staff nurse Edwige Tabi gave evidence that she put certain matters to Mr Harold Qualao including the conversation to the effect that if he leaves Jack alone in the room, he will inform the duty nurse that he was leaving the patient unattended to. It is said it was not put to Qualao that it was nurse Tabi who had conversation with Mr Qualao. Witness Edwige Tabi identified specific time period. It is said those are specific matters raised in the Defence case but not put to the Plaintiff's case.

Third, witness Edwige Tabi gave specific answers in cross-examination in relation to issue of allegations of Jack Qualao's door being opened or shut. That issue arose in the cross-examination of Mrs Edwige Tabi but it did not arose under the cross-examination of Harold Qualao.

The Defence Counsel, Mr Kalsakau, on behalf of the Defendant submitted that concerning the first issue, Counsel for the Plaintiff has in his possession and knowledge the written statement of the nurse Ruth Kaltavara since 1995.

As to issues 2 and 3, Counsel for the Plaintiff had the written statement of Nurse Edwige Tabi since 1995. He knew about the conversation which took place between nurse Edwige Tabi and Mr Harold Qualao.

It is also put that Mr Qualao has been in Court and listened to all witnesses, it is therefore submitted that it is prejudicial to the Defence to call Harold Qualao to give evidence in reply.

it is further submitted that the Plaintiff knew that th Defence disputes liability by pleading contributor negligence.

The issue for the Court is: to what extent a Judge car exercise his discretion to allow evidence in rebuttal in an action for negligence in which the Defendant pleads contributory negligence.

Order 38, Rule 9 (g) of the Western Pacific High court (Civil Procedure) Rules, 1964 says:

> *"O. 38 r 9 (g) - If the party opposed to the party beginning calls or reads evidence, the party beginning shall be at liberty to reply generally on the whole case, or he may, by leave of the Court, call fresh evidence in reply to the evidence given on the other side, on points material to the determination of the issues, or any of them, but not on collateral matters."*

Both Counsels agree that Order 38 Rule 9 (g) contains 2 different lumps rules - The First lump of that rule, it is suggested, is this:

> *"If the party opposed to the party beginning calls or reads evidence, that party beginning shall be at liberty to reply generally on the whole case ..."*

The second lump is that:

> *"... or he may, by leave of the Court, call fresh evidence in reply to the evidence given on the other side, on points material to the determination of the issues ... but not on collateral matters."*

Counsel for the Plaintiff applies under the First lump of this rule, and he stressed that the reading of the First lump of Rule 9 (g) of Order 38 should be stopped at: "... *to reply generally on the whole case ...*"

judgment, I am of the view that this is not the correct reading of that rule 9 (g) since it is incomplete. The First lump of that rule 9 (g) should be read:

> *"If the party opposed to the party beginning calls or reads evidence, that party beginning shall be at liberty to reply generally on the whole case, ... on points material to the determination of the issues, or any of them, but not on collateral matters."*

The general rule in respect to evidence in Rebuttal is similar both in criminal and civil jurisdictions. That general rule is that evidence in reply must normally be confined to rebutting the Defendant's case rather than merely confirming that of the Plaintiff and such evidence must be *"strictly in reply"*. [Gilbert -v- Comedy Opera Co. (1880) 16 Ch. D 594.].

The classic formulation of the rule is that by Tindal C. J. in R. V. Frost (1839):

> *"There is no doubt that the general rule is that where the crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if any matter arises ex-improviso, which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to be no reason why the matter which so arose ex improviso may not be answered by contrary evidence on the part of the crown."*

As in criminal cases, the Court in civil cases has a discretion, but one which will be more liberally exercised.

The case of Wright -v- Wilcox (1850) 9 CB 650 at 657, 137 ER 1047 at 1050 (CP) constitutes an exception to the above general rule. That case is the authority for the proposition that the unforseeability of the issue on which the Plaintiff seeks to call evidence in reply is relevant, as where the

Plaintiff was permitted to call a witness in reply to defence witnesses on an issue first raised by them and not put to the Plaintiff's case.

In the Wilcox's case, Maule J. observed that :
"*When a party has closed its case, he often asks, and is allowed, to supply a deficiency*" (at p. 1050). His Honour Judge further held that the Plaintiff may call evidence in reply to evidence called by the Defendant where, although he "*had reason to suspect that such evidence must be given*", he ought not to be "*bound to waste time by answering by anticipation that which might never be set up*". (at p. 1050).

The present case is an action for negligence in which the Defendant pleads contributory negligence. A special problem arises because though the Plaintiff bears a burden of proof on some issues and the Defendant on others, the evidence to be called by the Plaintiff in his own case bears on the issues on which the Defendant has the onus.

Applying the case of Wright -v- Wilcox to the present case, I am of the view that the evidence in reply is likely to be favourably received on the following grounds:

1. Mr Harold Qualao will be called to give evidence in reply to some specific matters raised in the Defence's case but are not put to the Plaintiff's case in Harold Qualao's cross-examination by the Defence Counsel. It will be in the interest of justice to do so.

2. The pieces of evidence in the Defence's case are important facts, that is, they are material to the determination of the issues between the parties and as such they are not collateral matters. (This means, they are additional but not subordinate to the determination of the issues between the parties).

3. The fact that Mr Harold Qualao was in Court through out the trial process and heard all the Defence evidence, is immaterial and does not prejudice the

Defendant. Mr Harold Qualao is not a witness called by the Plaintiff to testify on behalf of the Plaintiff's case. He is the Plaintiff and he has given evidence on his own behalf as Plaintiff and as such he is entitled to be present in Court through out and give evidence in reply to evidence called by the Defendant. This does not prejudice the Defendant at all.

For the foregoing reasons, I therefore exercise my discretion in favour of the Plaintiff to call evidence in reply on specific matters raised by the Defence's case which are not put in the Plaintiff's case and the Defendant's witnesses can then be re-called if that is desired, to deal with the rebutting evidence.

Dated at Port Vila, this 4th day of December 1998.

Vincent LUNABEK
Acting Chief Justice.