

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

Civil Case No. 268 of 2014

**BETWEEN: ORY COVO**

Claimant

**AND: NICOLAS RITSINIAS**

Defendant

**Coram:** *Justice Daniel Fatiaki*

**Counsel:** *N. Morrison for the Claimant  
M. Hurley for the Defendant*

**Date of Delivery:** *6 December 2018*

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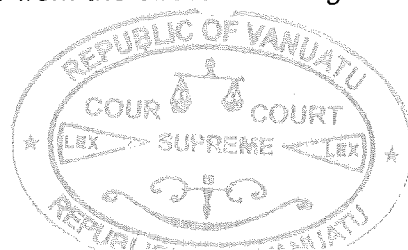
**JUDGMENT**

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1. This is a personal injuries claim arising out of an accident involving the claimant's motorcycle and the defendant's Toyota Hilux Double Cab truck on Mele Road on 29 November 2013 at about 7:45am.
2. By an amended claim dated 8 February 2017 the claimant claims damages and incorrectly computed medical expenses of **AUD 251,342.67** together with interest and costs for the personal injuries he suffered as a result of the accident which he claims was caused solely by the defendant's negligent driving. The defendant denies that the accident was caused solely by his negligence and pleads contributory negligence on the claimant's part. At the end of the trial defence counsel orally advised the court that the defendant admits his negligence and invokes the provisions of Section (1) of the **Law Reform (Contributory Negligence) Act (UK)** which applies in Vanuatu.
3. Counsel also filed three documents to assist the Court as follows:

**(A) Agreed Facts**

- (i) *On Friday morning 29 November 2013 the claimant was riding a motor bicycle model CRF450 (the motorcycle) from the direction of Salili towards Tagabe along the Mele Road, Efate;*
- (ii) *At about the same time the defendant was driving Toyota Hilux double cab motor vehicle registration No. 12139 from the direction of Tagabe towards Salili along the Mele Road, Efate;*



- (iii) *At that time the weather conditions were fine and the road surface was tar sealed;*
- (iv) *At about the same time the defendant made a left hand turn into his business premises, Vila Marine General, when the motorcycle collided into the right hand side of the Toyota Hilux (the accident);*
- (v) *As the result of the accident both the motorcycle and the Toyota Hilux were damaged and the claimant suffered personal injuries requiring his hospitalization initially in Noumea, New Caledonia and then in Sydney Australia.*

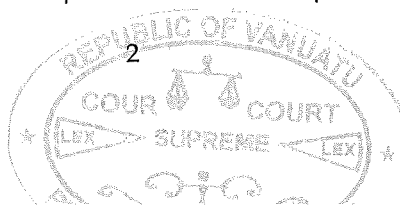
**(B) Agreed Issues**

- (i) *Was there contributory negligence by the claimant in relation to the motor vehicle accident that occurred on 29 November 2013 at Mele Road, Efate (the accident)?*
- (ii) *If there was contributory negligence, what is the percentage of the claimant's contributory negligence?*

**(C) Factual Questions to be determined**

- (i) *What was the pre-braking travel speed of the claimant?*
- (ii) *Does the pre-braking travel speed of the claimant (as determined by the answer to question 1) give rise to any contributory negligence by the claimant in all of the circumstances of this proceeding?*
- (iii) *If the answer to question 2 is yes, what is the percentage of the claimant's contributory negligence due to that factor?*
- (iv) *Does the fact that the claimant's motorcycle was unregistered and uninsured at the time of the accident give rise to any contributory negligence by the claimant in all of the circumstances of this proceeding?*
- (v) *If the answer to question 4 is yes, what is the percentage of the claimant's contributory negligence due to that factor?*

4. With the foregoing in mind I turn to consider the evidence in the case. The claimant gave evidence and called his brother Noam Roy Covo and Miri Schiller a car accident investigator and reconstruction expert. All three were cross-examined on their sworn statements. A police abstract report of the accident [Exhibit C(1)] and a sketch plan of the scene showing various measurement taken soon after the accident [Exhibit C(1)(a)] were produced by consent.
5. **Ory Covo** testified that he had no recollection of the day of the accident before his sworn statement was marked: **Exhibit C(3)**. The sworn statement is devoted almost entirely to the claimant's post-accident hospitalization and treatment and



how he has been affected in his work, day to day living and his mental ability and levels of concentration and memory.

6. In cross-examination, Ory confirmed and explained his written answers to written questions that had been served on him in early October 2016. The written answers were filed in early February 2017. In particular, the claimant explained that a quad bike accident in September 2009 occurred outside the La Parisienne bakery opposite Wilco's hardware when he hit the rear of a truck that was reversing into the road [**Answer No. 5**]. In explaining his **Answer No. 8** concerning any insurance claims, Ory said his insurer David Shield paid the quad bike claim without the need for court proceedings. Concerning his prior traffic violations Ory confirmed his **Answer No. 13** and explained that his licence suspension was for "*speeding*". He frankly admitted that his motorcycle that was involved in the accident was unregistered and uninsured although he had a Vanuatu licence to ride it. He also admitted that a valid registration and third party insurance were required for a motorcycle be ridden on a public road.
7. **Noam Roy Covo**, the claimant's elder brother, testified that on the 29 November 2013 he left their home at Bukura at about 7am and headed to Port Vila town to open their business **Goodies Limited**. They had loaded the claimant's quad bike on the tray of his truck and the claimant followed in his motorcycle a few minutes later. He recalled that the claimant overtook him just after he left the gravel Devil's Point road and entered the tar seal Mele road. A few kilometers later he arrived at the scene of the accident on Mele road. He noticed Ory lying on the ground next to Vila Marine's hangar. He also met the defendant who he considered a friend at the scene and heard him saying repeatedly: "*I'm sorry Noam you have to believe me, I didn't see him. It was an accident*".
8. In cross-examination he confirmed accompanying Ory to Noumea and then to Sydney for medical treatment. He recalls approaching the defendant in Sydney Airport in December 2013 and telling him that Ory was getting better. He also admitted telling the defendant that Ory was driving his motorcycle fairly fast on that day and Ory had earlier overtaken him on his way to town. He was not cross-examined about what the defendant had said to him at the scene of the accident.
9. The claimant's final witness was **Ms Miri Schiller** who described herself as an expert in car accident investigation and reconstruction. She prepared a report on her findings and conclusions on the reconstruction of the accident scene that she conducted on 12 November 2017 with the assistance of the claimant and a mechanical measuring wheel. She essentially confirmed the impact point in the claimant's lane as marked on the police sketch plan.
10. After reconstructing the scene using an identical truck to that of the defendant's on the day of the accident and after taking measurement she concluded that at



the impact moment, the defendant's truck was blocking **3.68 metres** of the road width of **6.43 metres** starting at the beginning of the claimant's lane and "*blocking more than half of the total width of the road*". She calculated the claimant's initial braking speed to be 63.3km/h using a formula and the measured brake marks at the scene of 22.5 metres in length.

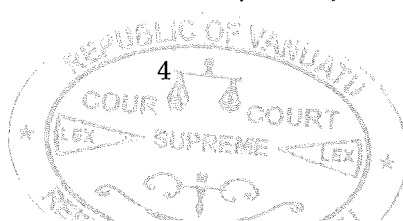
11. Using a motorcyclist's reaction time of **1.9 seconds** and the reconstructed average turning time of the defendant's vehicle of **3.115 seconds** and the estimated pre-braking speed of **63.3km/h** and working backwards she calculated that the claimant would have had 1.215 seconds to brake 22.5 metres which in her opinion "*is impossible*" for him to achieve in order to avoid the accident.
12. Conversely, **Ms Schiller** calculated from the reconstruction that the defendant would have been able to see the claimant's motorcycle a distance of **218.84 metres** away and would have had more than enough space and time to react to the motorcycle and wait for it to pass before executing his turn if he had been keeping a proper lookout and had seen the approaching motorcycle.
13. **Ms Schiller** recorded her conclusions and her opinion of the cause of the accident in the following extracts:

- "a. *Motorcycle wasn't driving fast prior to the accident;*
- b. *Collision happened at the motorcyclist's lane;*
- c. *The Toyota driver failed to give way to the motorcycle while turning from his lane through the motorcycle lane;*
- d. ***The motorcyclist made the right choice as a response to the Toyota blocking his way and his performance was exact;***
  - ***The motorcyclist did not have enough time to understand, react and break (sic) in order to prevent the accident;***
  - *The motorcyclist did not have space between the Toyota and the bus behind it to cross without hitting the Toyota;*
- e. ...

***Total responsibility of causing this accident lies on Mr Ritsinias' shoulders for not giving way to the motorcycle, blocking its way and causing an impact which caused the motorcyclist critical injuries".***

(my highlighting)

14. In cross-examination she agreed that the claimant's motorcycle collided with the defendant's truck "*at speed*". She was referred to various items and paragraphs of the defence expert's report – to some of which she agreed and to others she disagreed. She was adamant that she had used the correct formula in her calculations which did not include an "*impact speed*". She accepted that her



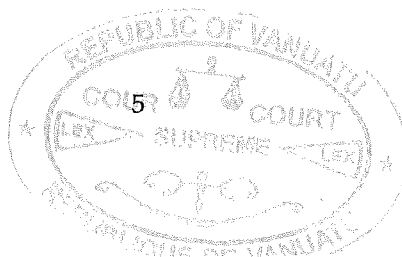
calculated initial pre-braking speed could be more but not much more and she strongly disagreed with the defence expert's calculated pre-braking speed of **81km/h** because he did not do calculations using lower impact speeds and he had not checked the damage on the vehicles involved in the accident.

15. The claimant's final evidence produced with the consent of defence counsel was the sworn statement of **Stephane Cattoire**, a director of "**On Wheels**", who confirmed servicing the claimant's motorcycle on 30 October 2013 to 1 November 2013 by replacing the engine oil, chain guard, throttle cable and adjusted the rim. In her view the claimant's bike was "*in as new condition*" and "*in perfect working order*". In other words there was nothing mechanically wrong with the claimant's motorcycle.
16. The defendant **Nicolas Ritsinias** produced his sworn statement and was cross-examined. He is the owner of **Vila Marine General**. The business is situated on Mele Road, Blacksands area. On Friday 29 November 2013 it was a public holiday. He had driven from his home at Havana Harbour in the morning to **Au Péché Mignon** in Port Vila town where he had a coffee and read the papers before heading back to his business premises. On the way and nearing his business premises he received an incoming "*9 second voice message*" on his digicel mobile at **07:24:50**. A minute later at **07:26:02** he made a "*28 second outgoing call*" to Belair Shipping Vanuatu Limited.
17. In cross-examination he agreed that road conditions that morning was good, weather was dry with light traffic and clear visibility of 150 metres approaching his business premises on Mele Road. He testified that he had put on his left turn indicator well in advance of his turn-off and had slowed to a stop because "*it was a high risk area*". There had been 2 accidents in the past involving vehicles trying to overtake vehicles that were turning left into his business premises driveway.
18. On the morning of the accident he felt safe after checking his rear view mirror and looking back before he made his left hand turn. He said he could see 500 metres ahead and when he looked he saw "*an approaching bus*" about 300 metres ahead and felt it wasn't a risk so he executed his turn. He was specifically asked:

**Q: The collision with the claimant was because you didn't see him?**

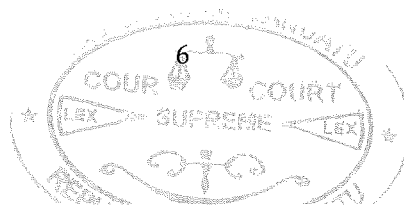
and the defendant answered

**A: I agree I didn't see the motorcycle before the accident. I saw the bus and some vehicles behind it**



He denied that he was concentrating on the vehicles coming from his rear and he maintained that he had checked the rear and then the front approaching traffic and he felt safe to turn. He accepted that a turning manoeuvre is: "... a timing thing".

19. Questioned about the "28 second outgoing call" he made at **07:26:02** on 29 November 2013 the defendant said he thought it was 3 to 4 mins before the accident. He agreed to regularly making hands-free mobile calls while driving because he had "*blue tooth*". Those answers are significant in the context of the other known facts in the case because the time of the defendant's outgoing call occurred barely a minute after he received the "9 second voice message" and "**Pro Medical**" the private emergency ambulance service which attended the accident scene records first receiving a call about the accident at "**07:34**" presumably soon after the accident occurred. On the defendant's own estimate that his "28 second outgoing call" occurred "*3 to 4 mins*" before the accident, the accident time would therefore be close to 7:30am which is 4 minutes before the emergency call was made to "**Pro Medical**".
20. Assuming that the time recorded by "**Pro Medical**" is accurate and, on this, no doubt was cast during the trial or in counsel's submissions, then what the timing means is that soon after making his "28 second outgoing call", the defendant had about 3 to 4 minutes to check if the bus and other traffic coming from behind him were a safe distance away so as not to attempt to overtake him. On his admission this was what was dominating his attention immediately before he executed his left turn and, given the time constraints, the defendant in my view, would have had barely a minute to look forward, carefully observe and then judge the distance and speed of any on-coming traffic before executing the left hand turn into the driveway of his business premises.
21. Under cross-examination about what he told Mr Conwell the insurance loss adjuster, the defendant reluctantly accepted that he had told him inter alia that his vehicle was "... **80% off the road**" with only the rear tray extending "**1.4 metres**" into the tar seal road "*at the time of impact*" as shown in **Photos 1 & 2**. He agreed that the narrative captions to those photos is based on information he provided to Mr Conwell. I reject this evidence as a vain attempt by the defendant to minimize his part in the accident. It is contradicted by the location of the damage observed on his truck, by the police sketch plan of the scene and the reconstruction at the accident scene undertaken by the claimant's expert which I accept.
22. Specifically, the defendant denied telling Mr Conwell that he saw a "*large truck approaching or recall telling him about seeing a motorcycle in front of a tip truck*". He denied giving Mr Conwell a statement on or about 20 December 2013. He recalls meeting with Mr Conwell a day or 2 after the accident and having a



general talk about the accident but can't recall saying he never saw a motorcycle or mentioning a "tip truck" to him. He recalls however telling him about needing medication at the Police Station. He admitted using spectacles for driving.

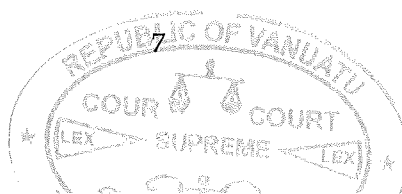
23. **David Chadwick Conwell** testified after the defendant. On 4 December 2013 he received instructions from QBE Insurance to investigate and assess a claim received from the defendant in relation to an accident that occurred on Mele Road on 29 November 2013. He went to the defendant's business premises on Mele Road on 4 December 2013 and had a preliminary interview with the defendant and took photographs of the defendant's damaged Toyota Hilux truck that had been involved in the accident. He also made notes of their interview.
24. He met the defendant again at his business premises on 27 February 2014 and he again made notes of what the defendant told him. He did not record a statement for the defendant's signature. By then he had already made a report to QBE Insurance on 20 December 2013 in which he recorded the defendant had given him a typewritten unsigned statement that he (the defendant) had prepared.
25. The most relevant passage in the defendant's statement is the following:

*"Before I reached the turning point where I turn left into the business premises, I realized that there was a bus and other vehicles behind me. I always look behind me when turning as we have had two accidents to my staff at this turning with vehicles trying to overtake while we turn. I put on my indicator, and slowed down, I always put on my indicator well in advance. When I reached the turning position, I looked forward and noted that there were no vehicles within a risk distance. I have gone back and estimated that this risk distance in my mind is about 150 – 200 metres. I know there were vehicles past this point, but could not tell you what they were. In my mind, all I noted was that they were in the distance and that I had a safe time in which to turn. I then started my turn and was amazed to see that a motorbike was approaching at great speed and that it was likely that the motorbike would collide with my car. I tried to accelerate but was unable to get out of his path and he collided with my back right hand side of the door. I brought my car to a stop on the gravel in front of the gate and got out. I saw the motorcyclist ... lying on the gravel in my driveway and noted the back right hand window was shattered, as well as the door hugely dented, the runner board broken and dented. The roof of my car was also dented. ..."*

(my underlining)

26. In cross-examination **Mr Conwell** confirmed receiving an unsigned 2 page typed statement from the defendant before the defendant flew out to South Africa in early December 2013. He transcribed his notes of the defendant's answers during the oral interview he conducted with him on 4 December 2013 in paragraphs 11(a) to (g) of his sworn statement as follows (omitting agreed matters):

**"11. During my interview with Mr Ritsinias on 4 December 2013 he informed me of the following matters relating to the accident:**



***(b) he looked ahead and saw that there was a large truck travelling inbound from Mele towards Port Vila. As he was waiting in the outbound lane to turn left into his property, he considered that he had ample time to turn left as the large truck was approximately 300m away from where he was turning left into his property;***

***(c) he made a left hand turn and 80% of his vehicle was on the coral road shoulder when he felt a huge impact to the rear right side of his vehicle;***

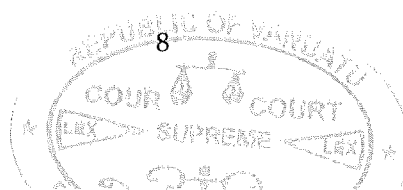
***(d) that approximately 1 metre of his vehicle was still on the roadway at the time of impact. He parked his vehicle and got out to find that a motorcycle rider had impacted him on the right rear door. The bike and the rider were lying on the roadside in front of his gate;***

***(f) that at no time did he see the motorcycle approaching*** however considers that it must have been in front of the tip truck at the time he turned left into his premises but was lost in the view of the front of the tip truck; ..."

(my highlighting)

27. **Mr Conwell** was adamant that he had accurately recorded the defendant's answers to him at their first meeting on 4 December 2013. He accepted there was an inconsistency between his transcribed answers (b) and (c) and part of the above underlined passages in the unsigned typewritten statement provided by the defendant concerning his sighting and the identity of the approaching vehicle and whether he had seen the claimant's motorcycle. Under direct questioning about these inconsistencies, **Mr Conwell** strongly disagreed with the defendant's sworn testify that he had never mentioned seeing a "large truck" or "tip truck" approaching and he never told Mr Conwell about not seeing the claimant's fast approaching motorcycle. Asked if he agreed that the defendant's recollection differed from his own Mr Conwell firmly replied: "No, my record of interview is exactly what the defendant told me nothing less or more".
28. In so far as there is a conflict between the defendant's recollections and his evidence and **Mr Conwell's** evidence I have no hesitation in accepting the direct, objective and contemporaneous written records of Mr Conwell.
29. The defendant's earliest written record of his truthful recollections about the accident are to be found however, in his handwritten police caution statement which was recorded over half an hour on 29 November 2013 several hours after he had been taken to the Police Station from the scene of the accident. The defendant describes the accident in the following words:

***"To the best of what I can recall, I was driving on Mele road and indicated to turn left into the premises known as Vila Marine I slowed down had switched on my indicator. There was a bus behind me and I was concerned and worry that he would try and overtake me. I proceeded to turn left and at the last second a motorbike in a very***





*excessive speed appear in the right hand side of the car crash on the rear right hand side of the car ...”.*

(my highlighting)

30. The particular recollection and concern of the defendant just before executing the left turn is clear from the extract as is the absence of any mention by the defendant of sighting an approaching motorcyclist well before or while executing his left turn prior to the collision except *“at the last second ...”*.

31. **Robert William Gerard Anderson** was the final witness called by the defence as its expert witness. He prepared 2 reports – an original report dated 28 October 2017 and after receiving further documents including the report of the claimant’s expert Ms Miri Schiller, he prepared a supplementary report dated 22 November 2017. In his original report Mr Anderson summarized his findings as follows:

*“I cannot conclude that it is likely that there was some physical impediment to the insured driver’s (defendant) line of sight toward the plaintiff, nor can I conclude that the physical evidence (which includes the photographed scene reconstructions and impact damage to both vehicles) suggest excessive speed on the part of the plaintiff”.*

32. In his supplementary report however, Mr Anderson opined that the evidence presented by Ms Schiller indicates the claimant was travelling at:

*“... a pre-braking speed of 81kph”*

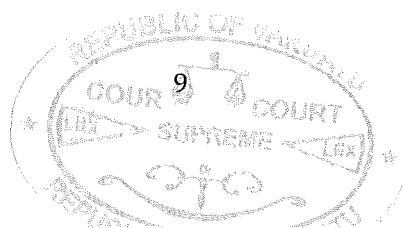
and further:

*“... it is possible to conclude that had the plaintiff been travelling at 60kph, it is likely that there would have been no collision and hence the plaintiff’s choice of speed materially contributed to the causation of the crash”*

and finally:

*“... (the defendant) would not have been able to detect the plaintiff’s elevated speed as he commenced his turn ... (and) ... it is plausible that (the defendant) would not have been able to judge that the gap between his vehicle and the approaching motorcycle was insufficient to safely cross the oncoming lane, if his expectation was that approaching traffic would be travelling at a lower speed”.*

33. On the basis of Mr Anderson’s amended conclusions and given the fact that a collision did occur, I accept that the claimant’s pre-braking speed must have exceeded 60kph which is also what Ms Schiller calculated at 63.3kph and which she accepted under cross-examination *“could be higher than 63kph but not much”*. In re-examination she confirmed her disagreement with Mr Anderson’s *“81kph”* and accepted a pre-braking speed of: *“66 to 70kph”*.



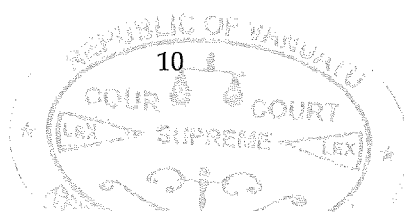
34. **Sections 4 & 5** respectively of the **Road Traffic (Control) Act** [CAP. 29] provides (so far as relevant):

*"Every driver wishing ... to change direction must indicate his intention clearly by ... light signal ... **A driver shall satisfy himself that no danger exists to other road users or himself before carrying out the above operations**".*

*"Every driver must at all times keep his vehicle to the right hand side of the road **particularly so when another road user arrives from the opposite direction ...**".*  
(my highlighting)

The onus of complying with both sections is on the driver who wishes to leave the right hand side of the road or who wishes to change direction from where he is heading. In the present case that driver is the defendant and both sections collectively require him to keep to his right side of the road especially "... *when another road user arrives from the opposite direction*" and, to satisfy himself that "*no danger exists to other road users*" before changing direction.

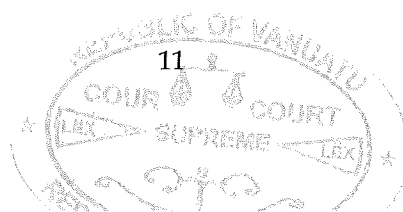
35. In both instances however, it is presumed that "*the driver*" is paying attention and actually sees the approaching or arriving traffic in good time to make the necessary assessments and adjustments to his vehicle and his driving to ensure that "... *no danger exists to other road users*" as a result of "*the driver*" leaving his right hand side of the road by executing a left turn in the face of on-coming traffic.
36. The defendant in changing direction and turning across Mele Road to enter the driveway of his business premises was doing something unusual and potentially dangerous, that is to say, instead of proceeding on his correct side of the road he was changing direction and crossing that side of the road on which vehicles approaching from the opposite direction had the right of way and it was the defendant's duty, first, to clearly signal his intention well in advance and, secondly, to see that no one was endangered by his change of direction. The defendant owed a very high duty of care to other road-users, particularly those arriving from the opposite direction who were entitled to use that portion of the road which he was crossing through.
37. The English case of **Simpson v Peat** (1952) 2 QB 24 bears a striking similarity to the facts of the present case and bears repeating. In that case, the defendant was driving a vehicle at a reasonable speed on a main road approaching a minor road leading off to the right. At the same time and place a motorcyclist was driving in the opposite direction at a reasonable speed approaching the minor road on his left. As the two vehicles approached each other the defendant drove his car to the right intending to turn into the minor road and crossing the path of the motorcyclist, and a collision occurred. The defendant was acquitted by the justices because in their opinion the collision was due to an "*error of judgment*".



38. On appeal, the Appellate Court comprised of five judges returned the case to the justices with a direction to convict the defendant of the offence charged namely, driving without due care and attention. **Lord Goddard CJ** who read the judgment of the Court said at p.28:

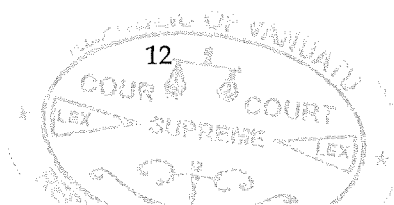
***"The defendant was turning to his off side in a main road cutting across the line of traffic coming from the opposite direction. It was not found that the motorcyclist was driving too fast or that the respondent was confronted with a sudden emergency ..., but in any case it was for him to take care that he could execute the manoeuvre in safety. To use the words of the justices in their finding, he thought he had left room for traffic coming in the opposite direction to get through, when in fact he had not done so".***  
(my highlighting)

39. In the present case, it is not necessary for me to finally determine which expert is correct in his or her estimation of the claimant's pre-braking speed because of my clear and firm satisfaction that the defendant at no time prior to the actual impact observed the claimant's motorcycle approaching on its correct side of the road from Mele and heading towards the defendant's turning vehicle. In other words, whatever the claimant's pre-braking speed might have been, it would have had no effect at all on the defendant's driving.
40. The failure on the defendant's part occurred because he was not keeping a proper lookout for approaching traffic either before or while executing a potentially dangerous manoeuvre of crossing in the path of such on-coming traffic that had the "*right of way*". In my view the duty to ensure that the way was clear and that it was completely safe to execute his left turn lane-crossing was entirely that of the defendant and his driving fell short of the standard of care and skill expected of an experienced and prudent driver. Defence counsel conceded as much at the end of the trial.
41. Despite that concession, counsel submits that based on its expert witness' opinion that the claimant's pre-braking speed was 81km/h and other factors including the unregistered and uninsured nature of the claimant's motorcycle and some historical evidence of the claimant's previous traffic accidents, the Court should find "*contributory negligence by the claimant of 90%*".
42. I do not accept that the claimant's pre-braking speed had anything to do with the accident occurring or that he was contributorily negligent in any material sense beyond the axiomatic fact that he was riding his motorcycle at a reasonable speed on his correct lane at the relevant time and place.
43. In particular, defence counsel submits that "*a vehicle such as a motorbike weighing less than 2 tons should not be travelling at a speed greater than 60kph on the Mele Road*". I disagree. The speed limit of 60kph has no application to a motorcycle which is lighter, faster, and more manoeuvrable than a truck.



Whatsmore a motorist approaching a stationary left-turning vehicle on a main road is entitled to assume that the driver of the turning vehicle has seen his approaching vehicle and will give him way before executing the turn. Counsel also submits that "... a reasonable motorbike rider faced with the same weather and traffic conditions on the morning of the accident would not have been travelling more than 60kph". Again, I disagree. The weather was fine, the road was straight, visibility was good and clear and traffic was light since it was a public holiday. The claimant was driving on his correct lane even at the "*point of impact*" and, at least, he saw the defendant's turning truck albeit at the very last moment as the motorcycle's brake marks indicate.

44. In my view, the claimant braking immediately prior to the collision with the rear driver-side door of the defendant's truck was the only reasonable reaction given the emergency of the situation the claimant was faced with and the need to make a "*split-second*" decision to avert or minimize the impact of the collision. This is commonly referred to as the "*agony of the moment*" principle.
45. On that principle a claimant will not be guilty of contributory negligence if (i) his or her action is a response to a sudden emergency brought about by the wrongful act of the defendant; and (ii) the action is one that a reasonable person faced with that emergency might take. The rule does not help a person who has created the emergency but does excuse a blameless person who, in a state of emergency, does the wrong thing due to a need to make up his or her mind in a hurry: **Hindmarsh v Guthrie** (1930) NZLR 15.
46. In my view the sudden emergency that the claimant was reacting to, was brought about entirely by the wrongful act of the defendant in failing to keep a proper lookout for on-coming traffic and, in that unsighted state, executing a potentially dangerous manoeuvre of crossing the path of the claimant's motorcycle which had the right of way. I do not accept that the claimant in following his proper lane at a speed commensurate with the road conditions and the maneuverability of his motorcycle in any way created or contributed to the emergency or was blameworthy.
47. In **Ng Chun Pui and Others v Lee Chuen Tai and Another** an appeal from Hong Kong, in Privy Council Appeal No. 1 of 1988, the plaintiffs relied on "*res ipsa loquitur*" to establish their claim of negligence against the defendant whose bus had collided with the plaintiff's bus on its incorrect side of the road. The defendant's driver gave evidence explaining how he had lost control of his bus in reacting to a dangerous manoeuvre of a blue car swerving suddenly in front of his bus. The primary judge gave judgment for the plaintiffs and this was reversed on appeal by the Hong Kong Court of Appeal. The Privy Council in dismissing the appeal against the judgment of the Court of Appeal and criticizing the trial judge's application of '*res ipsa loquitur*', said (*per Lord Griffiths*) at p.5:



***“... the trial judge also failed to give effect to those authorities which establish that a (driver) placed in a position of peril and emergency must not be judged by too critical a standard when he acts on the spur of the moment to avoid an accident”.***


48. In light of the foregoing I answer the factual questions earlier posed at paragraph 3 as follows:

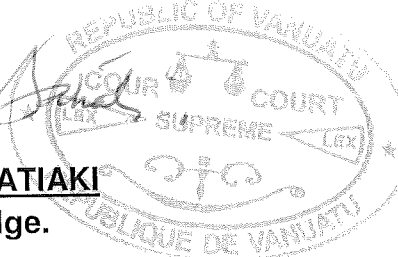
- (i) Unnecessary to determine;
- (ii) No;
- (iii) See answer (ii);
- (iv) No;
- (v) See answer (iv).

49. Judgment on liability is entered against the defendant in the sum of **AUD46,248.37** with general damages to be assessed. The claimant is awarded interest of 5% per annum on the sum awarded and on the general damages yet to be assessed, with effect from 20 August 2014 until fully paid up. The claimant is also awarded standard costs to be taxed if not agreed.

**DATED at Port Vila, this 6<sup>th</sup> day of December, 2018.**

**BY THE COURT**

  
**D. V. FATIAKI**  
Judge.

The seal of the Republic of Vanuatu Supreme Court is circular. It features a central emblem with a scale of justice and a star. The text "REPUBLIC OF VANUATU" is at the top, "SUPREME COURT" is in the center, and "PUBLIQUE DE VANUATU" is at the bottom. The word "LEX" appears on either side of the central emblem.