

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

Civil Case No. 25 of 2011

BETWEEN: MANISHA GARU
Claimant

**AND: GRAZIELLA LEONG trading as AU
BON MARCHÉ**
Defendant

AND : JOHNSLY JOVI
First Third Party

AND : DERRICK MALAS
Second Third Party

Coram: *Justice D. V. Fatiaki*

Counsel: *Mr. C. Leo for the Claimant
Mr. M. Hurley for the Defendant
No appearance for the Third Parties*

Date of Decision: *12 December 2013*

JUDGMENT

1. **Christmas day, 2008** is a day that will long be remembered by the claimant. During that day she was gainfully employed as a temporary shop assistant at **Au Bon Marché** Supermarket at **Manples, Tebakor** earning some money during her school holidays to help with her school fees. That fateful morning the claimant was seated at a table on the pavement outside the supermarket premises. She had been assigned to organize and wrap christmas gifts for customers of **Au Bon Marché** and, as might be expected, she was very busy.
2. While the claimant was busy wrapping gifts, a red car without warning crashed into her work station violently colliding with the table and breaking the shop plate glass window. The claimant who was standing between the table and shop window was thrown onto the pavement and sustained serious injuries. The claimant was rushed in an ambulance to **Vila Central Hospital**. She had sustained an open fracture of the right lower leg which was surgically immobilized and aligned using a cast. She was admitted as an inpatient for some 6 weeks and had to use crutches for some time after she was well enough to be discharged from hospital.
3. She was further assessed a year later in November 2009 by **Doctor Richard Leona** the General Surgeon at **Vila Central Hospital** who writes in the claimant's final medical report:

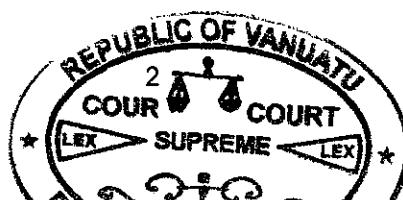


"She now has 100% loss of normal limb function due to permanent shortening of right lower limb, permanent scarring and on-going pain."

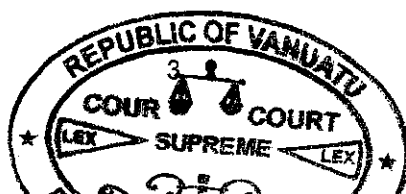
4. In his further evidence in chief **Dr. Leona** described the claimant's injuries as *"... a fractured tibia of the right leg and the proximal part. It was a high energy force causing a twisted injury"*. The claimant's right leg has shortened by **2 cm** and 15% of external rotation of her outbound leg – a condition called *"valgus"*. She was:

"... at risk of early osteo onset" and "... psychological trauma ...". There is a *"... loss of normal gait and she waddles, her right hip and shoulder drops. There is permanent scarring which also causes pain due to healing tissue accumulation. She will always have pain on medial side of right knee (which) will become worse"*. In his opinion *"leg injuries to growing teens are more serious than where growth has stopped as in an adult"*.

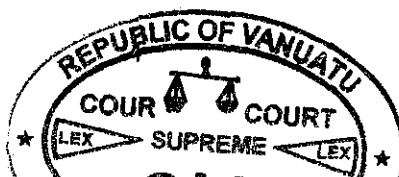
5. In cross-examination, **Dr. Leona** disagreed with the defence physio therapist's estimate of *"60 – 70% disability"* because *"(the claimant) is a growing girl and I can see the long term effects"*. He agreed however with defence **Dr. Bador's** assessment that a special orthopedic device would compensate for her shortened leg *"... as a temporary measure but won't alleviate the whole problem. (It) won't change the waddle. It will compensate for the 2cm shortening but (her) gait involves more than the leg and includes the whole body"*. He did not examine the claimant's thoracic situation only the injury to her right leg.
6. In this latter regard **Dr. Bador** noted that the claimant was *"hospitalized twice during winter seasons 2011 and 2012. She takes ventolin treatment (low level consumption)"* and **Winnie Matariki** the physiotherapist records the following thoracic injury: *"... thoracic rotation to the right-tightness, pain and limited range of motion. Heavy lifting caused chest pain and palpitation T8 – T10 tender along the Transverse Process."*
7. In so far as it may be necessary to do so, I have no hesitation in preferring the evidence of **Dr. Leona** in the event of any conflict with the defendant's expert witnesses who examined the claimant almost 4 years after the incident.
8. In the claimant's amended claim filed on **18 October 2011** she claims general and special damages in the sum of **VT19,074,000** together with interest and costs. In her amended defence the defendant denies any breach of duty or causing the claimant's injuries. Alternatively, the common law damages claimed are excessive and should be confined to an amount calculated under the **Workmen's Compensation Act [CAP. 202]**.



9. Early in the proceedings the defendant issued a Third Party Notice against the driver and owner of the red car that collided with the claimant, claiming "*indemnity, contribution and/or damages*" jointly and severally in respect of any amount ordered to be paid by the defendant to the claimant. Although served with the Notice only the driver appeared once in person and then took no further part in the proceedings. Likewise although claimant's counsel indicated he would seek to strike out the Notice no formal application was ever filed.
10. At the trial the claimant testified and relied on her sworn statements. Although written objection was made to most of the contents of the claimant's second sworn statement, she was not cross-examined at all. The claimant also called **Dr. Richard Leona** whose evidence has been earlier dealt with in this judgment.
11. The defendant called and produced the sworn statements of **Peter Marks** an investigator and insurance loss adjuster who investigated and reported on the accident in June 2010; **Winnie Matariki** a qualified physiotherapist who examined the claimant on **20 December 2012** and **Dr. Jean-Luc Bador** an experienced general medical practitioner who also examined the claimant on **20 December 2012**. Only the latter defence witnesses were cross-examined. Significant by its absence is the evidence of the defendant, the store manager or any other staff at the **Au Bon Marché** supermarket at the time.
12. At the end of the trial counsels agreed the following six (6) questions or issues required determination:
 - (i) Is the claimant entitled to any other entitlements in addition to her entitlements pursuant to the Workmen's Compensation Act [CAP. 202]?
 - (ii) Did the defendant breach its duty to ensure, so far as reasonably practicable, the health, safety and welfare at work of the claimant?
 - (iii) Did the defendant's breach of its duty cause the claimant's damages?
 - (iv) What are the damages to be awarded to the claimant?
 - (v) Was the accident which caused the claimant's damages, wholly caused or contributed to by the Third Parties' negligence (or either of them)?
 - (vi) If the answer to question 5 is yes, are the Third Parties (or either of them) liable to indemnify and/or contribute to any damages awarded to the claimant against the defendant and if so, for what amount?
13. Counsels agreed that issues (1) to (4) relate to the claim proper, while issues (5 and (6) relate to the Third Party Notice.



14. **Rule 3.7** of the **Civil Procedure Rules** which deals with third party notices is relatively brief. It allows for a defendant against whom a claim is brought, to serve a third party notice on a person who is not a party to the proceedings if the defendant "... *claims a contribution, indemnity or other remedy*". The relevant prescribed Form 4 requires the notice to include reasons for why the particular remedy is being sought from the third party who becomes a party to the proceedings from the date of receipt of the notice.
15. Having regard to the nature and object of third party proceedings, the expression "... *or other remedy*" must take its meaning from the preceding expressions namely, "*contribution*" and "*indemnity*". It is not possible therefore to seek "*damages*" for an independent separate claim in negligence. Otherwise the defendant would be able to pursue his own separate claim as a claimant for damages against the third parties within the context of the claimant's claim which is not provided for and could lead to much delay and confusion.
16. In the present third party notice the defendant claims "... *indemnity, contribution and/or damages ...*". It does not follow the outline in the prescribed Form and, indeed, it asserts that the third parties owed the claimant (not the defendant) a duty to exercise reasonable care, skill and diligence in the driving of the vehicle. No where in the notice is there any personal cause of action or damage asserted by the defendant against the third parties other than the conditional averment that: "*If the defendant is liable to the claimant as alleged or at all (all of which is denied), then by reason of the Third Parties negligence (or either of them) the defendant will suffer loss and damages*".
17. In my view for the defendant to be entitled to claim "*contribution*" against the third parties both the defendant and the third parties should be liable to the claimant on a "*common demand*" or be under a "*common obligation*". In the present case, on the pleadings and the evidence, there is neither a common demand or a common obligation existing between the defendant, the third parties and the claimant.
18. It might be that the claimant would have a good claim for damages against the third parties had she chosen to sue them, but, even then, there would be no commonality in either the duty or the breach that she might allege against the third parties and that which is presently alleged against the defendant her employer. In those circumstances the defendant's third party claim for "*contribution*" is in my view, very doubtful.
19. In this instance also, no application was ever made for permission to issue the Third Party Notice which was filed after the defence [see: Rule 3.7 (3) of the **Civil Procedure Rules**]. In light of the foregoing, I do not propose to deal with issues (5) and (6) or ignore the mandatory requirements of the Rule. This does not however, affect the defendant's right to maintain a separate action against the third parties in the event that judgment is entered against her and payment is made under it.



20. I turn next to consider the remaining issues in the case.

Is the claimant entitled to any other entitlements in addition to her entitlements pursuant to the Workmen's Compensation Act [CAP. 202]?

21. The issue as framed could be clearer. It appears to assume no cause of action arises or civil claim is available to an employee for damages for personal injuries arising from his/her employer's negligence other than for a claim under the **Workmen's Compensation Act**.

22. In my view the submission of defence counsel on this issue is misconceived and must fail. Nowhere in the **Workman's Compensation Act** [CAP. 202] is there either an express or implied bar to a claim for common law damages for personal injuries arising out of an employer's negligence or owing to a failure to discharge its statutory duty "... to ensure, so far as is reasonably practicable, the health safety and welfare at work of all his employees ..." [see: **VNPF v. Aruhuri and others** [2001] VUCA 16].

23. The Vanuatu law reports contain numerous judgments of this Court and the Court of Appeal awarding an employee common law damages for personal injuries against a tortfeasor including his/her employer and in my view the "*cause of action*" and civil claim is too well-established to be doubted now. This first issue is answered in the negative.

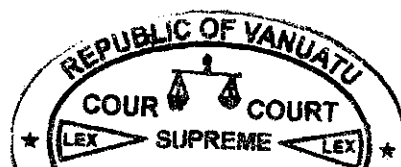
Did the defendant breach its duty to ensure, so far as reasonably practicable, the health, safety and welfare at work of the claimant?

24. Defence counsel's submissions on this issue may be summarized as follows: although the defendant accepts that under the common law and **section 2** of the **Health and Safety at Work Act** [CAP. 195] she owed a duty to the claimant employee to ensure her health, safety and welfare in the work place, nevertheless, she denies any breach of her duties in that regard.

25. Defence counsel relies substantially on the judgment of the High Court of Australia in **Modbury Triangle Shopping Centre Pty Ltd. v. Anzil** [2000] 205 CLR 254 where the owner of a shopping centre was held not liable for personal injuries inflicted on a tenant's employee by unknown assailants in an unlighted car park of the centre.

26. Claimant's counsel for his part, submits that the defendant manifestly failed to install any concrete parking stoppers and/or reasonable preventative measures to protect the claimant who was working outside the defendant's supermarket premises.

27. In my judgment the **Anzil** case (ibid) is readily distinguished from the present claim where the person injured is an employee of the owner of the premises and where the default alleged against the employer concerns the non-existence of protective measures erected at the work site where the employee was assigned to work.



28. The uncontested evidence is that on the day in question the claimant was directed to work at a table situated on the pavement outside the defendant's supermarket premises immediately adjacent to a fuel bowser and parking area which was readily accessible to and intended for vehicular traffic. It is also common ground that on the relevant date there were no speed bumps or raised concrete tyre stoppers or any form of barrier or posts that directly shielded and prevented the claimant's work area from being accessed by vehicular traffic. Indeed, the undisputed evidence is that some time after the claimant's accident, concrete tyre stoppers were erected outside the defendant's supermarket.

29. In my view the present case comes clearly within the principle of liability expressed by **Hayne J** in the **Anzil** case (ibid) when he said (at para 109):

"... an employer may owe an employee a duty to take reasonable care to prevent the employee being (injured by a third party). If that is so, however, it is because the employer can prevent the employee going in harms' way. The employer has the capacity to control the situation by controlling the employee and the system of work that is followed. The duty which the employer breaks in such a case is not a duty to control the conduct of others. It is a duty to provide a safe system of work and ensure that reasonable care is taken".

*(see also: per **Callinan J** at para 141).*

(my insertion in brackets)

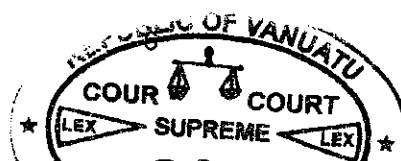
30. In light of the foregoing I answer the second issue in the affirmative.

Did the defendant's breach of its duty cause the claimant's damages?

31. Defence counsel's simple straight forward submission is no act or omission on the defendant's part was causative of the physical injuries suffered by the claimant which was a direct result of the negligent driving of the second named third party. Whatsmore counsel submits that there is *"... no evidence that concrete parking stops would have prevented the accident from occurring"* and counsel postulates further, *"... it is highly probable that the concrete parking stops would have created a 'ramping effect' so that the vehicle would have ascended the parking stop and the collision would still have occurred"*.

32. I can do no better to answer the submission than to refer to the observations of **Kirby J** in the **Anzil** case (ibid at para 95):

"Of course the (defendant's) omission (in the present case, to erect a protective barrier) was not the sole cause of the (claimant's) damage. It was not even the direct cause. The direct cause was the criminal conduct (the third party's negligent driving of the vehicle). But the (defendant's) omission represented a fact which it was open to the trial judge to conclude had materially contributed to the (claimant's) damage. Where a party such as the (defendant) fails to



establish that its conduct had no effect and claims that the damage suffered would have occurred in any event, it bears the forensic obligation of persuading a court to that conclusion”.

(my insertion in brackets)

33. In the absence of any protective, preventative or safety measures to eliminate or reduce the real risk of vehicular intrusion into the claimant's work area, I am satisfied that the defendant's breach of duty in failing to provide the claimant with a safe work place "*materially contributed*" to the collision that inflicted serious personal injuries on the claimant. This third issue is also answered in the affirmative.

What are the damages to be awarded to the claimant?

34. The following are the damages claimed in the amended claim:

"1. General Damages

- | | |
|--|--------------|
| a) 100% Permanent loss | VT12,000,000 |
| b) Pain and suffering | VT2,000,000 |
| c) Loss of Amenity | VT2,000,000 |
| d) Shock and sequel | VT1,000,000 |
| e) Lacerations | VT500,000 |
| f) Fractured of right lower limb | VT1,000,000 |
| g) Numbness and injured limb | VT500,000 |

2. Special Damages

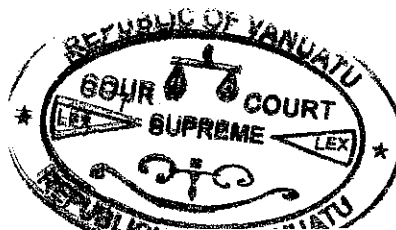
- | | |
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| a) Transportation | VT50,000 |
| b) Loss of temporary employment salary | VT24,000 |
| December 2008 to January 2009 | |

3. Interests;

4. Costs;"

35. It is also undisputed that as a result of the collision the claimant suffered a "*broken right leg*". Furthermore she was taken from the accident scene to **Vila Central Hospital** in "*an ambulance*" and, now has "... 100% loss of normal limb function due to shortening of her right lower limb; permanent scarring and ongoing pain" (see: agreed facts 4, 5 & 6).
36. Claimant counsel's brief closing submission on damages is:

"... the claimant is entitled to general damages and special damages outlined in its claim upon the premises that she sustained injuries when she was 14 years of age (...), the claimant attends school, is a bright student, has abundant life ahead of her, no longer enjoys her normal life, now asthmatic, has ongoing mental trauma, admitted her life would be short, no longer enjoys life."



37. If I may say so in the absence of any quantitative evidence or precedents to support the various amounts claimed I am left with the distinctly unfavourable impression that the claimed amounts are arbitrary figures without any proper or sound basis. In defence counsel's words the amounts claimed are "... *grossly excessive and not in line with any of the previous judgments of the Court*".
38. I am grateful to defence counsel for the assistance provided in his helpful and careful submission supported by relevant extracts from the UK Judicial Board of Studies Guidelines for the Assessment of General Damages in Personal Injury Cases (11th edn. 2012) and relevant local case authorities considering and applying the same, in particular, **Solzer v. Garae** [1992] VUSC 3; **Alphonse v. Tasso** [2007] VUSC 54; **Obed v. Kalo** [2008] VUSC 47; **Shem v. North Efate Timber Ltd.** [2008] VUSC 48; **Atis v. Natapei** [2010] VUSC 176 and **Entreprise Roger Brand v. Hinge** [2005] VUCA 21.
39. With the foregoing observations I turn to the claimant's evidence of how the accident and the injuries she sustained affected and continues to affect her and on which she was not cross-examined. Her evidence is extracted from her two (2) sworn statements dated 8 March 2011 and 4 March 2012 as follows:

(from sworn statement dated 8 March 2011)

"During the course of my employment, a vehicle driven by an unknown driver, without any warning ran straight to the table where I was preparing and wrapping the Christmas gifts and hit me;

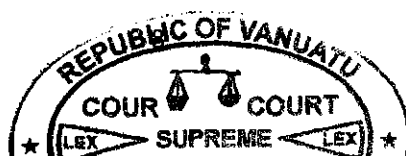
I fell on the floor where I was standing as the vehicle broke the window (glass) of the Au Bon Marché right behind me;

I was not able to detect the injury sustained as the accident happened in a split of a second. Few second later, I felt the great pain on my leg as I realized that I could not even stand. I was struggling and cried with pain as people were enjoying the Christmas festivities;

Few minutes later and while I was crying in agony and pain, the ambulance arrived to which I was driven to the Port Vila Central Hospital. I have read the contents of the sworn statement of Dr. Richard Leona who treated me at the hospital and I agree entirely with his report. I was particularly saddened when I came to know that I now have a permanent shortening of my right lower limb after I realized that I could no longer work properly as I used to;

I confirm that after the treatment I no longer enjoyed my normal life I used to enjoy. I used to play soccer at school now I could not perform to the standard expected due to the shortening of my leg. I have my personal ambition to advance in girls' soccer and my carrier (sic) in that respect by virtue of my injuries has now come to an end;

I confirm I could not stand for long during my normal day to day activities at home, in the classroom and elsewhere as I continue to feel tired very quickly and my concentration on all matters have dropped, immensely;



In terms of my educational pursuant (sic), the injuries sustained have affected me permanently, and I no longer feel comfortable and safe as I continue to have a permanent scar of fear in my life;

Additionally, the injuries sustained has permanently retracted my interests in my educational pursuant as I could no longer study for longer hours as I continue to suffer ongoing pain;

I confirm that during the said accident, I was 15 years of age and was attending year 9 at Lini Memorial College. That due to the said accident I was not able to attend classes for the whole year 2009 and I was one year behind;

I take this opportunity to enclose a copy of my exam results for years 7 and 8, annexed to and marked with the letters "MG1" hereto;

(from Sworn statement dated 04 March 2012)

That I continue to experience ongoing pain and suffering at home and during my studies at St Patrick's College and that the pain and suffering continue to affect me physically and mentally;

Annexed hereto and marked with the letters "MG3" is a true copy of the Principal of St Patrick's College letter dated 20 December 2011 in relation to my educational performance;

Annexed hereto and marked with the letters "MG4" is a true copy of my Medical Certificate prepared by Ritley Garae who is Acting Medical Services Manager at Godden Memorial Provincial Hospital at Lolowai, East Ambae;

I confirm that I continue to suffer ongoing pain since the accident of 25 December 2008."

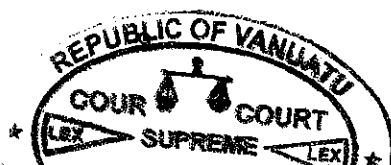
40. For completeness I set out the contents of the claimant's handwritten reference "**MG2**" provided by the Deputy Principal and Sports Master of **Lini Memorial College** on 22 September 2010 (almost 2 years after the accident). It reads:

"I am writing to present a potential or capability in physical education and sports for Miss Manisha Garu.

Manisha Garu has successfully gone through LMC physical education program. She has represented the college in all sports discipline such as basketball, volleyball, netball, soccer and even athletic.

In 2008 she became Lini's most improved and outstanding soccer player. She got selected during Pissa Game and flew with the Penama squad to Malekula (Lakatoro) for the woman soccer provincial championship. As such I must say Manisha was the youngest and had great potential to continue even further.

Now she has the interest she wants to be there with her friends in sports. But the pain in her legs and the chest after during and after games will not allow her to. This happens after the car accident she had in Port Vila. For

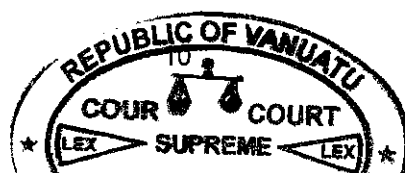


that reason LMC had to go without Manisha for the last two (2) Pissa games.

As a PE teacher who is responsible for the early upbringing of many students who become Vanuatu rep in sports, and Lilly Hingai and Amocld Sorina. Sadly to see that Manisha's career in sports has come to an end by that car accident.

Thank you for your understanding and your consideration."

41. In addition, the claimant testified to having difficulty walking and feeling ashamed and embarrassed because of her shortened leg. She also became nervous and fearful of walking on the side of the road and whenever a truck goes past. She now walks with a slight limp and she no longer plays football which she enjoyed and was good at. She often experiences back pain and shortness of breath and has developed asthma (see: "**MG4**"). Her schooling was adversely affected and she missed a lot of school while going for treatment and she continues to experience pain whenever she walks a lot and if she stands or sits for long periods as she is required to do in class.
42. This was a healthy, energetic, outspoken young girl who by all accounts was an above average student who also excelled in sport. She was born on **24 June 1993** and would have been 15 years of age at the time of the unfortunate accident which turned her life and world upside down. Christmas day will likely never mean the same for the claimant.
43. I am satisfied that the claimant suffered much pain, trauma and anxiety as a result of the accident which severely fractured her right leg which, although healed, has been shortened by 2 centimeters. Furthermore although her natural fear of passing vehicles will wear off with time, I do not doubt that she will continue to experience pain in her knee, leg and back throughout her adult life. In the words of **Dr. Bador** "... with the passing of time, and advanced calcification process, her right knee functional impairment will advance too" and "in the absence of proper care, she is likely to deteriorate progressively both physically because of the difference in length of both lower limbs, and psychologically."
44. The claimant can no longer enjoy the sports that she played and excelled in and her shortened right leg and waddling gait is a continuing source of embarrassment. From being a confident extrovert the claimant is now more introverted and self-conscious. She has "100% loss of normal limb function" of her leg.
45. Her schooling was badly affected and she missed a whole year of school leaving her a year behind her peers. From being an "outstanding" student with good prospect she is now easily distracted by the pain she experiences from sitting or standing for long periods in class.
46. Her unusual gait with the permanent scarring on her legs will likely affect her future marriage prospects as well as the types of employment



opportunities that she can pursue. Since the accident she has experienced pain on inspiration and has developed asthma.

47. Given the above and doing the best I can with the paucity of detailed evidence and submissions from the claimant I am content to award damages in this case under the following heads and for the enumerated amounts.

(1) Special Damages

Accepting that but for the accident, the claimant would have continued to work at her holiday job for the duration of her school holidays in 2008 I award her loss of wages for one (1) month – VT14,000;

I reject the claim for Transportation expenses as wholly unsupported by any evidence of payments made or of hospital visits actually attended by the claimant whilst undergoing treatment for her injuries.

(2) General Damages

- (a) Pain and suffering (past and future) VT750,000;
- (b) Loss of Amenities and Enjoyment of life VT1,500,000;
- (c) Permanent partial disablement and scarring VT4,000,000;
- (d) Loss of future earning capacity VT1,250,000;

TOTAL: VT7,500,000

48. In awarding the above amounts, I am conscious that there is a degree of assessment and impression involved. There is also an element of "crystal ball" gazing into the future. I have also borne in mind local living standards and economic conditions.

49. Summary

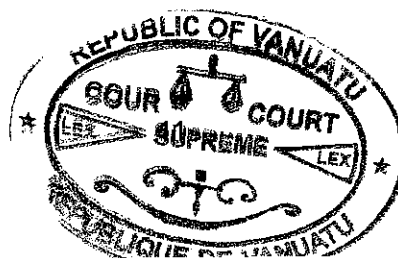
(A) Special Damages:

Loss of wages VT14,000

(B) General Damages:

- (i) Pain and suffering VT750,000
- (ii) Loss of Amenities VT1,500,000
- (iii) Permanent disability VT4,000,000
- (iv) Loss of earning capacity VT1,250,000


TOTAL: VT7,514,000



50. I also award the claimant interest of **5% per annum** on the special damages with effect from January 2009 and for general damages from 18 October 2011. The claimant is also awarded standard costs to be taxed if not agreed.

DATED at Port Vila, this 12th day of December, 2013.

BY THE COURT


D. V. FATIAKI
Judge.

