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

Civil Case No. 139 of 2008

BETWEEN: GUY BERNARD
Claimant

AND: RIDGWAY BLAKE
Defendant

Hearing: ***2 and 10 December, 2013***

Before: ***Justice Robert Spear***

Appearances: ***Robert Sugden for the Claimant***
Edward Nalyal for the Defendant

Judgment: ***18 December 2013***

RESERVED JUDGMENT

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1. On 24 April 2008, Mr. Benard slipped and fell while walking across Ridgway Blake's car park. Mr. Benard was injured as a result of this fall. He sued Ridgway Blake for damages on the basis that the defendants were in breach of the duty of care that they owed to visitors to their business premises pursuant the Occupiers Liability Act (1957) (UK).

2. The claim came before me on 14 February 2011 but only in respect of the issue of liability. At the commencement of the hearing, counsel for the parties accepted that the Court should just address the issue of liability at that time. Evidence had been filed by and for Mr. Benard that his injuries had continuing complications. Furthermore, it was clear that the case would require Mr Benard's injuries to be subjected to specialist medical assessment and that would require the assistance of overseas experts.

3. While it is generally desirable to deal with the issue of liability and damages at the same time, a case of this complexity requiring overseas medical assessment lends itself to a

division between the hearing on liability and the hearing on assessment of loss if required. It also highlights the practical difficulty that faced by anyone attempting to prosecute a case of this nature in Vanuatu.

4. In a reserved decision given on 31 March 2011[1], I found that Ridgway Blake was in breach of the duty of care that it owed to Mr Benard pursuant to s. 2 (2) of the Occupiers Liability Act 1957 UK) and that this was without any fault (contributory negligence) on the part of Mr. Benard. Matters were left at that time for the further medical assessment in the presentation of that evidence so that the Court could proceed to assess the damages.

5. One of the complications here is the nature and extent of the damages that can be reasonably attributed to the fall. Mr. Benard suffered a severe fracture of the tibia and fibia close to his ankle and there was no challenge to his claim in that respect. However, Mr. Benard claims further that he suffered a compression fracture to his lower back and his lack of mobility as a result of these injuries resulted in the onset of diabetes within a year of the fall. Ridgway Blake certainly challenges the claim that Mr. Benard suffered any injury to his back as a result of the fall or that it could be liable for his diabetes as being a reasonable consequence of the fall.

6. Mr. Benard fell and lay on the ground in pain in the car park. Mr. Morrison of Ridgway Blake attended and offered to take Mr. Benard to the hospital. Mr. Benard however did not appreciate how seriously he was injured and asked simply that he be taken home so that he could take some pain relief. It was not until a short time later that day that Mr. Benard realised that the tablets he had taken for pain relief would not be sufficient and he was then taken to Port Vila Central Hospital. His leg was x-rayed and the severe fracture of the lower leg was quickly identified – a severely displaced fracture – dislocation of the right ankle. Dr Hurly, the attendant medical practitioner at the Port Vila Central Hospital, informed Mr. Benard that the hospital at Port Vila was not equipped to handle such a fracture except by amputating the lower leg. Unsurprisingly, that approach (amputation) was not received well by Mr. Benard. He decided that he needed to travel to New

[1] ***Benard v Nigel*** *[2011] VUSC 37; Civil Case 139 of 2008 (14 February 2011)*

Caledonia urgently to seek a different outcome and that decision was supported by Dr Hurley who provided a medical certificate in these terms,

> *"M. Benard has suffered a serious traumatism in the area of the right ankle and his condition requires a surgical operation in New Caledonia ...this operation is urgent and must be carried out today and not tomorrow"*

7. Mr. Benard and his family had been treated regularly by a general practitioner in Noumea, Dr. Corrine Nepthali since 2006. It was accordingly unsurprising that Mr. Benard considered Noumea as the place to which he should travel for medical treatment and of course it was only one hour's flight from Port Vila. However, he faced the difficulty that the next scheduled flight to Noumea was not until the following day. Mr. Benard considered that his injuries required urgent attention which was also the view of Dr Hurley. There is no challenge to that consideration. What is challenged is whether the way in which Mr Benard travelled to Noumea was reasonable.

8. Mr. Benard chartered a plane from Air Vanuatu and he was taken that evening to Noumea where he was admitted to the local hospital at approximately 10.00 pm. He came under the care of the duty orthopedic surgeon Dr. Peres. Mr Benard was operated on the next morning which operation required the insertion of pins and plates which, as it happens, are still in place.

9. This claim would have been relatively straight forward if the broken leg was the only consequence of the fall. Mr. Benard has made an almost complete recovery from the broken leg. He appears to have regained almost full mobility with it although he suffers periodically from a small amount of pain and general discomfort. He has not had the plates or screws removed yet as he has not been able to afford to do so. There is a claim for special damages to permit that further operation to take place.

10. The principal challenge by the defence is to the claim by Mr. Benard that he also suffered the injury to his back as a result of the fall and that the onset of diabetes can also reasonably be attributed to the fall. It is necessary that those issues are resolved before attention is given to the assessment of damages for personal injury sustained by Mr. Benard.

Accordingly, the first issue to address is a determination of the extent of the personal injuries that Mr. Benard suffered as a result of the fall.

11. Mr. Benard's evidence is that, when he was examined at the Port Vila Central Hospital, an X-ray was taken not just of his leg but also of his back as he complained of the back injury at that time. However, that does not appear to be correct although that should not be taken as an adverse reflection of Mr Benard's general credibility. He was unquestionable in severe pain at the time.

12. It seems more likely that X-rays were taken a few days after the fall. I do not consider that this detracts from the claim in any way - and I will return to this.

13. Mr. Benard was discharged from hospital in Noumea with his foot and ankle in his splint and with medication for his pain. Mr. Benard stayed in Noumea for close to three weeks following the operation before returning to Port Vila.

14. Dr Philipp Rouvreau is a well-qualified and experienced orthopedic surgeon based in Noumea. Dr. Rouvreau has impressive medical credentials and claims a sub-specialty in spinal injuries. He also states that he is an "*expert accredited to the Appeal Court in Noumea*". Dr. Rouvreau provided written evidence and he also gave evidence by video link to the court. He was an impressive witness indeed.

15. His narrative of the particular events surrounding the fall and the operation by Dr. Peres was not subject to any challenge and I accept that the account compiled by Dr. Rouvreau from the various records to which he had access is accurate.

16. Dr. Rouvreau's involvement commenced in 2009 when Mr. Benard first attended on him with purposes of being assessed for the purposes of this proceeding. Mr Benard was 66 years at the time. Dr. Rouvreau noted that Mr. Benard's right ankle and foot had healed to the point where Mr. Benard was not suffering in pain. Dr. Rouvreau noted that Mr. Benard indicated that while he could no longer run and that the injury generally had "*not restricted his walking perimeter*", he had difficulty climbing stairs particularly on ships. Furthermore, he was unable to undertake "*fast walking exercises*".

17. Dr. Rouvreau confirmed his report of 12 May 2009 which stated:

"The duration of the Temporary Total Disablement (TTD) was 21 days, commencing on the day of the accident until his return to Port-Vila. This period of TTD was followed by a period of Temporary Partial Disablement (PTD) of 50% for 7 months: period of self-re-education, during which strolling was difficult (relieved by crutches) and field activities were physically impossible.

Given the length of time that has elapsed since the original accident, given the lack of active care for many months, we genuinely consider that Mr. Guy Benard has recovered from his original injuries as at the date of the expert's medical examination (12/05/2009). At that date, the after-effects are as follows:

None painful stiffness of the right ankle, retaining a goodly portion of mobility in the useful area but causing a definite diminishing of Mr. Guy Benard's locomotor capacity in physical and sports capacities;

Painful lumbar syndrome, non-disabling, warranting the occasional taking of medication".

These after-effects give rise to the establishment of a Partial Permanent Disability (PPD) the level of which can be assessed as at the date of consolidation of the 5%.

18. Dr. Rouvreau concluded his report,

"The medical-legal consequences of the public road accident involving Mr. Guy Benard on 24/04/2008, the report of which, in terms of injuries, the treatments and the after effects, is set out above, can be assessed as follows:

- *The duration of the temporary total disability (TTD) was 21 days followed by temporary partial disability (PTD) of 50% for 7 months;*
- *The date of healing can be set at 12/05/2009;*
- *The level of permanent partial disability can be estimated at the date of healing at 5%;*
- *A professional prejudice exists;*
- *The pretium toloris can be considered to be moderate at 4/7;*
- *The pretium doloris (the unfortunate circumstances that required the medi-vac to Noumea) can be considered to be moderate at 4/7*

- *The aesthetic prejudice (appearance) can be qualified as slight at 2/7;*
- *A prejudice as to appearance exists;*
- *The critical condition of Mr. Guy Benard is likely to deteriorate later on.*

19. Mr. Benard's evidence is that he was suffering serious pain particularly from his ankle but also in other parts of his body at the time that he was first seen by Dr Hurly in Port Vila and also when seen by Dr Peres in Noumea. Mr Benard claimed that he informed the medical practitioners who attended on him both in Port Vila and in Noumea that he was suffering pain in his lower back and, as mentioned, he understood that X-rays were taken of his lower back as well as his ankle. There is some uncertainty in the evidence as to whether X-rays were taken of his back on the day of the accident or whether they were taken at a later stage back in Port Vila. Be that as it may, Mr Benard's evidence is that there was nothing wrong with his back prior to the fall but that he suffered severe lower back pain and movement restriction from the time of the fall.

20. Dr. Rouvreau stated that the X-rays identified a compression fracture of the first lumbar vertebra (L1) and that this was likely to have arisen at the time of the fall.

21. Further evidence in this respect was given by Mr Benard's general practitioner Dr Nepthali who was, unfortunately, unable to give evidence by video link up as a result of an outbreak of dengue fever in New Caledonia which demanded her attention. Dr Nepthali confirmed in her evidence in chief (by the sworn statement) that Mr Benard and his whole family in Vanuatu have been her patients since 2006 and that before the accident Mr Benard had been very active physically. Dr Nepthali was contacted by Mrs Benard on the day of the fall and informed that Mr Benard was to be medivac'd urgently to hospital in Noumea.

22. The medical evidence for the claimant Mr Benard is entirely supportive of his claim that he had sustained a compression fracture of the first lumbar vertebra. Dr Rouvreau could find no sign that would suggest that the injury to the back occurred prior to the fall on 24 April 2008.

23. Issue was taken, however, in this respect by the medical practitioners engaged by the defendant.

24. Dr Taloga was one of three medical specialists engaged by the defendant who examined Mr Benard in Fiji. However, Dr Taloga was the only medical specialist to provide a report. He was made available for cross examination. Dr Taloga initially considered that the medical records did not appear to indicate Mr Benard had suffered injury to his back as a result of the fall. He stated in paragraph 15 of his initial sworn statement, *"such an injury would have left him temporarily incapacitated. This leaves me to form the opinion that this was most likely an old injury and unlikely to have resulted from the slip in the fall incident of 24 April 2008".*

25. During the course of his cross examination, Dr Taloga conceded, however, that this opinion needed to be reviewed particularly in the light of Dr Rouvreau's evidence. Dr Taloga's evidence concluded with an acceptance that the injury to the lower back **could** have been caused by the fall on 24 April 2008 which, of course, was a significant concession that favoured the claimant, Mr Benard.

26. Dr Bador is a general practitioner in Port Vila. He also examined Mr Benard on the instructions of the defendant and that examination occurred on 14 February 2013. Dr Bador's report is qualified in a number of respects as being primarily on the basis of reports he received from Mr Benard and without the benefit of all the medical records. Dr Bador examined X-rays that had been taken of Mr Benard's spine on 11 February 2012. Dr bador considered that they showed extensive arthritic lesions starting with the level of the fourth thoracic vertebra moving down to the first lumbar vertebra. Dr Bador stated that "*this looks like old arthritic process, probably more than 3 years old as osteoporosis requires usually years to develop*". Dr Bador considered that they only way in which it could be proven that this was not a pre-existing condition would be to examine the X-rays taken on the second day of hospitalisation in Noumea. However, Dr Bador had not seen those X-rays. He considered that whatever the pre-existing condition, the fall would simply aggravate it.

27. Dr Bador's evidence does not however run contrary to Mr Benard's claim that the injury to his back occurred as a result of the fall. The X-rays examined by Dr Bador were taken almost 4 years after the fall and, having regard to his conclusions that the arthritic indicia was at least 3 years old, that is not incompatible with Mr Benard's case.

28. It is of course Mr Benard who carries the burden of proof in respect of the nature and extent of his injuries and disability and of his past and future loss resulting from them. I consider that, on the evidence before me, Mr Benard has discharged that burden and proven that the injury to his back more likely than not arose as a result of the fall. There is the difficulty that Dr Nepthali was not able to be cross examined but Mr Nalyal responsibly acknowledge that the limited scope of Dr Nepthali's evidence in relation to the spinal injury was such that his inability to cross examine Dr Nepthali in this respect did not create any prejudice to the defence.

29. I accordingly find that the injury to the back was a consequence of the fall.

30. The next issue is whether the onset of diabetes within a year of the fall can also be accepted as a consequence or having been caused by the fall.

31. It is well understood that as matter of consequence, a claimant is entitled to recover damages for personal injuries if, and only if, those injuries were caused or materially contributed to by the defendant's breach of duty. It is now well established that the *"but for"* test is a starting point in any consideration of causation.

32. That "*but for*" test leaves it for the claimant to show that had the breach of duty not been committed this particular injury would not have happened. It was dealt with in this way by Phillips LJ in ***Clough v. First Choice Holidays and Flights Ltd***[2]**,**

> *"in the context of causation, the two words "but for" are shorthand. They encapsulate a principle understood by lawyers, but applied literally, or as if the two words embody the entire principle the words can mislead. They may convey the impression that the claimant's claim for damages for personal injuries must fail unless he can prove that the*

[2]***Clough v. First Choice Holidays and Flights Ltd*** *[1969] 1 QB 428, [1968] 1 All ER 1068*

defendant's negligence was the only, or the single, or even chronologically the last cause of his injuries. The authorities demonstrate that such an impression would be incorrect. The claimant is required to establish a causal link between the negligence of the defendant and his injuries or, in short, that his injuries were indeed consequent on the negligence. Although on its own it is not enough for him to show that the defendant created an increased risk of injury, the necessary causal link would be established if, as a matter of infringe from the evidence, the defendant's negligence made a material contribution to the claimant's injuries".

33. Mr Benard's evidence is that the injuries to his ankle and back prevented him from undertaking his regular form of exercise which was daily walks. Furthermore, that he was a fit and active man prior to the fall particularly as his work involved the surveying of ships which required him to move within quite confined places on ships. He was unable to undertake that regular exercise from the time of the accident, felt increasingly unwell and was eventually diagnosed by Dr Nepthali in Noumea in early 2009 as suffering from diabetes. Mr Benard approached Dr Nepthali because of various symptoms all identified in Dr Nepthali's report. There was no dispute that Dr Nepthali ordered blood and urine analysis which confirmed her suspicion of diabetes. Dr Nepthali went further and said *"it is commonly difficult to explain the origin of spontaneous diabetes but in this specific case of Mr Benard it was a total change of his life which certainly caused his illness. Before the accident, Mr Benard was very active physically and suddenly, he had no capacity for 1 year. He did not change his alimentation and his blood was in excess of glucose which cause the diabetes and in excess of fat which may cause the other dysfunctionmentes. ..... Mr Benard will spend the rest of his life with the diabetes and high blood pressure".*

34. None of the other medical practitioners who have given evidence in this case have managed to discredit the evidence of Mr Benard's general practitioner Dr Nepthali that the onset of diabetes was spontaneous rather than gradual. Reference was made by them however to Mr Benard's age and his life style which involved smoking 3 packets of cigarettes a day and drinking a litre of wine a day. In summary, their evidence pointed to Mr Benard being predisposed to diabetes because of his lifestyle but they could not discount the possibility that, if Mr Benard had been able to maintain his active lifestyle, then he might have avoided the onset of diabetes. I accordingly find that diabetes is again one of the injuries suffered by Mr Benard as a result of the fall.

35. When I turn to the assessment of damages it is necessary to have regard to the classic statement by Lord Blackburn in ***Livingstone v. Rawyards Gold Company*** [3]

> *"I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get that sum of money which will put the party who has been injured, or who has suffered, in the same position that he would have been in if he had not sustained the wrong for which he is now giving his compensation or reparation".*

36. Damages for personal injury have 2 elements; first, an award of general damages for pain suffering and loss of amenity; secondly, an award of special damages for past and future pecuniary loss which can include past and future medical and care cost. What governs both awards of damages is the overlying need for "reasonableness".

Special damages

37. The claim seeks initial treatment cost to a total sum of Vt 2,983,585. That is challenged in only one respect being the cost of chartering a plane to take Mr Benard to Noumea for emergency surgery. The cost of that flight was Vt 1.1 million.

38. Mr Nalyal argued that this was not a reasonable expense and that Mr Benard could have traveled the following day on a scheduled flight. I do not agree.

39. Dr Hurley's medical certificate confirms that there was a need for urgent surgery and for Mr Benard to be medivac'd to Noumea that day. Mr Sugden fairly argued that it would be unreasonable to require Mr Benard to have waited until the following day and then to travel to Noumea on a scheduled flight. I accept that submission. Limited medical treatment is simply one of the issues faced by those who reside here in Vanuatu. Accordingly, I consider that the initial treatment costs of Vt 2,983,585 to be established.

[3] ***Livingstone v. Rawyards Gold Company*** (1880) 5 App Cas 25, 39

40. Mr Benard had secured a contract with Trident Holdings that was to have commenced on 5 May 2008 for a period of six months. He was unable to undertake that contract because of his lack of mobility and he had to sub-contract the work to a company, Techmar Pacific. While there was no real challenge to Mr Benard's evidence in this respect, it is still incumbent on Mr Benard to prove the actual loss that he suffered in respect of the Trident Holdings contract and as to future earnings.

41. The amount claimed in this respect for the loss of the Trident Holdings contract is Vt 4,260,000. The evidence is not convincing that this would have been the net return to Mr Benard notwithstanding that the contract work would be unlikely to involve other costs than for Mr Benard's time. A reasonable return here would be Vt 3 million.

42. Mr Sugden contends that this contract can also be seen as an indication as to the work available to Mr Benard at around this time. The argument is that Mr Benard had a reduced earning capacity from that point which should be compensated at the rate of Vt 100,000 per month. For the 64 months since he would have finished the Trident Holdings job the claim is stated to be Vt 6,400,000. With respect, I consider that this fails to take account of Mr Benard's age (65 at the time of the accident and 70 now) and the lack of evidence that there was an abundance of work for him in this respect. There is always uncertainty about contract work and that must be so in a small centre such as Port Vila. I allow Vt 1 million in this respect.

43. There is no challenge to the evidence that the cost incurred for medication to date amounts to Vt 280,163.

44. Mr Benard also seeks special damages for (what is described as) future economic loss. More exactly, they are expenses that he considers that he will incur.

45. The first expense is the cost of Vt 425,400 for the required operation to remove the pins and plate in his leg. No challenge is made to that aspect of the claim and it appears to be an expense, if it had been incurred already, which would have been recoverable as part of the medical expenses. That claim is allowed.

46. Then there is also the on-going cost of medication which is stated to be Vt 270.78 per day as from 11 December 2013.

47. It is contended that Mr Benard, as a Frenchman, can be taken as having a life expectancy of 81 years. His evidence is that his parents and grandparents lived to a greater age and that he can expect to do so as well is simply that, an expectation founded in hope. There are simply too many uncertainties in life to depart from general life expectancy tables when considering such an actuarial assessment. Perhaps Mr Benard's parents did not smoke 60 cigarettes a day?

48. Furthermore, the evidence that the life expectancy of a Frenchman is 81 years of age has not been established either by evidence nor by consent. For this case, I will allow five years for the on-going cost of medication which is approximately Vt 500,000.

49. I allow nothing for the claim that Mr Benard could expect to have work for the next five years and that he should be compensated for that loss. That may have happened but equally it may not have happened. Again, there are simply too many variables that could come in to play here irrespective of whether the accident did or did not occur.

50. Consideration also needs to be given to interest and that should be considered at the rate of 5% per annum as is customary in these matters. It would generally be appropriate to make the assessment from the date of expenditure. The approach taken by Mr Sugden is complicated and again requires a number of assumptions in order to justify the population of the equations involved. Rather than attempt a recalculation in this respect, a fixed amount of Vt 2 million is awarded for interest on all special damages.

51. This accordingly results in an award of special damages as follows:

		Vt
a)	Initial treatment costs	2 983 585
b)	Loss of earnings	4 000 000
c)	Medication to date	280 163
d)	Future cost of operation	425,400

e)	On-going medication	500,000
f)	Interest	2 000 000

Special Damages Vt 10,189,148

General Damages

52. As previously mentioned, the purposes of general damages as to compensation for pain, suffering and loss for amenities. This raises the question of the Judicial Studies Board Guidelines for the assessment of general damages and personal injury cases *"JSB Guidelines"* first published in March 1992. The JSB Guidelines were developed in the UK to provide some consistency in awards for particular types of injury. The JSB Guidelines have gone through periodic reviews and the current edition, the ninth edition, was settled in 2008.

53. What is of critical importance however is to recognize that the JSB Guidelines are indeed just that – guidelines. It is still for the trial judge to use his or her own judgment and experience in the context of the facts of particular case in settling the award for general damages. It is furthermore well accepted now that there are five factors likely to be particularly important when considering an assessment for general damages being:-

a) The nature of the injury;
b) Its severity;
c) The duration of any disability and its prognosis;
d) The impact of the injury and any continuing disability on the claimant; and
e) The awareness of the claimant of his disability.

54. Back in 2011 when this case first went to trial, Mr Sugden indicated that challenge would be made to the approach taken by the former Chief Justice D'Imacourt in ***Solzer v. Garae***[4]. The ***Solzer*** case required an assessment for damages for personal injury sustained in a motor vehicle accident. The former Chief Justice looked to various decisions of the Courts in the United Kingdom and concluded that if he was in the United Kingdom the appropriate

[4] ***CC 117/92 (15 June 1992)***

award for Mr Solzer would have been £30,000. However, he considered that a reference to comparative income between the United Kingdom and Vanuatu the award in Vanuatu should be 50% of what would be awarded in the United Kingdom.

55. With respect to the former Chief Justice, it is difficult to see how any such assessment can be made having regard to the reference material he appears to have relied upon. Be that as it may, it is clear that his Lordship suffered by an absence of detailed economic material. I have the same difficulty. It is likely that this information is simply not available.

56. In ***Solzer***, the learned Chief Justice recognised the difficulties faced by him when he said:

> *"I must, therefore, find a way of determining a fair and just figure to compensate Mr Solzer for his injuries. I have not found it easy and both parties are entitled to know how I came by my decision, should they wish to take this matter elsewhere. Necessity, as they say, is the mother of invention."*

57. Mr Sugden's principal submission in this respect is that the basis for the Solzer approach must be seen as unreliable and, with the greatest respect to the former Chief Justice, I must agree with Mr Sugden. The material relied on by the learned Chief Justice cannot possible be a reliable guide. However, the JSB Guidelines are regularly reviewed and can provide us in Vanuatu with an authoritive appreciation of what an injured person in the UK might well receive by way of an award of damages..

58. Evidence was provided by Mr Benard's wife and son in law as to the cost of various items in the UK as compared to the cost of those items in Vanuatu. I found this evidence insufficient to establish the point that Mr Sugden was attempting to make and that was that there should be no real difference between the UK and Vanuatu in the assessment of general damages. In short, Mr Sugden's argument is that the JSB Guidelines should conveniently apply here without any discount.

59. What I prefer to do in this case is have regard to the JSB Guidelines and then stand back and consider what would be appropriate to compensate Mr Benard for his injuries in so far as general damages are concerned. I accept immediately that this is unlikely to be helpful

as a guideline judgment or even as a reference point for the assessment of general damages for personal injuries in Vanuatu. However, that is not the necessary responsibility of a trial judge. That responsibility must be to make an assessment of the damages in the case before that Court.

60. Another complication is that the JSB Guidelines provided to me by Mr Sugden are indeed the eight edition whereas the latest material I have found is that the UK is currently working off the ninth edition. Be that as it may, regard will now be made to the JSB Guidelines (eight edition) as to the various categories and their respective range of damages.

61. Mr Sugden argued that Mr Benard's ankle injury was in the N(b) severe category involving or requiring an award for damages in the ranch of £20,500 to £32,750. However, that severe injury category is explained in this way

> *"Injuries necessitating an extensive period of treatment and/or a lengthy period in plaster or where pins and plates have been inserted and there is significant residual disability in the form of ankle instability, severely limited ability to walk. The level of the award within the bracket will be determined in part by such features as a failed arthrodesis, regular sleep disturbance, unsightly scarring and any need to wear any special footwear."*

62. I consider that Mr Benard's ankle injury falls more exactly or more neatly into the N (c) moderate category being,

> *"Fractures, ligamentous tears and the like which give rise to less serious disabilities such as difficulty in walking on uneven ground, awkwardness on stairs, irritation from metal plates and residual scarring".*

63. The applicable range for that moderate category £8,700 to £17,500. I consider that Mr Benard falls closer to the lower end of that scale.

64. Back injuries naturally attract higher ranch of damages. Again, the B(b)(i) moderate category would appear to be appropriate here

"Cases where any residual disability is of less severity than that in (a) (iii) above. The bracket contains a wide variety of injuries. Examples are a case of a crush fracture of the lumbar vertebrae where there is a substantial risk of osteoarthritis and constant pain discomfort with impairment of sexual function; that of a traumatic spondylolisthesis with continuous pain and a probability that spinal fusion will be necessary: or that of a prolapsed intervertebral disc with substantial acceleration of back degeneration".

65. The ranch for category B(b)(i) is £18,250 to £25,500.

66. An additional factor which should be taken account of when placing the back injury within that range is of course the onset of diabetes. That would justify an award at the higher end of that range.

67. Accordingly, I consider that the UK position in respect of general damages would be an award of £30,000 made of £10,000 for the ankle and £20,000 for the back. Taking a conversion rate of say Vt 155 for the £1, this would equate to an award of Vt 4,650,000.

68. I consider, however, that it is nigh on impossible to simply look at a likely UK award and neatly convert that to someone living in Vanuatu. The difference between life in the UK and life here is the difference between chalk and cheese. In the end, what should always govern such an award is the court's judgment as to what is reasonable in all the circumstances. In this case, I consider that an award of Vt 3 million for general damages is fair and reasonable. It may be that a higher award would be made in either Australia or the UK but some restraint is required here for an award in Vanuatu.

Conclusion

69. Accordingly, damages are awarded in the sum of Vt 13,189,148:

a)	Special damages of	10 189 148
b)	General damages of	3 000 000
c)	Total	Vt 13,189,148

70. I have heard from counsel of the issue of costs. Mr Nalyal concedes that the careful and detailed work required of Mr Sugden in this case justifies a higher hourly rate than would otherwise apply to standard costs. Clearly, that must be so. Mr Sugden has presented a complex and difficult case with considerable skill and his written material has been of great assistance.

71. The claimant is entitled to standard costs but on an enhanced basis at the rate of Vt 20,000 per hour to be agreed or taxed. Those costs will include the costs of the expert medical witnesses for the claimant and the cost of the video link arrangements.

BY THE COURT