

(Civil Jurisdiction)

IN THE MATTER OF: (1) The Constitution of the
Republic of Vanuatu
(2) The Police Act [CAP.105
(3) The Criminal Procedure
Code Act [CAP.136]

BETWEEN: SILAS MICHEL AND 32 OTHERS

Plaintiffs

AND: THE GOVERNMENT OF THE
REPUBLIC OF VANUATU

First Defendant

AND: THE COMMISSIONER OF POLICE

Second Defendant

Coram: Mr Justice Oliver A. Saksak
Ms Cynthia Thomas – Clerk

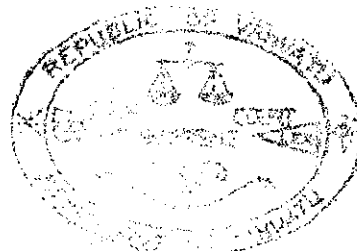
Counsel: Mr Bill B. Tamwata and Mr George F. Boar for the Plaintiffs
Mr Tom Joe for the Defendants

Date of Hearing: 9th October, 2002.

Date of Judgment: 14th April, 2003.

JUDGMENT ON ASSESSMENT OF DAMAGES

There are 33 Plaintiffs in this action. Their initial action was taken out in the name "Working Group For Justice". They obtained judgment on 14th February 2002 entitling each of them to payments of compensation for breaches of their constitutional rights pursuant to Article 6(2) of the Constitution. Compensation was to be assessed by the Court. The facts are contained in the Judgment of 14th February 2002 and I need not repeat them.



Each of the Plaintiffs claims individually damages to be assessed under different heads as follows –

1.	Unlawful arrest	–	VT 500,000
2.	Unlawful entry onto private property	–	VT 500,000
3.	Unlawful imprisonment	–	VT 500,000 per day
4.	Assaults and brutality	–	VT 500,000
5.	Inhuman treatment	–	VT5,000,000
6.	Denial of food, water and medication during custody	–	VT5,000,000
7.	Custody in unhygienic cell condition	–	VT 500,000
8.	Emotional stress and anxiety	–	VT 500,000
9.	Pain and suffering	–	VT1,000,000
10.	Exemplary damages	–	VT5,000,000
11.	Punitive damages	–	VT5,000,000
12.	Aggravating damages	–	VT5,000,000
13.	Special damages	–	VT 5,000

	Total:	-	VT29,050,000
			=====

Multiplying this total sum by 33 plaintiffs the overall total amount is VT958,650,000. This of course does not include the VT500,000 claimed by each plaintiff for the whole duration of their custody in jail.

The following cases were submitted for consideration by the Court by both Mr Tamwata and Mr Joe.

Marika L v. Kapieni ABV 49/98.

Donselaar v. Donselaar (1992) NZLR 97.

Auckland City Council v. Blundell (1986) 1 NZLR 732, at p.739.

Thompson v. Commissioner of Police (1977) 3 WLR 403.

Chan Wai Tonk v. L.Ping Sam (1985) HKLR 176.

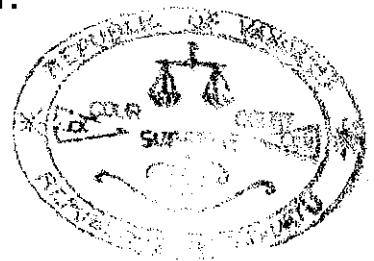
Kaufusi v. Lasa & Others (1990) TLR 39 at p.10.

Selina Tahu v. Albertine Kwemoli, unreported Civil Appeal Case No.2 of 2001.

F. Harrisen v. J. P. Holloway (No.1) (1984) 1VLR at p.106.

F. Harrisen v. J. P. Holloway (No.2) (1984) 1VLR at p.147.

Talpoa v. Tasul & Others. Judgment dated June 2001.



Marie Rose Banga v. Emily Waiwo Appeal Case No.1 of 1996 with references to Timakata v. AG (1992) 2VLR 575 at p.583; and Bill Billie Willie v. PSC (1992) 2VLR p. 634 at p.645
 Dorsen v. Brysten Civil Case No. 153 of 1997.
 Angela Marie Dunlea & Ors v. Her Majesty's Attorney General [2000] NZCA 84 (14 June 2000)
 Rookes v. Barnard [1964] AC 1129
 Broome v. Cassell [1972] AC 1027
 AG v. Reynolds [1979] ALLERLR 129.
 John Salamon v. The Independent Sate of PNG [1994] PNGLR 265.
 Sivarosi Raikali v. The AG and Commissioner of Prisons [1999] FLR 313. Guy Bernard v. Minister of Immigration & Others – Civil Case No. 30 of 1997
 Jeannie Gower v. Hotel Equities – Civil Case No. 9 of 2000.
 Kalfau Moli v. Bob Heston – Civil Case No. 11 of 2000.

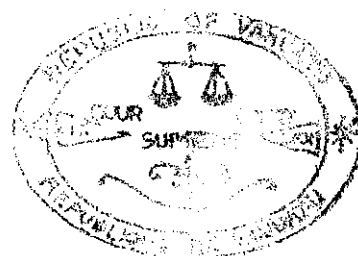
In assessing damages and quantum I take into consideration the following principles –

1. Damages must not be excessive

They must take into account local and economic circumstances. The case law on this are two Fijian cases of Marika L. v. Kapieni ABU 49/95 and Sivarosi Raikali v. Attorney General & Commissioner of Prisons, a Hong Kong Case of Tonk v. Ping Sam (1985) HKLR 176, and the Vanuatu Court of Appeal Case of Kalfau Moli v. Bob Heston Civil Appeal Case No. 11 of 2000.

The Moli & Heston case is important because it lays down the starting point for consideration in regard to assessment of damages generally as the economic situation in Vanuatu. The Court of Appeal said this at p. 10:

“ In our judgment the starting point is its look at the economic situation in this country. We recall that the minimum wage is in the vicinity of VT200.000 per year. Senior and responsible people within the community often earn no more than VT1.500,000 per year”. (emphasis added)



As regards excessive damage the Court said in the following passage:

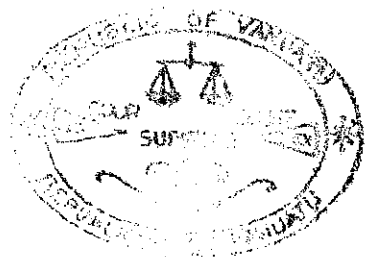
“When one tries to reflect those figures back into compassion with New Zealand or Australia defamations onwards (and realise that the levels of remuneration which are perhaps a tenth or even a twentieth of what it might be elsewhere), we are satisfied that a total award in this case of VT8 million is excessive. If translated by reference to the different economic standards in New Zealand or Australia it would create a figure which in those places would clearly be seen as excessive”.

The Moli & Heston case was a defamatory case. The Respondent was Managing Director of a Poultry Farm. He is an expatriate person. On the level of the minimum wage he would in my view be earning in excess of VT1,500,000 per year. Based on that factor and his representation the Court awarded him compensation and aggravated damages in the sum of VT 3 Million.

In comparison to the present case, there was no evidence from any of the Plaintiffs in relation to employment. The Court did give verbal directions to Counsel to file affidavits to that effect, however that directions was not complied with. There is therefore no evidence that any of the Plaintiffs were employed. And none of them have claimed for damage to reputation. If therefore the starting point for Mr Heston was VT1,500,000, for the Plaintiffs the starting point must be zero (0).

2. There must be no Double Counting.

Where claims for damages are made under different heads there is always a risk of double counting. The English cases of Broom v. Cassell [1972] AC. 1027 p. 1073 and Thompson v. Commissioner of Police of the Metropolis [1997] 3 WLR 403 at 414 are the authorities for this principle. In the Vanuatu case of Moli & Heston (Supra) the Court of Appeal appears to uphold that principle when it said as follows at p. 10:



"In our judgment it is appropriate to look at the issues of compensatory and aggravated damages as one. They can best be coupled as a total...."

Based on these authorities therefore all claims made by the Plaintiffs for:-

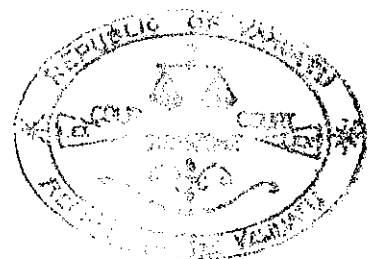
- (a) Unlawful arrest;
- (b) Unlawful entry onto property;
- (c) Unlawful imprisonment;
- (d) Assaults and Brutality;
- (e) Inhuman Treatment;
- (f) Denial of Food, Water and Medication;
- (g) Custody in unhygienic cell conditions;
- (h) Emotional stress and anxiety;
- (i) Pain and suffering; and
- (j) Aggravating damages will be grouped together as compensatory and aggravated damages.

In the Thompson Case (Supra) the guideline is that aggravated damages can only be awarded where they are claimed by the Plaintiff and where there are aggravating features about the defendant's conduct which justify such awards. These features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest and/or detention which now that they have behaved in a high-handed, insulting, malicious or oppressive manner. In the evidence presented such features are apparent, however the nature and extent differs from one plaintiff to another.

3. Exemplary Damages

The position in Vanuatu appears to be that exemplary damages can only be awarded in special cases or circumstances. In Freddy Harisen v. J. P Holloway 1 VLR 148 at p.151 the Court of Appeal said this:

"Exemplary damages may perhaps be awarded where there is some deliberate oppression, where a tort is committed somewhat flagrantly, where warnings against



repetition of such conduct have been given. Factors of that nature are not apparent in this case.”

The Court therefore upheld the Supreme Court’s decision to disallow the sum of VT5 million claimed as exemplary damages.

In Moli & Heston Case (Supra) the Court of Appeal awarded punitive damages of VT2 million in addition to the compensatory and aggravated damages of VT3 million. At p.10 the court said this:

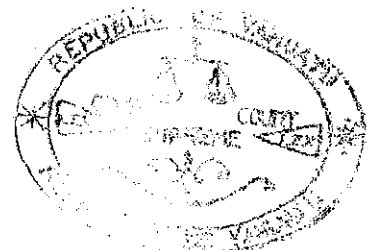
“There are however matters which in our judgment in the circumstances of this case make it appropriate for an additional award for punitive damages because that award of compensatory and aggravated damages is in sufficient to punish the wrong doing in this case.”

The Court then went on to list the four factors and then said this at the end:

“Those factors in our judgment are particularly reprehensible and deserve condign condemnation. They call for and require additional punishment.”

The Thompson Case (Supra) at pp.415 – 417 lays down clear guidelines in respect of exemplary damages. They can be awarded based on clear evidence supporting the claim. In exceptional circumstances they can be awarded where there has been conduct, including oppressive or arbitrary behavior by police officers. They can be awarded over and above the compensatory and aggravated damages only if the Court considers that the compensation awarded under those heads in the circumstances are inadequate punishment for the defendants.

In the Tongan Case of Kaufusi v. Lasi (1990) TLR 39 the Court awarded exemplary damages to mark the court’s special censure of the defendant’s arbitrary and oppressive conduct. In awarding exemplary damages in the case of Malto Bong Alick v. The Commissioner of Police Civil Case No.53 of 2001. (unreported) the Court applied Kaufusi v. Lasi (Supra); Broom v. Cassell & Co



(supra) and Attorney General v. Reynolds [1979] 3 All ER. 129. Based on these authorities and the clear evidence of oppressive or arbitrary conducts by the officers of the Defendants, I am of the view that the Plaintiffs are entitled to be awarded exemplary damages but at a reduced amount from those claimed.

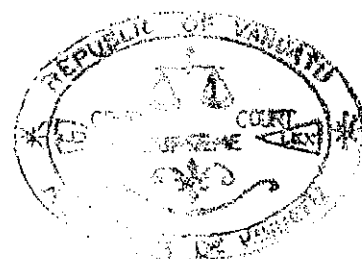
But the cases cited above are cases involving claims in tort. The Plaintiffs claims are for breaches of constitutional rights. Tort law deals with wrongs, the Constitution deals with rights. In Angela Marie Dunlea & Others v. Attorney General [2000] NZ CA 84 the Court of Appeal of New Zealand discussed the vindication of rights under the New Zealand Bill of Rights Act 1990 and said this is relation to the extra dimension of the subject matter at p.18 at paragraph 24:

“Compensation will not be effective to vindicate and affirm the right which has been violated, however unless the quantum of the award recognises that a fundamental right possessed by the Plaintiff has been denied. It follows that the award cannot be simply equated with damages for “equivalent” breaches of common law torts such as wrongful arrest, false imprisonment or the like. The focus of the Court is wider and must embrace the impact of the State’s violation of the citizen’s fundamental rights”.

Then at p.20 the Court said:

“The award is public law compensation not common law damages. The focus of the claim is on the breach of the rights not on the personal injury, and is similar to the approach adopted for exemplary damages claims. Such damages also focus on punishing the conduct of the wrong-doer rather than compensating the victim for the personal injury.”

In Papua New Guinea the National Court of Justice in the constitutional case of John Tuink Salamon v. The Independent State of Papua New Guinea [1964] PNG RR 265 found these were breaches of constitutional rights of 13 plaintiffs. The Court awarded exemplary damages. Woods, J said this at p.266:



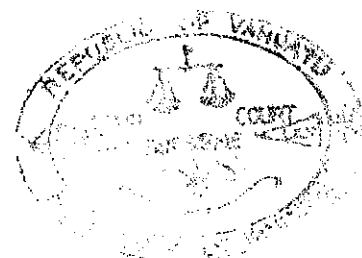
“On the claim for breach of constitutional rights I will consider that heading together with exemplary damages. Exemplary damages are a matter of special consideration and have generally been regarded as a mark of public censure against excessive misconduct. They are not to unjustly enrich a party but, rather are symbolic of the public’s indignation.”

In the Vanuatu Case of Guy Bernard v. The Minister for Immigration and Others, Civil Case No.30 of 1997 (unreported) the Court found that the petitioners constitutional rights of liberty and protection of the law under Article 5(1)(b) and (d) were violated by the Government. He was unlawfully arrested outside his home. His house was unlawfully searched and his wife and daughters were made to stand outside in the rain in night clothes while he watched. He was handcuffed and while he watched. He was handcuffed and unlawfully detained for approximately thirty hours in a cell. He was awarded VT1,500,000 in damages. Under his given circumstances the quantum of damages appears to be fair and reasonable.

And that leads me to the next point for consideration. And that is that each plaintiff should be compensated for what each one suffered. The Thompson Case (Supra) is the authority for this proposition. And each case must be decided in its particular merits and circumstances. The Malto Case (Supra) is authority for this proposition. This case is placed in the same category as the present except that he founded his action on tort and not under the constitution. He was awarded VT300,000.

In the case of Jeannie Gower v. Hotel Equities South Pacific Ltd, Civil Case No.91 of 2000 (unreported) Marum, J applied the reasonable and fair standard under Article 47(1) of the constitution to do justice to the case. So it is with this case. The Plaintiffs have claimed ridiculously large sums of damages. But in their submissions all they seek in their prayers is for awards which should be seen as reasonable and fair to do them justice. There may well be other claims which the Court would have to consider, as it has already done in the Malto Case and the Court is mindful that it should set a precedence for the Court to follow in those later cases, if any.

4. Special Damages



Only two of the Plaintiffs, Malon Nelson and Batick Massing did show that they are entitled to receive special damages. There will be nominal sums awarded for those.

5. Pecuniary Losses

The Plaintiffs have not claimed for this head of damages and therefore none will be awarded.

6. Mitigation

There is factor that the Court considers as a mitigating factor that will affect the quantum of damages of some of the Plaintiffs. And that is the fact that charges were subsequently laid against a number of them. Those charged and convicted are –

- (a) Batick Robinson - Fined VT15,000.
- (b) Arnold Bong - Imprisoned for three months.
- (c) Donald Berg - Discharged on a good behavior bond for six months.
- (d) Leslie Bong - Discharged.
- (e) Maltok Asher - Fined by the village chiefs at VT30.000.

The Plaintiffs have founded their action or claims on breaches of their constitutional rights. Where it has been shown to the Court on evidence that charges were subsequently laid, proved and the plaintiffs were accordingly convicted, their claims will in my view be substantially reduced. The reason is simply this that the exercise of a person's fundamental right is subject to the respect of the rights of others. By their convictions it has been shown in my view that these Plaintiffs themselves disregarded the fundamental rights of others. Therefore it is my view that no exemplary damages should be awarded to those five plaintiffs were charged and convicted. Accordingly I so rule.



7. Pamela Ulas

Although Pamela is one of the Plaintiffs in this Action the awards made to her are very low. That reflects the fact that her only valid claim was for stress and anxiety. Her claims are really accounted for within her husband's awards, under Item 10.

8. The Final Assessments

Based on the evidence before the Court and following the principles in the cases discussed in this judgment I arrive at the conclusion that the awards to be made to the Plaintiff should fall under three heads:

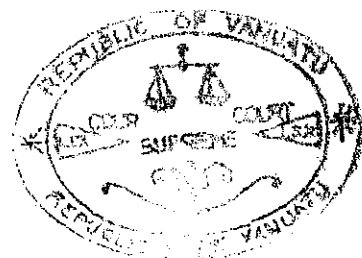
- (a) Compensation and aggravated damages
- (b) Exemplary damages
- (c) Special damages.

Under the first head the Defendants are liable to pay damages to the Plaintiffs in the aggregate sum of VT6,400,000. In my view this sum is a reasonable and fair amount to compensate the Plaintiffs for unlawful arrests, unlawful entries onto private property, unlawful imprisonment, assaults and brutality, inhuman treatment, denial of food, water and medication, custody in unhygienic cell conditions, emotional stress and pain and suffering.

Under the second head the Defendants are liable to pay damages to the Plaintiffs in the aggregate sum of VT2,550,000. This sum is awarded against the Defendants to mark the Court's special censure on the oppressive actions of the agents of the Defendants on the Plaintiffs and acts as a punishment to the Defendants, and to vindicate the Plaintiff's breaches of constitutional rights.

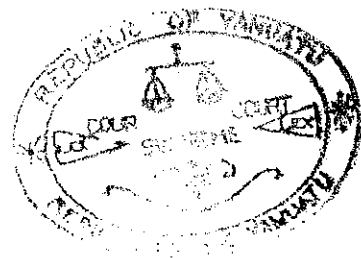
And finally under the third head the Defendants are liable to pay the sum of VT7,000. This sum is to compensate two of the Plaintiffs who gave evidence relating to loss of personal items and belongings.

Payments will be made to individual Plaintiffs in the following manner –



Name of Plaintiff	General Damages	Exemplary	Special	Totals
1. David Shem	VT400,000	100,000	Nil	500,000
2. Sam Ham	400,000	100,000	"	500,000
3. Kansen Tomaki	400,000	100,000	"	500,000
4. Leslie Joe	400,000	100,000	"	500,000
5. Leslie David	300,000	100,000	"	400,000
6. Wycliff Ulas	300,000	100,000	"	400,000
Note: These six Plaintiffs were taken to Vila and back to Santo.				
7. Batick Massing	250,000	100,000	5,000	355,000
8. Erick Gideon	250,000	100,000	Nil	350,000
9. Arthur Bae	250,000	100,000	Nil	350,000
10. James Ulas	250,000	100,000	"	350,000
11. Peter Mahit	250,000	100,000	"	350,000
12. Mahlon Nelson	200,000	100,000	2,000	302,000
13. Jules Bill	200,000	100,000	Nil	300,000
14. David Simeon	200,000	100,000	"	300,000
15. Charley Ulas	200,000	100,000	"	300,000
16. Richard Tining	200,000	100,000	"	300,000
17. Vira Lone	200,000	100,000	"	300,000
18. Tasso George	200,000	100,000	"	300,000
19. Donney Alick	200,000	100,000	"	300,000
20. Wilson Haila	200,000	100,000	"	300,000
21. Maltock Asher	200,000	100,000	"	300,000
22. David Packete	200,000	100,000	"	300,000
23. Allan Aru	200,000	100,000	"	300,000
24. Silas Michel	150,000	100,000	"	250,000
25. Maccollen Ulas	150,000	100,000	"	250,000
26. Jondide Mahit	40,000	20,000	Nil	60,000
27. Philip Avock	40,000	Nil	Nil	40,000
28. Even George	30,000	20,000	"	50,000
29. Batick Robinson	30,000	Nil	Nil	30,000
30. Bong Andeng	30,000	Nil	Nil	30,000
31. Donald Berg	30,000	Nil	Nil	30,000
32. Arnold Bong	30,000	Nil	Nil	30,000
33. Pamela Ulas	20,000	10,000	Nil	30,000
Totals	6,400,000	2,550,000	7,000	6,400,000

8,957,000



9. Quantum

The overall total amount of damages to be paid by the Defendants to the Plaintiffs is the sum of VT8,957,000. This amount is a reasonable and fair amount in my view to do justice to the Plaintiffs basing it on the economic and local circumstances of both the Plaintiffs and the Defendants.

10. The Orders

I therefore hereby Order that –

- (1) The Defendants pay damages to the Plaintiffs individually but in the aggregate sum of VT8,957,000 in the manner set out in the preceding pages.
- (2) The Defendants pay the Plaintiff's costs of and incidental to this proceedings to be taxed if not agreed.

DATED at Luganville this 14th day of April, 2003.

BY THE COURT



OLIVER A. SAKSAK

Judge

