

BETWEEN: HAROLD QUALAO of P.O.Box 462,
Port-Vila, Efate, Republic of Vanuatu
Plaintiff

AND: THE GOVERNMENT OF THE
REPUBLIC VANUATU
First Defendant

AND: Dr. RONALD PEACH of C/- Vila
Central Hospital, Port-Vila, in the
Republic of Vanuatu
Second Defendant

Coram: Chief Justice Vincent LUNABEK

Counsels: Mr. Mark Hurley for the Plaintiff
Mr. George Boar for the Defendants

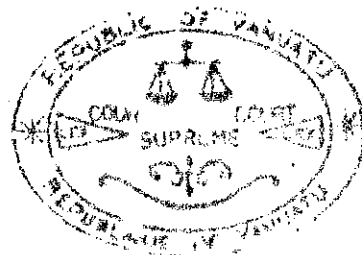
JUDGMENT

INTRODUCTION

The plaintiff Mr. Harold Qualao claimed for damages and compensation for the death of his son, Jack Kapera Nicholson Qualao. On 8 December, 1999 the Court held that the defendant Government was responsible for the negligence of its servants and agents and responsible for the system in place at the hospital which leads to the death of the plaintiff's son on 29 August 1993.

The plaintiff, then claims for:

1. Damages under the Fatal Accidents Act (1846-1959) UK;
2. Damages under the Law Reform (Miscellaneous Provisions) Act (1934) UK;



3. Compensation under the customary law of Ambae;
4. Interest; and
5. Costs.

By Consent Orders of 20 September 2001, the parties agreed to settle damages under the Fatal Accidents Act (relief 1) and damages under the Law Reform (Misc. Provision) Act (1934) UK (relief 2).

The only outstanding issue is the compensation under the customary law of Ambae as contained in paragraph 3 of the plaintiff's relief. However, counsel for the plaintiff informed the Court that the plaintiff does not seek a separate award of damage in respect of paragraph (1) and (3) of the relief sought. Rather, the plaintiff applies for the Court to rule on what is the appropriate customary law of Ambae which is relevant to the deceased.

The deceased Jack Kapera Nicholson Qualao while playing rugby at Independence Park, Port Vila on Friday 27 August 1993 was knocked unconsciously. He was at that time 19 years old and employed as an Assistant Chef at a Port Vila restaurant. He was shortly after the incident taken to Vila Central Hospital for injury sustained on his head. The deceased was attended to and examined by the general surgeon at the hospital, Dr. Ronald Peach. He diagnosed the deceased with an extradural hemorrhage, for the bleeding in the brain area. Dr. Peach decided and made a hole in the deceased's skull to remove the collection of the blood. This was done and the deceased appeared to improve after the operation. The next morning however, the deceased fell out of bed and hit his head on the floor. This resulted in another operation to remove more blood from the brain, which was also performed by Dr. Peach. The operation was not successful and the deceased's condition became critical. The following morning, Sunday 29 August 1993, he was flown to the Liverpool Hospital in Sydney, Australia, where a specialist examined the deceased and found that his brain has already died. His respirator was turned off later that evening and he died.



EVIDENCE AND FINDING

There are three witnesses called by the Plaintiff to give evidence. The defendants do not call any witness.

The facts as established by the evidence are as follows:

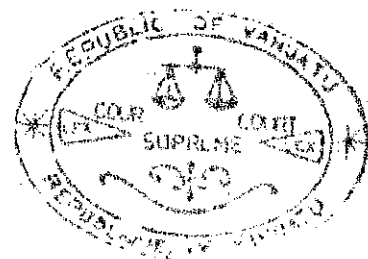
Mrs. Elizabeth Qualao and the Plaintiff (her husband) had four children, Jack Kapera Nicholson Qualao (deceased), Yvonne Qualao, Colin Qualao, and Jeannick Qualao. The deceased went to Malapoa College. He was one of the bright students in year nine (9) at Malapoa College in his year and was awarded a scholarship to do year ten (10) to year eleven (11) in New Zealand in 1989. He went on the scholarship but due to influence of friends, he came back in August of the same year.

Her son (deceased) wanted to become a pilot. His interest started since he was a small boy.

After her son came back from New Zealand she had asked him to look around for a job. He looked around and could only find a job in a restaurant. He worked as Assistant Chef. While working there was an advertisement in the paper for application for Air Traffic controller. Her son applied for it and was shortlisted. Evidence of this was exhibited.

Her son earns about 24,000 Vatu per month. On his paydays, he gave money for the house to support the family. She also said that her son was living with the rest of the family up to the time of his death.

Mr. Harold Qualao gave evidence to the following effect. He is a Civil Engineer and is self-employed. In his family there are eight of them, four women and four boys. And in his father's family, there are three girls and four boys. His father is the eldest. He had four children, Jack who is the eldest, Yvonne, Collin and



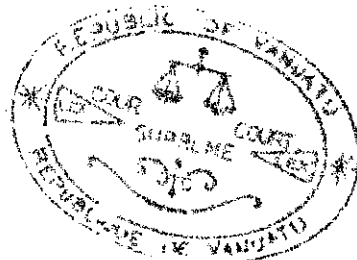
Jannick. Since his father is the first born of his family, he as the first born son observes the responsibility that his father is obliged to carry out. He said that as the first born of the family besides looking after his children he also looks after uncles and mother's brother. He also looks after his parents. They all stay together.

Mr. Qualao in support of his evidence gave examples of responsibility he played in his extended family such as meeting funeral expenses, helping extended family when sick, contributing during marriages, payment of school fees when one family member requested and other items extended families requested. He said that if he fails he would fail his duties. Under cross-examination, Mr. Qualao was asked as to whether the responsibilities of the first born son are transferred to the second son, if the first son died. He answered in the negative.

Mr. Qualao said that Jack as the eldest son learned his responsibility as the first born. He said that up to his time of death he stayed with them and he taught him about those responsibilities that are required of him. He told the court that Jack went to the village since he was 5 or 6 years old. When he was at Malapoa, he went during his holidays to the village. Mr. Qualao said his uncle promised to give land to Jack for gardening. He said that he bought two plots of land in Santo and he registered them in his name and Jack's. These two plots of land then changed to his name after Jack's death in 1999.

Mr. Qualao further said that as a first born son of the family they look at him as the head of the family. Jack as his first born son is also the head of the family. This is the practice of his island, Ambae. This part of evidence is accepted as such.

Chief Denis Vira was called by the plaintiff as a chief and expert of the custom of Ambae. He told the court that he came to Port Vila in 1971 and is the chief of Ambae in Port Vila. He said that he has around 300 people living in Port Vila. He said that his responsibility is to ensure his people live peacefully.



Chief Denis Vira told the court that he knows Qualao family since he was a child. He said that he knew Jack. Jack is a kind and very responsible boy. Although he is not always stayed with the family, he said Jack was very helpful to his parents and he did anything that his parents asked him to do.

Chief Denis Vira told the court that the responsibility of the eldest son in the family is different from that of the other brothers in the family. His responsibility is quite significant from that of the other brothers. He told the court that the father usually give his custom title and responsibilities to his elder son. But when the elder son dies and his father survives him, then, the father transfers his custom title and responsibilities automatically to the second born son in the family.

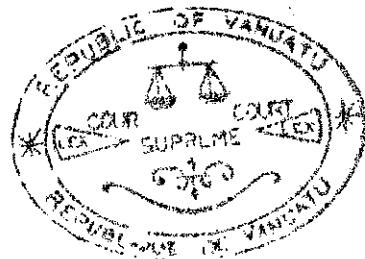
That part of the evidence of Chief Denis Vira is contradicted by that of Mr. Qualao. Chief Denis Vira was called as an expert witness on the custom of part of Ambae where the Plaintiff came from. If there is a contradiction, then, the evidence of Chief Vira, as expert, is to be preferred on that point. I do so here.

The factual finding of the Court is that the father transfers his custom titles and responsibilities to his first born son. Once the transfer is done, the son becomes the head of the family. If the first son dies and the father survives him, the father transfers his custom titles, duties and responsibilities to his second born son.

1. SUBMISSION OF BOTH PARTIES

The Plaintiff's claim is made pursuant to Article 95(3) of the Constitution which provides that:

"Customary law shall continue to have effect as part of the law of the Republic of Vanuatu".



It is the plaintiff's submission that as the eldest son in the family, the deceased would have been expected throughout the course of his working life to not only provide for his parents and siblings but also to his entire extended family as far as custom practices of Ambae is concerned.

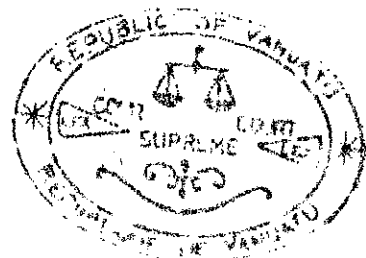
The Plaintiff stated that there has been oral and documentary evidence led as to the financial contribution made by the deceased at the date of his death. They said Jack contributed about 100,000 VT per annum for the period of 20 years. These contributions represent payments expected in custom from the deceased and such payments would have only increased once the deceased's earnings increased, notwithstanding that he subsequently would move out of the family home and/or became married with children.

The defendant referred to the case of Robert Boe and John Ronnie Taga v. Ben Thomas (Vanuatu Law Reports, pg. 293) in which the Court was asked to consider the custom of the parties in assessing general damages. The Hon. Chief Justice Cook held as follows:

"I regret that I cannot accede to this submission (of Mr. Rissen) as custom varies so much in each village throughout Vanuatu that it would be quite impossible to lay down guidelines for those dealing with the matter (at pg. 296)."

I doubt as to the relevance of such a submission and the two (2) cases referred to above as they do not assist the Court here.

The defendant further submits that in respect to reasonable expectation of pecuniary benefit, irrespective of whether custom is accepted as an appropriate matter for consideration in assessment of damages, the dependants could not reasonably expect to receive from their son a sum of 100,000 Vatu per annum for the period of twenty (20) years from their son Jack Qualao. The defendant submit finally that other circumstances would likely affect and decrease the



amount of money the deceased would be expected to provide to his family, such as raising his own family.

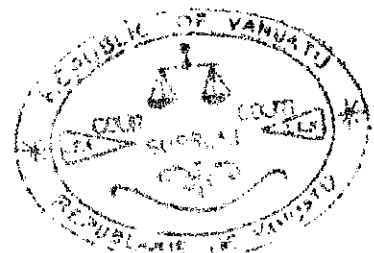
APPLICATION OF THE LAW TO THE FACTS AS FOUND BY THE COURT

Based on the factual finding of the Court, I, therefore, make a declaration as a matter of law that the customary law of the plaintiff is that the father transfers his custom titles, duties and responsibilities to his first born son. If the first son dies and the father survives him, then, the father transfers his custom titles, duties and responsibilities to his second born son. The declaration is to the effect that that is the appropriate custom of the area or part of the area or part of the Island of Ambae where the plaintiff comes from. As such, it is the customary law of the plaintiff.

Under the Constitution of Vanuatu, customary law is part of the laws of this country [Article 95(3)]. The law I am going to apply in this case is the customary law of the plaintiff as found and declared above. The question I should remind myself of is whether this is an appropriate type of case requiring the application of customary law. Assessing the facts before the Court I am of the view that this is not an appropriate case where customary law should be applied and/or if the customary law of the plaintiff is applied, the claim for customary compensation must fail for the reasons as set out below:-

First, customary law is an independent source of law as provided under the Constitution (section 95(3)). Therefore, if a claim is sought under customary law, it must be pleaded on the basis of custom. One cannot claim for compensation under customary law and plead it under the imported law as what was done in this case. Such would demean the status of the customary law as an independent source of law and create unnecessary complexities.

Second, the plaintiff claim for financial support to the entire extended family. I am obliged to say that the claim is too remote. Beside that, the Fatal Accidents Act



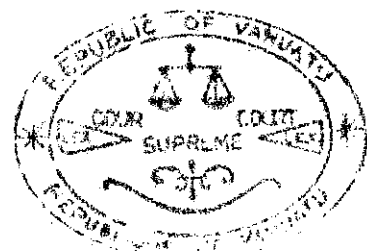
requires that dependent of the deceased needs to be clearly stated in the claim. This is not the case in the present case. A claim cannot be made in vacuum.

Third, in accordance with the plaintiff's customary law, the first (eldest) son of a family has responsibilities over his other brothers and family. He is the head of the family. On his death, his title and responsibilities are automatically transferred to the second born son in the family.

In the present case, the evidence is that the deceased has a junior brother namely, Colin Qualao. Applying the customary law of the plaintiff, the customary title and responsibilities of the deceased brother are automatically transferred to his junior brother Colin Qualao. Any customary duties and responsibilities of the deceased Jack are in accordance with the custom of the plaintiff, to be carried out by the deceased's brother, Colin Qualao.

Fourth, in accordance with the plaintiff's customary law, usually the father transferred his custom titles and responsibilities to his first born son. When the father survives his first born son's death, then, he transfers them to the second born son in the family. In the present case, there is no evidence that the plaintiff/father, Mr. Harold Qualao, had transferred his title and responsibilities to the deceased son during his lifetime. It follows then that the deceased first born son has not been bestowed with his custom title, duties and responsibilities by his father. This means that the deceased at the time of his death has no custom duties and responsibilities over his families. Any money paid by the deceased first born son, during his life time to his extended families, cannot amount to a performance of a duty and/or responsibility based in custom and expected in custom from the deceased. His father, Harold Qualao, has never transferred his customary title and responsibilities to him. The financial contributions made by the deceased son to his families, are simple gifts.

Finally, it is common ground to note that the purpose of the customary compensation is not to pay for the injury or death caused but to bring peace between the affected parties. This is based on the belief that human being is



valuable to the society and one cannot value human being in term of monetary terms. This was held in the neighbouring Melanesian Solomon Islands in the case of **Longa v. Solomon Taiyo Ltd (1980) SILR 239** at pg.259 which then Chief Justice Daly said:

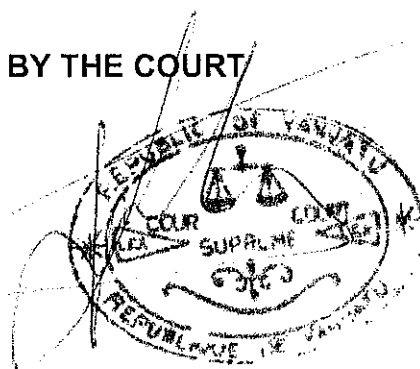
"I do not think that I can get much assistance from custom compensation awarded in similar cases in Solomon Islands where the basis of compensation is often not an attempt to compensate the victim but rather a customary amount paid to restore the peace between the lines of the victim and the wrongdoer".

In the present case, the customary compensation is not to bring peace between the affected parties, but to compensate the loss of the financial contributions made by the deceased as payments of monies expected in custom from the deceased by the extended families in the performance of his custom duty and/or responsibility. However, as it transpires from the evidence and findings, and on balance, there is not enough evidence to prove the customary compensation claim on the basis of the customary law of Ambae.

Based on those factors, I, therefore, come to the conclusion that the customary compensation claim must fail. There will be no order as to costs. Each party to bear their own costs.

DATED at PORT-VILA this 31st Day of MARCH 2004

BY THE COURT



**Vincent LUNABEK
Chief Justice**