

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

**Civil  
Case No. 15/774 SC/CIVL**

**BETWEEN:**                    **Philemon Wilbur and  
Mayble Wilbur  
Applicants**

**AND:**                         **Benjie Wotu  
Defendant**

**Date of HEARING:**            *13th day of October, 2017 at 2:00 PM*

**Date of JUDGMENT:**        *28<sup>th</sup> day of October, 2017*

**Before:**                        *James Paul Geoghegan*

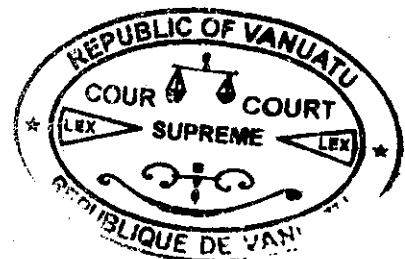
**Appearances:**                *Ms Bakeo (PSO) for the Applicants (Appearing for Ms Tari)  
Mr Benjie Wotu, Fresh Wota 1 Area, Port Vila.*

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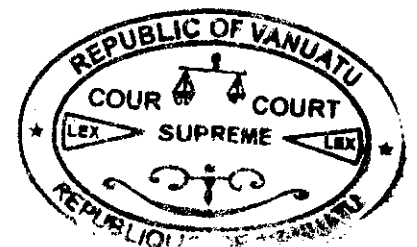
**JUDGMENT**

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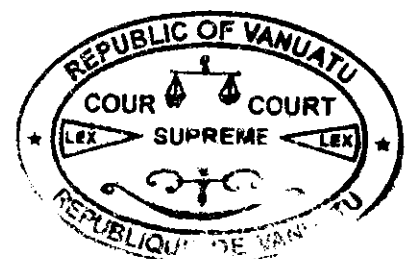
1. These proceedings consist of a claim for damages by the claimants arising out of the death of their son in a motor vehicle accident on November 10<sup>th</sup> 2012.
2. The claimants claim the following damages from the defendant:-
  - a) Vt 2 million for loss of reasonable prospect of contributing to the deceased's parents and family.
  - b) Vt 500,000 for pain and suffering.



- c) Vt 600,000 for loss of expectation of life.
  - d) Vt 1 million for exemplary damages.
  - e) Special damages totaling Vt 945,000.
  - f) Such other orders as the Court deems fit.
3. The claimant's son Eugene was killed in a motor vehicle accident on November 10<sup>th</sup> 2012. On that day, Eugene was the passenger of a Toyota Hilux vehicle which was driven by the defendant. The defendant had been consuming alcohol prior to driving and had driven at an excessive speed resulting in his losing control of the vehicle which overturned on Devils Point Road. Eugene died some two hours after the accident from the injuries sustained by him. He was 20 years old. Another passenger in the vehicle Mr Eric Nikiau suffered severe injuries and died a couple of days after being taken to Vila Central Hospital.
4. Mr Wotu was charged with one count of reckless driving causing the death of Eugene and pleaded guilty to that charge on May 7<sup>th</sup> 2013. On June 21<sup>st</sup> 2013, he was sentenced by Aru J to 1 year and 9 months imprisonment suspended for a period of 2 years. He was also disqualified from driving for a period of 2 years.
5. The proceedings were served upon Mr Wotu on March 31<sup>st</sup> 2017 after having originally been filed in the Supreme Court on November 4<sup>th</sup> 2015. Regrettably there were delays in service of the proceedings on Mr Wotu and while attempts were made to serve him with the proceedings those attempts were unsuccessful. An application for renewal of the proceedings was filed on May 24<sup>th</sup> 2016, however that application was not considered until March 29<sup>th</sup> 2017 when the application was granted. The proceedings were served very promptly thereafter.
6. Mr Wotu took no steps to defend the proceedings. Accordingly they were set down for a hearing to assess damages on August 28<sup>th</sup>. Regrettably, however, no further evidence was filed on behalf of the claimants addressing various issues which were significant in terms of enabling the Court to properly assess damages.



7. On August 28<sup>th</sup> when the matter was called, Mr Wotu appeared as a self-represented litigant. He was advised of the purpose of the hearing and he confirmed that he accepted liability and that he wished to make arrangements with the claimants for the payment of compensation.
8. The proceedings were adjourned to October 13<sup>th</sup> and the claimants were directed to file further evidence. Mr Wotu was advised that he could attend the Court and that he should preferably seek legal advice if he wished to do so. He was advised that he could make submissions to the Court on the issue of how much he should be required to pay to the claimants but that he could not contest liability in respect of the matter given that he accepted liability and it was clear that that acceptance was appropriate.
9. Accordingly, on August 18th judgment was entered for the claimants on liability only.
10. When the matter was recalled on October 13<sup>th</sup> Mr Wotu appeared again with his father. He did not wish to address the Court on the issue of damages however his father expressed considerable sorrow at the fact that the accident which resulted in Eugene's death had caused considerable division within the family and that he had been unable to attend to payment of compensation to Eugene's family as they had not been prepared to accept the offer made to them.
11. The purpose of this judgment is to address the issue of damages and to assess the appropriate amount which should be paid.
12. In that regard, the claim may be divided into three parts, namely compensation under the Fatal Accident Act 1976, compensation under the Law Reform (Miscellaneous Provisions) Act 1934 and the awarding of special damages.

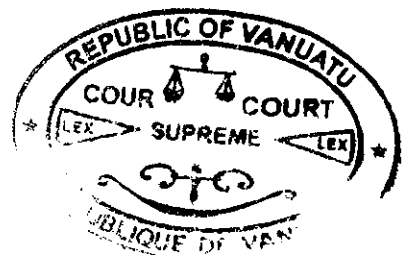


## FATAL ACCIDENTS ACT 1976

13. The Fatal Accidents Act entitles any dependent of a deceased to issue proceedings for damages in any circumstances where the deceased's death is caused by "any wrongful act, neglect or default" which would have entitled the deceased to issue a claim for damages against the person liable for his or her death had death not ensued. The dependents of the deceased therefore step into the deceased's shoes.
14. Apart from the ability of the Court to award general damages in such a claim, section 3(3) of the Act enables a dependent to obtain damages in respect of funeral expenses incurred in respect of the deceased by the defendant.
15. A dependent includes any person who is a parent of the deceased.
16. The claimants seek damages of Vt 2 million as loss of a reasonable prospect of the deceased contributing to the family for a period of 20 years at Vt 100,000 per year.
17. Eugene was 20 when he died. He was attending Year 13 at Lycee LAB School in Port Vila and was clearly an able and intelligent young man. He was close to his family and his mother gave evidence that he wished to become a pilot. In 2008 and 2009 he had worked as a Traffic Officer at Pekoa International Airport in Santo where he earned Vt 30,000 a month which was paid to his family. The family was a large one with Mr and Mrs Wilbur having seven children in total including Eugene.
18. Ms Bakeo urges the Court to accept the calculation of Vt 100,000 as an amount which would properly reflect Eugene's contribution to the family on an annual basis. Counsel relies on the decision in Esley v. Toara<sup>1</sup> where the Supreme Court dealt with a similar case involving the death of a 17 year old boy. Coventry J found that the

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<sup>1</sup>[2000] VUSC 78

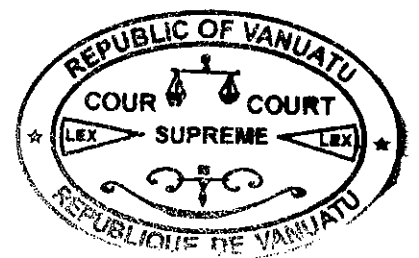


evidence showed that the deceased would have been able to obtain employment in the mid-range of wages and that allowing for the deceased's own expenses it would have been reasonable to have expected a contribution of Vt 100,000 from the deceased to the family. He also considered that the period of 20 years was reasonable as it was within the life expectancy of the dependents who have made the claim.

19. In Iokhauto v. South Island Shipping Cooperative Ltd<sup>2</sup> Weir J utilized a 2006 Vanuatu Report on household income and expenditure and World Health Organization data on Vanuatu life expectancy, to adopt an average life expectancy for a male in Vanuatu as at 2009 of 62.4 years and an average life expectancy of a female of 65.7 years resulting in an overall average of 64 years.
20. One of the defects in the original evidence filed on behalf of the claimants was a lack of any evidence regarding the age of the claimants. Accordingly it was effectively impossible for the Court to assess an appropriate period for which compensation could be paid. That defect was rectified by the claimants and the evidence establishes that Mrs Wilbur was aged 47 at the time of Eugene's death while Mr Wilbur was aged 49.
21. I consider it appropriate to adopt the reasoning of Weir J in Iokhauto regarding establishing the average life expectancy which is to be used as the basis to consider an appropriate award of damage under this head. Accordingly, I adopt the overall average of 64 years.
22. I consider that there is ample evidence to justify a conclusion that Eugene could reasonably have been expected to contribute Vt 100,000 per annum to his family during the course of his parent's life. However, I consider that it would be inappropriate to grant damages under this head for a period of 20 years given the

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<sup>2</sup> [2011] VUSC 343



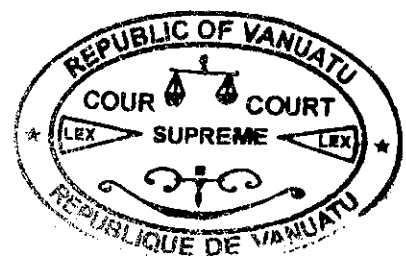
ages of the claimants. The youngest claimant Mrs Wilbur was aged 47 at the time of Eugene's death and accordingly an appropriate period for the assessment of damages is 17 years and not 20. I am satisfied however that damages of Vt 100,000 per annum are appropriate and accordingly the claimants are awarded Vt 1,700,000 for loss of reasonable prospect of contribution.

23. I turn then to consider the issue of special damages for funeral expenses. This issue has again been the subject of further evidence filed by the claimants who faced significant expenditure in securing the return of Eugene's body from Port Vila to Luganville. In the claimant's statement of claim an order was sought for payment of special damages in the sum of Vt 945,000. It is not entirely clear from the evidence how this amount is comprised. However, it would appear to be comprised as follows:-

- a) Cost of air fares and transportation to return Eugene's body to Luganville Vt 175,367.
  - b) Food for family, Vt 428,000.
  - c) Cost of construction of grave, memorial and transport for family Vt 83,000.
  - d) Customary ceremonies Vt 30,000
- Total - Vt 846,367

24. There is clear evidence of the cost of airfares to travel to Port Vila for the purposes of accompanying Eugene's body back to Luganville and the cost of returning his body. I consider that the damages of Vt 175,367 are made out.

25. As to the loan from Simeon Construction for Vt 130,000 the evidence of Mr Wilbur was that this sum was borrowed from Simeon Construction to enable him to meet funeral expenses, transportation costs and other expenses related to the funeral. Given that this cost has been accounted for under another headings such as food for family members and the cost of transport etc.. I am not prepared to take this sum into account as it would simply involve a double counting and would therefore be



inappropriate. There was also no proof of the loan and although the amount was not disputed by the defendant, the onus is on the claimant to provide sufficient proof of any claim.

26. As to the cost of food for family members I accept that there is a significant period of mourning but there is no proof of any of the costs involved in the claim of Vt 428,000. The evidence is that the expenses were incurred on November 10<sup>th</sup> and 11<sup>th</sup>, the 10<sup>th</sup> day, 50<sup>th</sup> day and 100<sup>th</sup> day after the death. The evidence of Mrs Wilbur is there were over 20 people who were sleeping with Mr and Mrs Wilbur who needed to be fed for the entire grieving period. Given the lack of any receipts in respect of the costs faced by the family I consider that it would be appropriate to require the claimant to pay a proportion of the claim to costs and that sum must, by its very nature be arbitrary. I consider that an appropriate award in respect of the cost of food would be Vt 300,000.

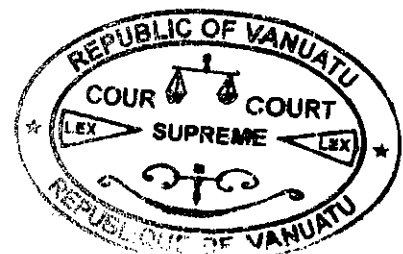
27. As to the claimed costs for the preparation of Eugene's grave, erection of a shelter and cost of transporting family, those costs are claimed at Vt 83,000 and I consider that to be a reasonable sum.

28. There is no proof of the cost of Vt 30,000 in respect of a customary ceremony and accordingly I am not prepared to make any award in respect of that ceremony.

29. Accordingly, the amount awarded for these expenses is Vt 558, 367.

#### **LAW REFORM (MISCELLANEOUS PROVISIONS) ACT 1934**

30. Pursuant to the Law Reform (Miscellaneous Provisions) Act 1934 all causes of action vested in any deceased survive for the benefit of his estate.

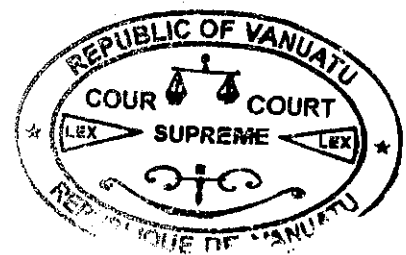


31. Under this head the claimants seek Vt 500,000 in damages for pain and suffering which occurred between the commission of the act causing death and death of the deceased. A death certificate produced appears to establish that that period was 2 hours.

32. In her written submissions for the claimants, Mrs Tari submitted that based on Esley an award of Vt 100,000 could be justified given the circumstances of Eugene's death. I note that this is a departure from the amount claimed in the statement of claim and consider that it is more realistic than the sum of Vt 500,000 claimed in the statement of claim. In all of the circumstances, given that death occurred 2 hours after the accident and there is no evidence as to the degree of Stephen's consciousness or insight between the accident and the time of death I consider Ms Tari's submissions under this head to be responsible and award Vt 100,000 for pain and suffering.

33. In addition, the claimants seek damages of between Vt 500,000 and 600,000 for loss of expectation of life. The calculation of the amount is based on Esley and Iokhautu. Esley involved an award of Vt 500,000 in respect of a claim involving the death of a 15 year old who was described as healthy and a person who could have looked forward to a full and active life. Iokhautu involved a claim in respect of the death of a 43 year old mother and her 2 children aged 5 and 3. In that case Weir J awarded damages for loss of expectation of life of Vt 600,000 in respect of the mother having taken account of the award in Esley and making an adjustment for inflation. Weir J. also included in that sum an award for pain and suffering, dealing with both heads on a global basis.

34. In this case, the claim involves the death of a 20 year old man who had his life ahead of him. The evidence establishes that he was fit healthy and could have looked forward to a full and rewarding life. In all of the circumstances, the claim for Vt 600,000 under this head is reasonable. However it is also clear that the defendant, through his family has also paid the sum of VT 50,000 to the claimants and





accordingly it is appropriate to deduct that sum from the amount of VT 600,000. Accordingly, I award VT 550,000 under this head.

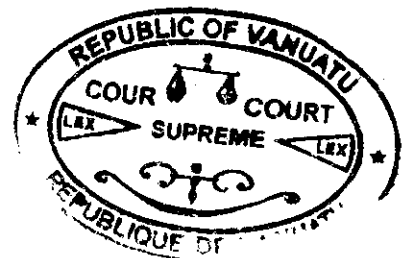
### EXEMPLARY DAMAGES

35. In her written submissions Mrs Tari referred to the fact that when Mr Wotu was sentenced Aru J had noted the following:-

*"With regards to late Eugene Wilbur, custom reconciliation is yet to be performed and his family has asked for compensation for Vt 1,000,000 which your family agreed to. Taking this into account I reduce your sentence by 6 months. For your early guilty plea you are entitled to a one third discount which further reduces your sentence to 2 years. As you are a first time offender I deduct three months which leaves you with an end sentence of 1 years and 9 months imprisonment".*

36. There is no dispute that the sum of Vt 1,000,000 referred to by Aru J was not paid by Mr Wotu's family. The claimants do however, acknowledge having received Vt 50,000. Mrs Tari's submissions appears to be that given the promise made by Mr Wotu's family of payment of Vt 1,000,000 that sum should be awarded in these proceedings under the heading of exemplary damages. I do not accept this submission. If Vt 1,000,000 had been paid as promised then it would have been entirely appropriate to have taken that payment into account in the awarding of damages under the other heads referred to herein. In other words, the Vt 1,000,000 would have been deducted from one or other of the sums awarded under various heads. The promise by Mr Wotu's family to pay Vt 1,000,000 does not constitute a separate ground for damages.

37. Regardless of that consideration I would not have considered this case to be one where an award of exemplary damages would be appropriate. Exemplary damages were granted in Iokhoauto due to the conduct of the defendant company in putting to sea in bad weather conditions, against the protestations of the Deputy



Commissioner of the Vanuatu Maritime Authority exhibiting behavior which Weir J described as “contumacious” and “flagrantly and grossly negligent”.

38. Weir J referred to an Australian Court of Appeal decision in “Freddy Harrisen v. JP Holloway”<sup>3</sup> where the Court said:-

*“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.”*

39. Weir J also referred to the Vanuatu Court of Appeal decision in Andikar v. Siro<sup>4</sup> where the Court of Appeal stated:-

*“Even if we assume that exemplary damages are available in the more general circumstances permitted in New Zealand... than in the United Kingdom..., we do not consider that the evidence was sufficient to show the three Andikar parties acted so deliberately and outrageously in relation to the rights of Tom Siro as to justify an award at such damages”.*

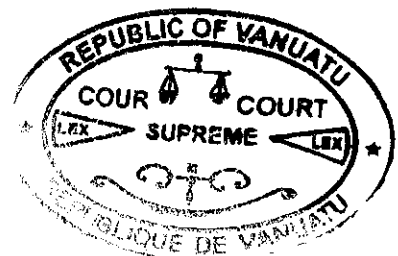
40. As referred to by Weir J in Iokhauto the purpose of exemplary and damages is as a mark of public censure against egregious misconduct. While the circumstances of this case are certainly tragic and while Mr Wotu was guilty of reckless driving, possibly under the influence of alcohol, the circumstances are not such as to justify an award of exemplary damages and I decline to do so.

41. Accordingly the claimant is awarded VT 2,908,369 comprised as follows:-

a)	Fatal Accidents Act -	Vt 1, 700,000
b)	Law Reform (Miscellaneous Provisions) Act	
	Pain and suffering	Vt 100,000
	Loss of expectation of life	Vt 550,000

<sup>3</sup> [1948] 1VLR148

<sup>4</sup> [2008] VUCA 1



c) Funeral and other expenses - Vt 558,369  
Total: Vt 2,908,369

42. The claimant is awarded costs to be agreed within 21 days failing which they are to be taxed.

DATED at Port Vila this 28<sup>th</sup> day of October, 2017

BY THE COURT

.....  
James Paul Geoghegan

Judge

