

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

CIVIL CASE No.286 of 2013

BETWEEN: **MASLEA SCOTT**
Claimant

AND: **REPUBLIC OF VANUATU**
Defendant

Coram: Vincent Lunabek Chief Justice

Counsel: Mr. Saling Stephens for the Claimant

The Solicitor General for the Defendant

Date of Delivery of Judgment: 16th April 2019

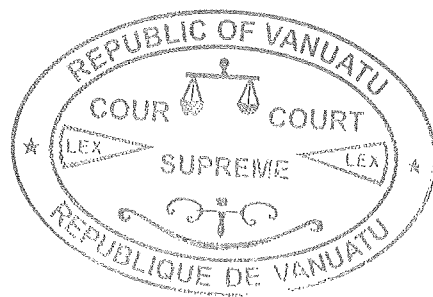
JUDGMENT

Introduction

1. This is a claim for damages. The Claimant was a detainee. While he served his imprisonment sentence, he was assaulted by other detainees. He sustained injuries as a consequence of the assaults. He claimed for damages suffered due to the negligence of the Defendant.

Claimant's Case

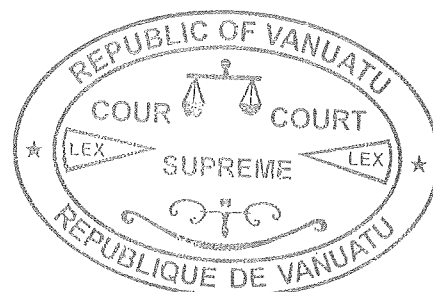
2. In his Amended Supreme Court Claim, the Claimant asserted that:
 - The Defendant owes a statutory duty of care to the Claimant.
 - The statutory duty of care owed to the Claimant was breached when the Claimant was assaulted in 2007, 2008 and 2010.
 - As a result of the breach, the Claimant had suffered damages.



3. The total amount of compensation claimed as a result of the purported damage is Vatu 12, 000, 000.
4. The Claimant had deposed three sworn statements in support of his claim dated respectively 12 December 2013, 29 August 2014 and 30 August 2014. The gist of the Claimant's evidence is that he was assaulted while being in the Correctional Centre. The Claimant asserted that in both occasions in 2007 and 2008, when he was assaulted, correctional officers were present and did not take any steps to stop the assault.
5. The Claimant deposed evidence showing medical reports made on or about 17 December 2007, 3 March 2008, 15 June 2009 and in 2011 in respect to his injuries sustained during the assault in 2007 and 2008. Those medical reports made reference to the Claimant's chronic Temporomandibular Joint (TMJ) (jaw joint) problem and the fracture of the left lunar bone (wrist bone).

Defendant's Case

6. The Defence case is this. It acknowledges that principally, it owes a duty of care to all detainees under custody. This general principal duty of care is envisaged under Correctional Services Act No.10 of 2006. It is the Defendant's case that there is a statutory duty to the Claimant although it asserts that the duty of care was not breached being that the officers were not negligent in carrying out their duties at the relevant dates in which the assaults were purported to have taken place.
7. It is further contended in the Defendant's defence that the injuries sustained by the Claimant emanates through the Claimant's own negligence. The Defendant relies on two sworn statements of Johnny Marango dated 7th October 2014 and 29 October 2014 and a sworn statement from Mr. James Narvot dated 29 October 2014.



Background

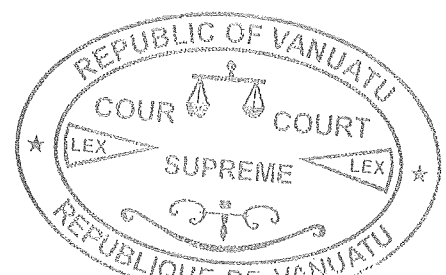
8. On or about 2nd April 2008, the Supreme Court had issued a warrant of commitment after convicting the Claimant for sexual intercourse without consent for a term of 6 years imprisonment.
9. But prior to the Claimant's sentencing and committal, he was under remand at the Correctional Centre at Luganville, Santo since December 2007.
10. On or about 17 December 2007 at around 7.15am the Claimant was assaulted by Mr. Jack Nalau and Mr. Sam Vina, two other detainees. The assault took place at the Claimant's cell. The assault took place when the correctional officers were supervising low risk detainees when they were having their breakfast and were guarding the guard house.
11. On 1 March 2008, the Claimant was assaulted inside the Correctional Centre at Luganville, Santo by detainee Jack Nalau.
12. Medical reports made on the injuries sustained by the Claimant in relation to the assault in 2007, stated that the Claimant had suffered from a Chronic Temporomandibular Joint (TMJ) (jaw joint) problem.
13. Medical report also stated that the Claimant was admitted to hospital on 1 March 2008 having suffered from a punctured wound around his upper part of his right back side sustained during the assault in 1 March 2008.

Issues

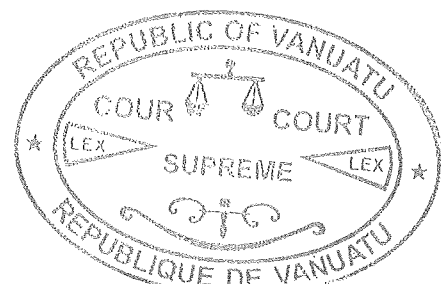
14. The issue in this case is: - Whether or not the state may be liable for the actions taken by detainees on another detainee who was under lawful custody.

Evidence

15. The Claimant filed three sworn statements in support of his claim dated 12 December 2013 (Exhibit C1), 29 December 2014 (Exhibit C2) and 30 August 2014 (Exhibit C3).

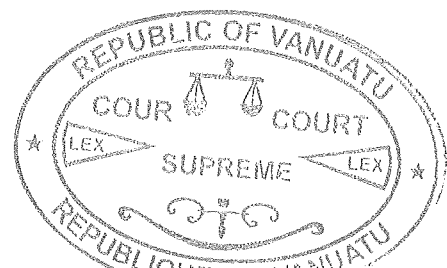


16. The Claimant deposes that he claimed for compensation against the Director of Correctional Services because on 3rd December 2010 at about 8 o'clock at the High Risk Unit in Port Vila, detainee Jack Nalau and four (4) other detainees came to his cell and assaulted him. He sustained injuries on his face as a result. He said the incident happened in the presence of the Correctional officers but they failed to take any actions to stop the fight.
17. On 25th December 2010, he said he was at the High risk unit of the correctional centre in Port Vila and at about 3.00pm o'clock, detainee Jack Nalau and three (3) others assaulted him at the common room of the centre in the presence of correctional officers and they did not do anything to stop the fight.
18. On 30th December 2010, he was at the high risk unit at the correctional centre in Port Vila, outside the laundry area, detainee Jack Nalau and some others again assaulted him in the presence of the correction officers. They did nothing to stop the fight.
19. On 9th November 2011 at about 9.15am in the morning, he said detainee Jack Nalau and others called him outside his cell to go outside. He went outside his cell and they assaulted him in the presence of the correctional officers. They did nothing to stop the fight.
20. In his sworn statement filed 9 August 2014 (Exhibit C2), the Claimant said on 16th December 2007, he claimed damages against the two correctional officers, namely, Danstan and krem because they did not lock the cells of the high risks detainees after lunch hour and at that time, detainee Jack Nalau and Sam Vira came to the low risk unit cell in the other building, entered into female detainees cells. Sam Vira came in first and Jack Nalau followed him. He said he was sleeping profoundly when Sam Vira kicked and assaulted his left hand. It was broken.
21. He was admitted to the Northern District Hospital. He provided a medical certificate showing that his left wrist (hand) was fractured. The two correctional



officers just stood watching. They did nothing to stop the assault. They assaulted him in the cell and pulled him outside the cell about 40 metres. Time was about 7.15am. Other detainees only stopped the assault on him.

22. Johnny Marango is the first defence witness. He is the Director of the Correctional Centre since December 2010. He filed a sworn statement on 7 October 2014 (D1). He is responsible for the correctional centre and the managers are responsible daily. He is located at the main office in town. He referred and confirmed the record of daily report of detainees. There were forms like the one shown in Port Vila and Luganville. What he has was a copy of occurrence book. They maintained a unit operational book register. It was kept and filed in by duty officers each day. Duty officers noted what happened each day and brought to his attention. Exhibit JM8 and JM9 were made of the information he received from the centres. There were two formats – one copy of occurrence book “JM2” is for the staff use. “JM8” is the main one for the centres – occurrence book.
23. He was asked he failed to disclose the occurrence book of December 2010 for the centre. He said he did not agree.
24. James Narvot is the second witness of the Defendant. He is the senior correctional officer with 8 years experience. He was asked about the occurrence book and he answered that the occurrence book is to record duty incident whether big or small time, and day and hours. The occurrence book is a diary kept by each duty officer every day and then record day activities. He worked 12 hours and 7 to 7 every day. The occurrence book records activities incidents and events occurring 7 days to 7.
25. He was asked about 3 December 2010 what was recorded on that day. He said his officer working under his responsibilities recorded events and what happened each day but he said on 3 December 2010, he was on duty.
26. He said what was in the occurrence book of 2010 was what was recorded. He did not know any other information. He was shown JM1, he said he never saw this before. He was shown “JM2” he said it was the photocopy of a diary attendance

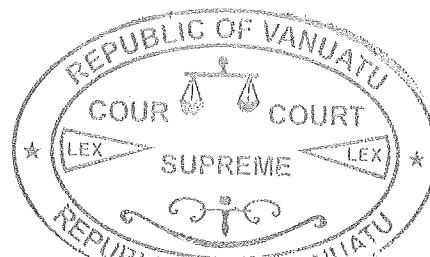


book. They used the form at the gate office, one signed it before getting inside the office. They had the format before in 2006. Today they used the diary supplied by the head office.

27. It was suggested he did not record properly the activities of 2010. He denied and said that was the record. On 3 December 2010 and 25 December 2010 they made copies of the diary of the time they worked. He did not work on 30 December 2010. He did not know of the incident leading up to this case. He has no idea about the incident leading up to this case.
28. In his re-examination, he clarified that he signed the statement filed in this case. He knew that there is a case but he did not see any incidents or denied any such incidents happened in the cell that he saw. He confirmed that Mr. Saling of counsel showed to him attached to his statements and they were copies of diaries recorded of activities, incidents, times and date. The diary is for a full shift. It is for everyone who worked on that day. He signed the statement (diary) as he agreed with it. He has the copy of pages of diaries of 3 December 2010 and 25 December 2010 but he did not have for 3 December 2010.

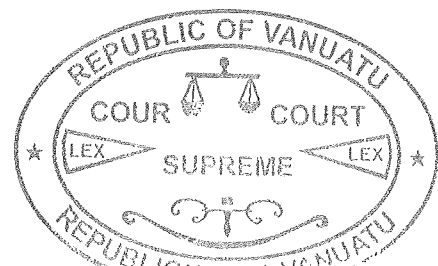
Findings

29. On the basis of evidence, the following is found and accepted as facts.
- a) Detainee Jack Nalau was transferred from Port Vila correctional services to Luganville correctional centre on 28 August 2007 (see "JM6").
 - b) Over the period in November 2007 to February 2008, Jack Nalau continued to escape from Luganville correctional centre (see "JM7").
 - c) On 13th March 2008, Jack Nalau was transferred from the Luganville correctional centre to Port Vila correctional centre (see "JM8").
 - d) The claimant was remanded at the Luganville correctional centre on or about 2007. On 15 December 2007, the claimant escaped from the Luganville Correctional Centre as confirmed by "JM1" annexed to the statements of Johnny Marango, Director of correctional service department. On 16 December 2007, at 07.10 am, two detainees, Jack



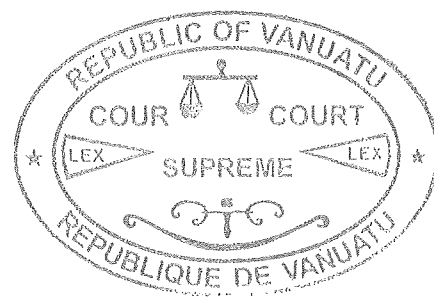
Nalau and Sam Vira assaulted the Claimant at the claimant's cell in the remand apartment. The fight broke out when Officer Danstan Toa was supervising the detainees' breakfast and Officer Keren Seth was in the guard house. The Claimant confirmed in his evidence in cross examination that there were two officers at that time but there were plenty detainees and when the incident happened there was need for more officers to stop the incident.

- e) The fight broke out because the Claimant escaped on 15 December 2007 at night and returned again. Detainees Jack Nalau and Sam Vira and other detainees assaulted the Claimant inside his cell. At the time of the incident, the correctional officers approached the scene of the fight but the Claimant run outside his cell and Jack Nalau and Sam Vira were chasing him, one officer (Danstan) run after the claimant to prevent him from being hurt by the two detainees. At around 7.53 am the claimant was taken to the hospital by the correctional supervisor on Santo (see annexure "JM2" to the statement of Johnny Marango, Director of Correctional Services Department filed 8 October 2014).
- f) The claimant started to serve his detention term at Luganville Centre, Santo, on 15 February 2008, the claimant and detainee Jack Nalau escaped from high risk unit. They both got drunk and they returned in the centre again. On 1 March 2008 at about 12.00 pm, while the correctional officers were having lunch, they heard loud noises from the high risk unit. They attended and saw detainee Jack Nalau was assaulting the claimant. They took the claimant to the Northern District Hospital for treatment. The medical certificate confirmed that the Claimant was admitted with a puncture wound but recovering well and stable (see "JM1" annexed to Johnny Marango's statement filed 8 October 2014).
- g) On 31 December 2007, the Claimant escaped from Luganville correctional centre (see "JM1"). On 1 January 2008, the Claimant escaped and returned on the same date (see "JM2"). On 18 April 2008, the Claimant



escaped and returned on 4 June 2008 (see "JM2"). In the undated Police statement of witness Kelly Alaistair, who is a correctional officer on Santo, he stated that the Claimant escaped from the Luganville correctional centre from 31 December 2007, 18 April 2008 and 19 October 2008 (see "JM3"). On 16 June 2009, Obi Ken Molu, who is the correctional officer at Luganville correctional centre made a witness statement at the police in Luganville regarding the Claimant's escapes (see "JM4"). On 9 July 2009, the Claimant was transferred from Luganville correctional centre to Port Vila correctional centre (see "JM5").

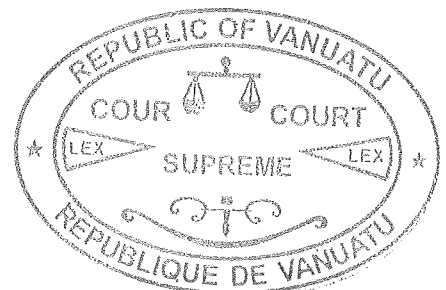
- h) The claimant was sentenced to 6 years imprisonment for the offence of sexual intercourse without consent on 2 April 2008 and his sentence was effective from 15 February 2008. The claimant went for further medical check-up at Luganville Medical Centre on 9 April 2008.
- i) The claimant escaped his lawful custody on 17 July 2008. He was recaptured on 23 October 2008.
- j) On 29 June 2009, a recommendation was made by those responsible to transfer the claimant to Port Vila Correctional Centre for close supervision for the following reason:-
 - He can sometimes confuse officers;
 - When in the correctional centre, he share the detainees' food to his family during their visitation on weekend.
 - When going out to Banban for firewood cutting, he just went off to his residence and visit his wife.
 - He is not cooperating with his fellow inmates.
 - Assault inside the centre assault another fellow inmate.
 - Re-classified to medium risk.
- k) The Claimant was transferred to Port Vila correctional centre to serve his sentence on 9 July 2009. On 3 December 2010, the claimant was in the Port Vila correctional centre. Detainee Jack Nalau also was transferred to



Port Vila correctional centre. But they are each locked in separate cells of the high risk unit. The occurrence book kept by the duty officers did not record any assault occurring on 3 December 2010, 25 December 2010 or 31 December 2010.

- l) The claimant has difficulty to show any assault on him in 2010. The claimant's best answer was that he was basing his claim and damages he sought on the incidents of 2007 and 2008. There is no incidents of assaults occurring in 2010. There is no evidence to that effect.
- m) Despite the question and challenges by Mr. Stephens of Counsel on the occurrence book, and the activities recorded in the occurrence book, Johnny Marango maintained his evidence that on 2010, there was no incident of assaults on the claimant at the Correctional centre at Port Vila as the claimant alleged in his claim and statements. Mr. Narvot who was on duty on 3 December 2010 and 25 December 2010 confirmed that there was no incident of assault as alleged by the claimant. On 3 December and 25 December 2010, Narvot was on duty. As to 31 December 2010, Mr. Narvot said he was not on duty at that date. However, the occurrence book and the records of activities were accurate and did not record any of such event of assault as alleged by the claimant. On the strength of the evidence, there were no records of assaults as alleged by the claimant at the Port Vila correctional centre on 3 December 2010, 25 December 2010 and 31 December 2010. This finding of no incident of assaults on the Claimant is confirmed by the material attached to his sworn statement of 13 December 2013 and 29 August 2014 and in particular the two (2) medical report dated 19 July 2010 and 01 December 2010. The medical reports were issued by Dr. Nelson Tanghwa (Dental Surgeon) referred to chronic problem (injuries) and he the Claimant sustained from 2007 and 2008. There was no report of incident of assaults on the Claimant in 2010.

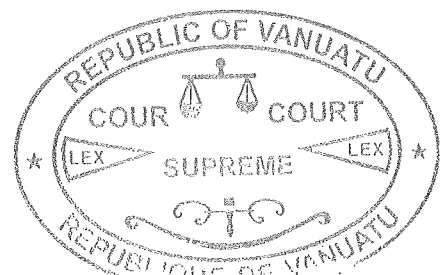
30. The summary of my assessment of facts are as follows:-



- (a) On or about 16 December 2007 at around 7.15am, the Claimant was assaulted by two other detainees, namely Jack Nalau and Sam Vira. The assault took place at the Claimant's cell. The assault took place when the correctional officers were supervising the low risk detainees. There were two correctional officers at that time. One officer supervised the low risk detainees when they had breakfast and the other officer was guarding the guard house. This was confirmed by the Claimant in his cross-examination when he answered to a question relating to this issue that there should be more correctional officers to stop the assault incidents.
- (b) At the time of incident on 17 December 2007, correctional officer, Dansatan Toa ran toward the Claimant to protect him from the assault by the two detainees. It is a normal reaction by a correctional officer in his duty toward the detainee (Claimant). I accept that evidence.
- (c) On 1 March 2008 at about 12.00pm, while the correctional officers were having lunch, they heard noises from the high risk unit. They attended and saw detainee Jack Nalau was assaulting the Claimant. They took the Claimant to the Northern District Hospital for treatment. It is a fact that the daily routine program at the Luganville correctional centre states that at 12.00pm, all detainees on locked down had been adhered to. The evidence was given to the effect that after placing all detainees on lock down the officers attended to have their lunch however overheard the commotion that resulted with the Claimant having sustained injuries.
- (d) There was no assault involving the Claimant in 2010. There was no evidence in support. All evidence including the Claimant's support the finding that there was no assault on the Claimant detainee in the correctional services centres in 2010.

The Law

31. The relevant statutory legislation applicable in this matter is the Correctional Services Act No. 10 of 2003 ("the Act"). Sections 10 (b) (c) (d); 14 (a) (b) and (c);



20 (1) (2) (3) (4) and (5); 65 (1) (2) and (3) are the relevant provisions. They provide as follows:

Subsection 10 (b) (c) (d) of the Act states:

A correctional centre manager has the following functions:

- (b) the responsibility for the control, supervision and general administration of the correctional centre to which he or she is appointed as manager; and*
- (c) the responsibility for the safety and security of the detainees and any person lawfully in the correctional centre and of the correctional centre itself; and*
- (d) the responsibility for ensuring order and discipline in the correctional centre; and...*

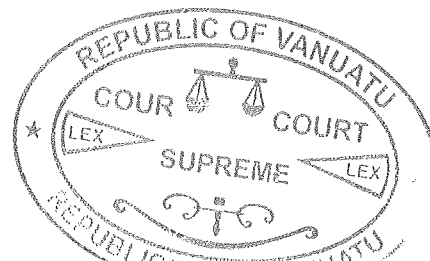
Section 14 of the Act states

A correctional officer has the following functions:

- (a) to ensure the safe custody and welfare of a detainee under his or her control; and*
- (b) to comply with and implement any rules made by the Director or correctional centre manager; and*
- (c) such other functions as are conferred on him or her under this Act or any other Act.*

Section 20 of the Act states:

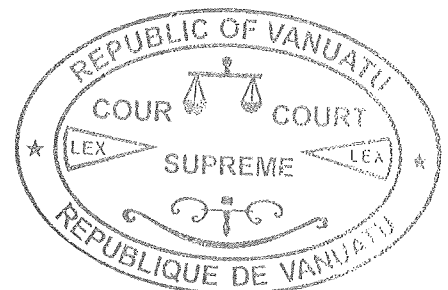
- (1) The Director has legal custody of every detainee and a correctional centre manager shall be responsible for the day to day care of every detainee in his or her centre.*
- (2) Legal custody of a detainee under subsection (1):*



- (a) commences as soon as the detainee is received within the correctional centre or into the custody of a correctional officer; and
 - (b) is to continue while the detainee is confined in the correctional centre.
- (3) If a detainee is for any reason outside the correctional centre in the custody or under the control or supervision of any other authorised person under this Act, that authorised person shall have the powers and obligations of a correctional officer in dealing with the detainee.
- (4) If a correctional officer or an authorised person having custody or control or supervision of any detainee outside the correctional centre is:
 - (a) ill or incapacitated; or
 - (b) for any other reason, that custody or control or supervision ceases;the detainee must return to the correctional centre.
- (5) If the detainee fails to return to the correctional centre, he or she is deemed to have escaped from lawful custody, and is subject to criminal charge.

Section 65 of the Act states:

- (1) There shall be no liability against the State, the Director, a staff member or against any other authorised person, to recover damages for any act, matter or thing done or omitted to be done in good faith arising from a breach of the provisions of this Act or any other Act dealing with the correctional service system.
- (2) A person is not exempted from liability under subsection (1) for any act or omission that constitutes bad faith or gross negligence on the part of that person.

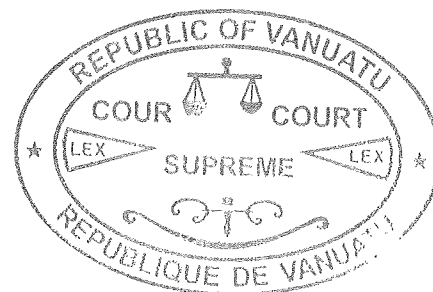


32. The case of **X (Minors) –v- Bedfordshire CC [1995] UKHL 9 (29 June 1995)** is advanced by the Defence to be of good case authority on the issue raised in this case. The Claimant's Counsel appeared to agree with the Defendant's Counsel. They both made submissions relying on that case. The relevant part of that judgment of the House of Lords (English) was in the judgment of Lord Browne – Wilkinson when he said:

The question is whether, if Parliament has imposed a statutory duty on an authority to carry out a particular function, a plaintiff who has suffered damage in consequence of the authority's performance or non-performance or that function has a right of action in damages against the authority. It is important to distinguish such actions to recover damages, based on a private law cause of action, from actions in public law to enforce the due performance of statutory duties, now brought by way of judicial review. The breach of a public law right by itself gives rise to no claim for damages. A claim for damages must be based on a private law cause of action.

Private law claims for damages can be classified into four different categories. viz:

- (A) Actions for breach of statutory duty simpliciter (i.e. irrespective of carelessness).*
 - (B) Actions based solely on the careless performance of a statutory duty in the absence of any other common law right of action.*
 - 3. Actions based on a common law duty of care arising either from the imposition of the statutory duty or from the performance of it.*
 - 4. Misfeasance in public office, i.e. the failure to exercise, or the exercise of, statutory powers either with the intention to injure the plaintiff or in the knowledge that the conduct is unlawful..*
- (B) The careless performance of a statutory duty - no common law duty of care.*



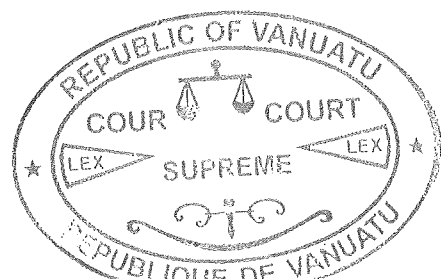
This category comprises those cases in which the plaintiff alleges (a) the statutory duty and (b) the "negligent" breach of that duty but does not allege that the defendant was under a common law duty of care to the plaintiff. It is the use of the word "negligent" in this context which gives rise to confusion: it is sometimes used to connote mere carelessness (there being no common law duty of care) and sometimes to import the concept of a common law duty of care. In my judgment it is important in considering the authorities to distinguish between the two concepts: as will appear, in my view the careless performance of a statutory duty does not in itself give rise to any cause of action in the absence of either a statutory right of action (Category (A) above) or a common law duty of care (Category (C) below).

In my judgment the correct view is that in order to found a cause of action flowing from the careless exercise of statutory powers or duties, the plaintiff has to show that the circumstances are such as to raise a duty of care at common law. The mere assertion of the careless exercise of a statutory power or duty is not sufficient.(underline my emphasis).

(C) *The common law duty of care*

In this category, the claim alleges either that a statutory duty gives rise to a common law duty of care owed to the plaintiff by the defendant to do or refrain from doing a particular act or (more often) that in the course of carrying out a statutory duty the defendant has brought about such a relationship between himself and the plaintiff as to give rise to a duty of care at common law. A further variant is a claim by the plaintiff that, whether or not the authority is itself under a duty of care to the plaintiff, its servant in the course of performing the statutory function was under a common law duty of care for breach of which the authority is vicariously liable.

Mr. Munby, in his reply in the Newham case, invited your Lordships to lay down the general principles applicable in determining the



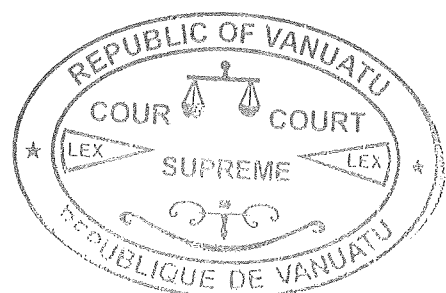
circumstances in which the law would impose a common law duty of care arising from the exercise of statutory powers or duties. I have no doubt that, if possible, this would be most desirable. But I have found it quite impossible either to detect such principle in the wide range of authorities and academic writings to which we were referred or to devise any such principle de novo. The truth of the matter is that statutory duties now exist over such a wide range of diverse activities and take so many different forms that no one principle is capable of being formulated applicable to all cases. However, in my view it is possible in considering the problems raised by these particular appeals to identify certain points which are of significance.

1. Co-existence of statutory duty and common law duty of care.

It is clear that a common law duty of care may arise in the performance of statutory functions. But a broad distinction has to be drawn between:

1. cases in which it is alleged that the authority owes a duty of care in the manner in which it exercises a statutory discretion:
2. cases in which a duty of care is alleged to arise from the manner in which the statutory duty has been implemented in practice.

An example of (a) in the educational field would be a decision whether or not to exercise a statutory discretion to close a school, being a decision which necessarily involves the exercise of a discretion. An example of (b) would be the actual running of a school pursuant to the statutory duties. In such latter case a common law duty to take reasonable care for the physical safety of the pupils will arise. The fact that the school is being run pursuant to a statutory duty is not necessarily incompatible with a common law duty of care arising from the proximate relationship between a school and the pupils it has agreed to accept. The distinction is between (a) taking care in exercising a statutory discretion whether or not to do an act and (b)

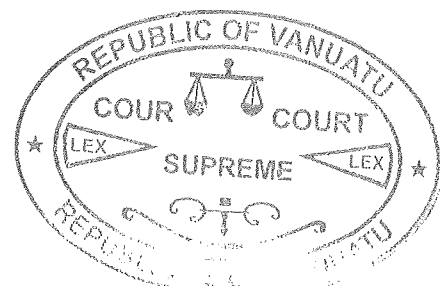


having decided to do that act, taking care in the manner in which you do it.

33. I set out the submissions of both parties below.

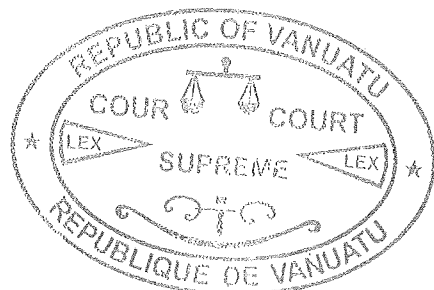
Submissions

34. Mr. Stephens submitted on behalf of the Claimant that the provisions of section 20 of the Act imposes a duty of care on the correctional centres from the time a detainee is received within the Correctional Centre up until the time the detainee is officially released from the custody of the correctional centres. Mr. Stephens said from both the evidence of the Claimant and the Defendant, there is undoubtedly no dispute that the Claimant was assaulted while in lawful custody. He therefore submitted that the above issue will be answered by this Honourable Court affirmatively and to find the Defendant liable for the actions and/or omissions of the Correctional officers and to award costs against the Defendant.
35. Mr. Stephens in his supplementary submissions filed 6 February 2015 further submitted that section 65 of the Act had no application in this case because the various assaults complained of, were done by third parties who were also detainees serving their respective prison sentence terms in the correctional centres of Santo and Port Vila under the vicarious liability.
36. He submitted further that the (English) case of **X (Minors) –v- Bedfordshire CC [1995] 2 AC 633**, Lord Wilkinson offered general guide as to when a public authority could be liable in the tort of negligence in respect of the performance of a statutory function. The requirement was that the private law conditions for the existence of a duty of care must be satisfied and he set them below and submitted in respect to the circumstances of this case:
37. Firstly, that the Defendant ought to have foreseen that the Claimant must suffer injury or damage if the Defendant act negligently.
38. Mr. Stephens illustrated his point in this way. In the evidence, the Claimant says on 16th December 2007, officers Danstan and Krem failed to lock the cells to the

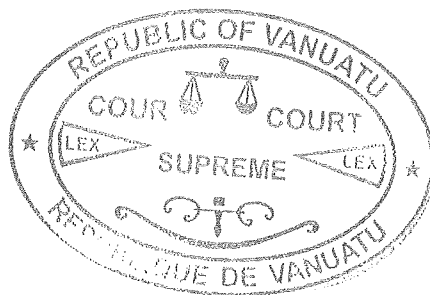


high risk unit, this enabled detainees Jack Nalau and Sam Vira to skip out from their cells and entered upon the Claimant's cell at the low risk unit and assaulted the Claimant, thereby causing a fracture to his left hand.

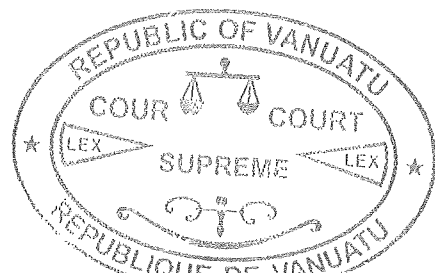
39. He also said that the Claimant gave evidence that in another incident on 1st March 2008, Officers Andrew Nalau and Vuti Kelly allowed detainee Jack Nalau to escape from the centre and returned in the morning intoxicated with alcohol liquor without any discipline imposed on him. On the same day, the Claimant says the said officers namely Andrew Nalau and Vuti Kelly again allowed detainee Jack Nalau, the second time to go out of the correctional centre and returned sometime later with a bottle of alcohol liquor and was allowed free entry back into the centre which consequently caused Jack Nalau to enter upon the Claimant's cell at the low risk unit and plunged a sharp weapon from behind his back into his abdomen which resulted in a life threatening injury.
40. Second, it is the proximity of the Claimant and the Defendant – the Claimant said at the relevant dates of the various assaults he sustained, he was still serving his prison term and the Defendant was the public authority which was imposed by parliament to be responsible for the day to day care of the Claimant which never happened in this matter.
41. The third requirement is that as consequences of items (a) and (b) above, it is just and reasonable to impose a duty of care on the Defendant a duty of care on the Defendant due to the negligent acts of its servants and agents.
42. The Defendant submitted that the Claimant's pleadings are defective in its paragraph 5, 9, 12, 15, and 18. These paragraphs state that the correctional officers owed the Claimant a statutory duty of care but that duty was breached. However, the Claimant's pleadings do not go as far to state that in the course of carryout a statutory duty the Defendant has brought about such a relationship between himself and the Claimant as to give rise to a duty of care at common law.



43. The Defendant referred and relied on the judgment of the House of Lords (English) **X (Minors) –v- Bedfordshire CC [1995] UKHL 9 (29 June 1995)** where Lord Browne Wilkinson ruled the correct view to be that in order to find a cause of action flowing from the careless exercise of statutory powers or duties, the Claimant has to show that the circumstances are such as to raise a duty of care at common law. The mere assertion of the careless exercise of a statutory power or duty is not sufficient.
44. The Defendant also submitted that the Claimant in his pleadings at no stage purport to draw the Court's attention to a purported fact that the circumstances of the correctional officers duty was one that gives rise to a duty of care at common law. The Defence said the Claimant failed to establish that the Defendant owes a duty of care to the Claimant and that that duty of care was breached and that the breach of that said duty has caused damage to the Claimant.
45. The Defendant pointed out and submitted that on the evidence, he Claimant deposes facts to the extent that he was assaulted in his cell and that the assault continued outside of his cell toward the correctional centre office. It is not disputed that at the time when the Claimant said he was assaulted on 16 December 2007, the officer on duty was supervising detainees who were having their breakfast that morning and that the other officer was at the guard house. The Claimant responded that there should be more officers to look after the detainees since there were not enough officers to prevent other assault from taking place. The Defendant further pointed to the evidence of the Claimant in cross-examination that the fact that the officer was supervising other detainees who were having breakfast it was a duty that they have undertaken to those detainees who are also lawfully under their care and the Claimant repeated his answers that there should be more officers to look after the detainees since there were not enough officers to prevent the assault from taking place. The Defendant pointed out and submitted further that on the incident of assault on the Claimant on 16 December 2007, the evidence of the Defendant established also that a correctional officer (Danstan Toa) had actually run towards the Claimant to shield him from other detainees who assaulted the Claimant.

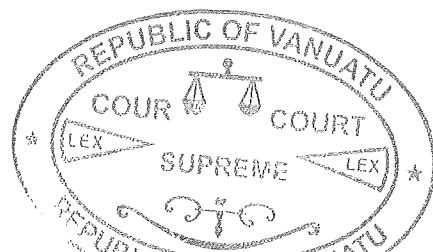


46. In respect to the assault that happened on 1 March 2008, the Defendant gave evidence that the correctional officers were having lunch, they heard noises that when they attended to the scene where the noises came, they noticed the Claimant was assaulted by another detainee, Jack Nalau. The Defendant said that the daily routine program at the Luganville correctional centre was at 12.00pm, all detainees are locked down and that was what happened on 1 March 2008 at 12.00pm. The Defendant submitted therefore that on 1 March 2008 the duty to place detainees on locked down at 12.00pm had been adhered to and it was during their lunch time that they overheard the commotion that resulted with the Claimant having being sustained injuries. The defence referred to the provisions of section 65 of the Act and submitted that there is no suggestion by the Claimant through evidence and or by way of pleadings to assert that the Defendant's officers had undertaken their duties in bad faith or by way of gross negligence. The Defendant contended that there was no evidence adduced by the Claimant's cell was deliberately open that Mr. Nalau had access to confront the Claimant and to assault him. The Defendant submitted also that there was no evidence by the Claimant to suggest that the Defendant's action was so unreasonable that a reasonable person could have drawn an Inference to the possible breach of duty. The Defendant submitted further that the duty performed by the officers in light of the factual evidence placed before the Court, would suggest from a reasonable person point of view that such duty was undertaken within the expected manner.
47. The Defendant submitted further that the relationship between the officers of the correctional centre and detainees is one that gives rise to the Defendant having owing a duty to the Claimant for reasons that the legislation gives the Defendant a positive duty to care for those in custody. However, the Defendant submitted that at no time in the circumstances of the Claimant's case was that duty been breached.
48. On the causation, the Defendant submitted that the evidence adduced established that at the relevant times when the Claimant was assaulted by other detainees, the correctional officers where supervising other detainees who were either having breakfast or the Claimant was such time required to be in lockdown. In such



circumstances it was not foreseeable that the correctional officers' unprovoked attendance to other duties could have been caused the injuries in which the Claimant has sustained. The Defendant referred and relied on a passage of a judgment in **Bonnington Casting Ltd –v- Wardlaw [1956] AC 613** where the Court held to that effect.

49. The Defendant submitted also that although the Defendant has a statutory obligation to take care of the Claimant while in custody, any injury that may have arose in his case must be connected to actions of correctional officers that tantamount to him sustaining injuries. The Defendant said there is no evidence establishing a link between the non-action of correctional officers and the injuries sustained by the Claimant. The Defendant said the evidence adduced by the Defendant established the correctional officers at the time when the Claimant was assaulted have undertaken their responsibilities as what a reasonable person could have construed. The Defendant further submitted that it is unforeseeable that while the Claimant will be under the care of the Defendant it is highly that any possible damage suffered by the Claimant would arise from the conduct of the Defendant under section 14 (a) of the Correctional Services Act No.10 of 2006. The Defendant further submitted that it may suggested to the contrary that any damage arising within the lawful custody may most probably arise from the own conduct of the detainee himself for example while his sentence decided to abscond from lawful detention. In the circumstance, the Defendant submitted that the causation of the Claimant's injury is too remote from the conduct of the Defendant in undertaking their duties as envisaged under the Act.
50. Finally, the Defendant referred and relied on the provisions of section 26 (2) of the Act which provide that a detainee who assaults any other person including a detainee, commits a serious offence is liable to be punished as envisaged under section 32 (2) of the Act. The Defendant submitted that the provisions of section 26(2) places the burden of responsibility of such offences on the detainees themselves who have committed those offences. The Defendant relied on the (English) case of **Ellis –v- Home Office [1953] 2 ALL ER 149**. The Defendant further submitted that the proposition that although being a prisoner under the

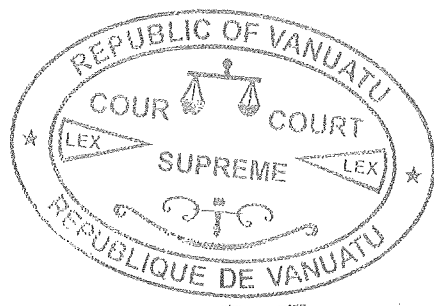


lawful custody and having sustained injuries while under lawful custody, that does not in itself entitle a detainee to be successful in an action against the state but that such injuries caused must be established to the extent that it occurred due to the negligence of the offices concerned.

51. In the present case, the Defendant said the circumstances show that the proper supervision and the duty undertaken at the time when the Claimant was assaulted at the correctional centre in Luganville Santo in December 2007 and March 2008 being that one of the officers was supervising the low risk detainees having their breakfast while the other officers was at the watch tower and further that the correctional officers clocked down all the cells and while they were having lunch, the incidents of assaults occurred. The Defendant said these facts do not draw any inference as to what extent the officers' actions were negligent so as to lead to the assaults on the Claimant.

Considerations and applications of law in the circumstances of this case

52. The central issue posed in this case is whether or not the state is liable for failure to take due care to protect detainees in their charge for being injured by other detainees.
53. This is the first case of its kind in this jurisdiction. I am guided and I rely on other commonwealth case authorities when they are relevant and persuasive.
54. The law of tort offers a range of remedies for wrong done to prisoners. That is at least the position in theory. More generally, there has been a retrenchment in judicial thinking in regard to the tort of negligence over the past decade as reflected in the cases such as in **X (Minors) –v- Bedfordshire CC [1995] UKHL 9 (29 June 1995)** and an Irish Supreme Court decision in **Glencar Explorations plc –v- Mayo County Council (No.2) [2002] 1IR84**. To establish a duty of care in any case, detainees (Claimants) now have to show, in addition to proximity of relationship and foreseeability of damage, that it is just and reasonable to impose such a duty.

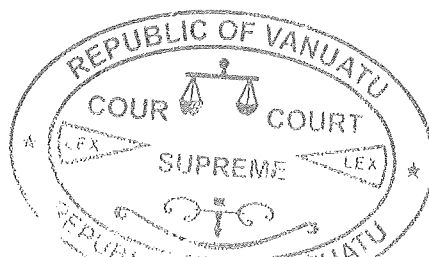


55. There are, however, other developments which encourage courts to be somewhat were sympathetic to prisoners' claims. The first is that, our Constitution is vertical in its application as opposed to horizontal application. It envisages the vindication of constitutional rights against the state, its servants and agents guilty of breaching the rights in question. The Court of Appeal in **Francois –v- Ozols [1998] VUCA5; Civil Appeal Case 155 of 1996 (25 June 1998)** stated the vertical application of the Constitution in this way:

"The opening words of Article 5 are critical to the understanding of the nature of the fundamental rights and freedoms that are guaranteed. The words "The Republic of Vanuatu recognizes..." are not apt to create new private rights and obligations between individuals. The words are a covenant by the Republic to all persons (subject only to a qualification in respect of non-citizens) that in its relationship with them the Republic will recognize the fundamental rights and freedoms set out in Article 5. The provisions of Article 6 provide the means by which compliance by the Republic can be enforced

The purpose of Article 5 is to protect the individual against arbitrary or unjust treatment by the organs of government through which the affairs of the Republic are administered. The protection of private rights between individuals, as opposed to the protection of rights between the individual and the Republic, is ensured by other provisions of the Constitution, namely the provisions of Chapter 4 that establish Parliament to make laws for the peace, order and good government of Vanuatu, the provisions of Chapter 7 that establish the Executive to implement those laws, and the provisions of Chapter 8 which establish the Judiciary to enable individuals to enforce them.

56. Moreover, if a claim of such vindication does not fit into the traditional repertoire of torts or if a particular tort is "basically ineffective" in providing vindication, then the Court can make an award of damages in order to ensure that the right is effectively vindicated: See **Koilo –v- Public Prosecutor [2010] VUCA 22; Criminal Case 20 of 2008 (16 July 2010)** in July 2009, Koilo filed a Constitutional application (unreported) seeking damages for violation to his constitutional rights against the State Republic arising from the assaults – Koilo was a detainee with records of escape from lawful custody. The police took him out of the Correctional Services



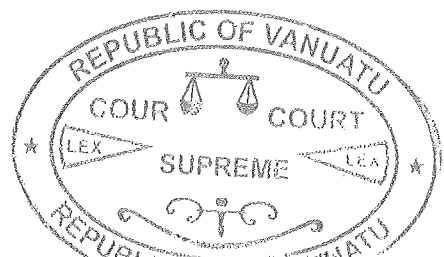
centres into the police custody and assaulted him. Koilo sustained very serious injuries on his body and he was almost unable to attend his appeal before the Court of Appeal. In August 2010, the Court of Appeal was advised that Koilo's Constitutional Application has been settled with the State paying Mr. Koilo damages in a sum of money. Koilo was sentenced taking into account the violations against his rights committed by servants or agents of the State.

57. The Koilo's case reflected the Vanuatu Courts invoking the need to protect the dignity of detainees from an oppressively controlling and intensive correctional services centres regime of inspections.
58. Before I look at the particular case, a few observations are in order.
59. The first is perhaps an obvious one: prisons are dangerous places and some prisoners are dangerous people. As was pointed out in the decision of the High Court of Australia in **New South Wales V.Bujdoso [2005] HCA 76**, at paragraph 44:

"It is true that a prison authority, as with any other authority, is under no greater duty than to take reasonable care. But the content of the duty in relation to a prison and its inmates is obviously different from what it is in the general law-abiding community. A prison may immediately be contrasted with, for example, a shopping centre to which people lawfully resort, and at which they generally lawfully conduct themselves. In a prison, the prison authority is charged with the custody and care of persons involuntarily held there. Violence is, to a greater degree, often on the cards. No one except the authority can protect a target from the violence of other inmates. Many of the people in prisons are there precisely because they present a danger, often a physical danger, to the community. It is also notorious that without close supervision some of the prisoners would do grave physical injury to other prisoners."

60. The second observation is that concern for the dignity and liberty of prisoners is a factor telling against an overly protective regime of searches, scrutiny and control. In **Creighton –v- Ireland [2010] IESC 50**, Finnely J stated:

"Prisons may, as an inevitable consequence of the character of persons detained, be dangerous places. Prisoners are entitled to expect that authorities would take reasonable care to protect them from attack by fellow prisoners. What is reasonable, will as always, depend on the circumstances. As the cases recognise, prison



authorities may have to tread a delicate line between the achievement of the objective of protecting the safety of prisoners and the risks of adopting unduly repressive and inhumane measures. They must balance the protective function and possible demand for instructive searches against the need to permit prisoners an appropriate degree of freedom and movement and human dignity."

61. The third, and final observation is that each case will depend on its very particular circumstances. Among the questions the courts ask are the following:

Was the victim of the attack a likely target? Had he or she informed the authorities of any particular danger from a particular individual or individual or was he or she a likely target for other reasons (such as the nature of the offence with which he or she has been charged or of which he or she has been convicted)?

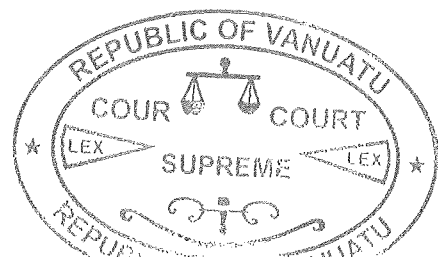
What weapon was used? Is it one that ought not to have been in a prison or one the use of which the authorities could have done nothing realistically to prevent?

What was supervision regime? Was it adequate to prevent attacks of this kind? Was it carried out on the day in question?

Was the design of the prison premises such as to expose prisoners to the risk of attacks? Against the background of the particular design, was the organisation of activities in the prison such as to expose prisoners to such risk?

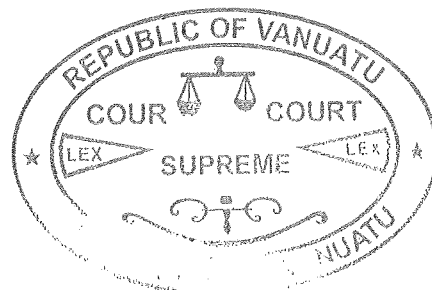
Was the response of the prison officers to the attack, once it had commenced, adequate? Should the risk of a slow response have been anticipated by better organisation of the prisoners' activities?

62. Coming back to the circumstances of the present case, Mr Maslea Scott was assaulted twice while he was remanded and detained at the custody of the correctional officers. I consider separately the two assaults, on the Claimant.
63. The first assault happened on the 16 December 2007 at the Luganville Correctional Centre about 7:15am, the Claimant was remanded at the Luganville Correctional Centre waiting for his sentence. He was sentenced for 6 years



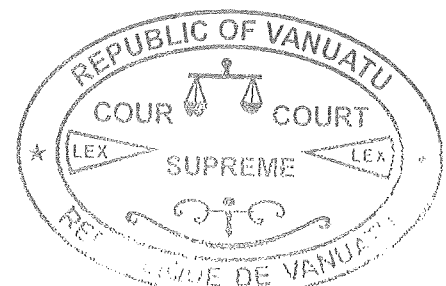
imprisonment sentence on 2nd April 2008. He was in remand at the lower risk Unit which is in the other building from the high risk unit detainees on. On 15th December 2007, the claimant escaped at night from his remand and returned again. On 16th December 2007, at 07:10am, two detainees of the High Risk Unit, Jack Nalau and Sam Vira come to the lower risk unit and assaulted the Claimant in his cell in the remand department. He was sleeping when Sam Vira kicked him and broke his left hand. The two detainees kicked him on his left hand and right knee. They kicked him on his left and right rip. He sustained injuries on his body. His face was swollen and he spat blood. The detainee only stopped the fight. The Claimant asked the supervising officer Mr. Obi Ken to take him to hospital for medical treatment. Mr. Obi ken took the Claimant to the Northern District Hospital for treatment. The Claimant was admitted in the hospital and got treated. The Claimant claimed damages against the Correctional Officers because they failed their duty of care toward him. The Claimant accepted that there were just two Correctional Officers, one was looking after the Lower Risk Unit detainees while the other was guarding the guard house. The Claimant said there was so many detainees and there should be more correctional officers.

64. On December 2007, in view of the sudden, unprovoked nature of the attack, no case had been made out based on the lack of staff on duty in the low risk unit to exercise proper supervision. Further, the correctional officers had not been aware of any antagonism by the two detainees (Jack Nalau and Saon Vira) to the claimant. Neither ought they have known of any objection by the claimant or other prisoners to any other inmate visiting him in his cell. In this case, despite the fact that there were just two correctional officers, on 16 December 2007, when the two detainees assaulted the claimant, the correctional officer (Dunstan Toa) saw that the claimant came out from his cell and was chased by the two others, he run to the claimant to shield him from the other two detainees who assaulted the claimant. On 16 December 2007, the incident of assault happened when the two correctional officers have undertaken their duty to supervise other detainees and guarded the guard house. Here, there is no evidence showing the proximity of



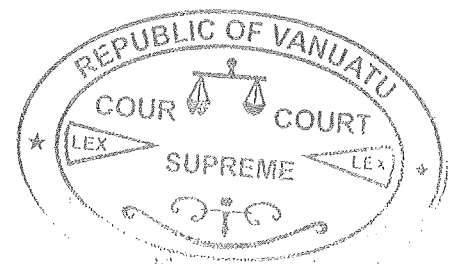
relationship and foreseeability of damage on the basis of evidence, it would not be just and reasonable to impose such a duty in such circumstances.

65. I accept the submissions of the Defendant in respect to the first incident of assault on the claimant on 16 December 2007. In order to found a cause of action flowing from the careless exercise of statutory powers or duties, the claimant has to show that the circumstances are such as to raise a duty of care at common law. The mere assertion of the careless exercise of a statutory power or duty is not sufficient. That is what happened to the claim of the Claimant in respect to the incident of assault occurring on 16 December 2007. It is therefore rejected. The provisions of section 65 of the Correctional Services Act apply here.
66. I now consider the second incident of assault on the Claimant on 1 March 2008. This incident occurred at 12.00pm while the correctional officers were having lunch, they heard noises from the high risk unit. They attended and saw detainee Jack Nalau was assaulting the Claimant. Detainee Jack Nalau escaped that night and came back in the morning. The two correctional officers opened the gate for Jack Nalau to re-enter the correctional centre at Luganville at that time again. Jack Nalau was drunk. The Claimant said he saw the correctional officers treated some of the detainees differently. At that time, when Jack Nalau came back in the correctional centre, he threatened him, he asked for his dark glasses. The Claimant refused to give his dark glasses to him because they were not his. Jack Nalau swore at him and wanted to assault him. The Claimant said he reported the incident straight away to correctional officers Andrew Nalau and Vuti Kelly. The two correctional officers did not do anything even to talk to Jack Nalau to remain calm as he was drunk or they did not even attempt to call the police to arrest Jack Nalau. Jack Nalau went into his room, took a file (a weapon), passed behind him and speared him with the file. The file went through his shirt to his body inside about 5mm wide deep. As a result he sustained serious injuries in his body.
67. The correctional officers were having lunch, they heard noises from the high risk unit. They attended and saw detainee Jack Nalau was assaulting the Claimant. They took the Claimant to the hospital for treatment. The Claimant spent one (1)

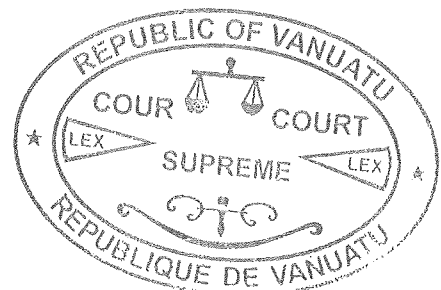


week at the Northern District Hospital. He sustained injuries as reflected in the medical report attached to the Claimant's statement filed 29 August 2014.

68. The Defendant said the daily routine program at the Luganville correctional centre states that at 12.00pm, all detainees on lock down had been adhered to. They said after they placed all detainees on lock down, the officers attended to have their lunch however, overheard the commotion that resulted with the Claimant having sustained injuries.
69. The evidence demonstrated that there was a history of conflict between detainee Jack Nalau and the Claimant. Mr. Jack Nalau and Sam Vira assaulted the Claimant in December 2007. The correctional officers knew of this. On 1 March 2008, before detainee Jack Nalau assaulted the Claimants, he swore at him and threatened to assault the Claimant. He was drunk. He was allowed to re-enter the Correctional Services Centre's gate. The Claimant's evidence is that he reported the threat of assault on him by Jack Nalau straight away to the correctional officers: Andrew Nalau and Vuti Kelly who supervised the correction centre at Luganville at that time. The Defendant did not provide evidence contrary to the Claimant's on this point. The correctional authorities have known of this conflict between the Claimant and detainee Jack Nalau and the threat to assault the Claimant by this particular detainee. The Claimant said the correctional officers did nothing. They did not talk to Jack Nalau to stay calm as he was drunk. They did not even call the police to arrest Mr. Jack Nalau as he escaped and came to the correctional centre drunk and he had with him a bottle of alcohol liquor. It is noted that the enquiry which is made when prisoners are admitted to prison, together with the receptivity of the prison authorities to complaints by prisoners and the well-known policy of separating prisoners in these situations are as much as could be expected from the prison authorities in the discharge of their duty to take reasonable steps to safeguard prisoners at risk of violence in circumstance such as existed in this case. None of those have been undertaken by the correctional officers here. They went to have lunch. The attack on the Claimant on 1 March 2008 is not unexpected. The two officers on duty at the time may have prevented it if reasonable measures or steps have been undertaken. Insofar as



personal injury is concerned the duty is general and pervasive. It demands that attention be given to prisoners' needs in terms of sustenance and healthcare, and a safe physical environment. It encompasses a requirement that steps be taken to protect prisoners from the depredations of fellow inmates, and sometimes to prevent prisoner self-harm. The breadth of the duty reflects the level of control that a prison authority has over both the prison environment and prisoners themselves. Prisoners are in many respects substantially dependent on their correctional centre officers (gaolers). This is simply a function of their confinement: they are without freedom and without capacity to provide for their own needs. To that extend, they are particularly exposed to certain risks of injuries should their interests be neglected. Here, the only evidence from the Defendant was that the officers adhered to the rather passive security regime that at 12.00pm o'clock, all detainees are on locked down. In my mind, the Defendant's officials were aware of this. They were on notice of a particular threat to the Claimant's physical safety. In the circumstances, the continued reliance on the passive security regime within the compound had involved a failure to take due care for his wellbeing. The Claimant was able to point to few relatively simple measures that could have been taken for his protection: the Defendant's officer could have talked and warned detainee Jack Nalau to remain calm as he was drunk, it could have ensured that the area of the Claimant's room was more effectively monitored as until detainee Jack Nalau's status of drunkenness is over; they could have called on the police to arrest detainee Jack Nalau as he was drunk in the correctional centre. The Defendant did not give evidence denying what the Claimant asserted. They only said at 12.00pm on 1 March 2008, all detainees were on locked down as it was the practice before they went for lunch. The Defendant failed to demonstrate that the adoption of such measures would have been impracticable or unduly costly, or that they were otherwise unreasonable. In the circumstances of this case, I am satisfied that the relationship between the correctional officers and detainee is one characterised by control by the authority of the prison and its assumption of responsibility over the prisoner, matters which no doubt pervade the whole life and existence of those in correctional services centres: most aspects of life, and autonomous existence, are subject to control and direction. Given the nature of the

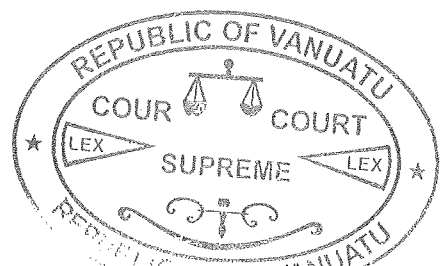


relationship involved, it may be that the duty is properly to be on the prison authority himself. I need to emphasize that prison authorities are not obliged to guarantee the safety of prisoners absolutely. The mere fact that a prisoner has suffered an injury while in custody will not of itself give rise to liability. The law recognises that a prison authority cannot guard against every possible contingency. An authority's obligation is both anchored and defined by the notion of reasonableness. Breach of duty essentially consists in failure by a Defendant to respond reasonably to an appreciable risk of harm. In this case, it is just and reasonable to hold that the Defendant's officers failed their duty of care to the Claimant on 1 March 2008. In these circumstances the correctional officers have been negligent in the way they have failed to prevent this attack on the Claimant on 1 March 2008.

70. The correctional officers are servants or agents of the State. I hold the state is vicariously liable for the failure of correctional officers to take reasonable care to protect the attack on the Claimant at the Luganville Correctional Centre on 1 March 2008.

Damages assessment

71. On the question of damages, the Claimant claimed damages of VT2, 000, 000 being VT500, 000 for pain and suffering, VT500, 000 for nervous shock for what happened and aggravated damages as a result of the conduct of the correctional officers in securing a safe environment for the Claimant to serve his prison term for the incident of assault and injuries occurring on March 2008.
72. From the outset, I rule that it is not appropriate to make award of aggravated damage to the correctional officers and by vicarious liability to the State Republic.
73. There are no submissions from either parties on damages. I do what I can to assess the damages. I peruse the medical reports provided by the Claimant, and in particular, medical reports attached to the Claimant's statement filed 29 August 2014. The medical report dated 3 March 2008 made at Northern District Hospital showed the Claimant had a fracture wound of 5mm wide of entry point - area

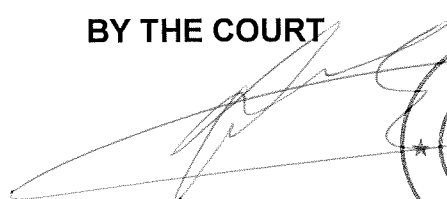


swelling and wound-Tender on palpation. He was hit with a pointed blunt hard object, reported by Doctor Samuel Kemuel. On 6 March 2008, it was reported that the Claimant was admitted on 1 March 2008 with a puncture wound as a result of a violent attack at the correctional services centres. The wound was not deep. The patient has been well recovered and he was stable.

74. I assess the damages on what I have in the evidence. Jack Nalau assaulted the Claimant with a sharp file. He speared the Claimant from the back. It was a weapon. The weapon went through his shirt to his body with a 5mm wide deep in his body. He spent one (1) week at the Northern District Hospital. I assess the pain and suffering to VT500, 000. I assess also the nervous shock for what happened to him at VT300, 000. The total of award is VT800, 000 to the Claimant against the correctional authorities and vicariously against the State.
75. The Claimant is entitled to an interest of 5% per annum on the judgment sum of VT800, 000 from the date of judgment until settlement.
76. The Defendant shall pay such amount of VT800, 000 to the Claimant within 30 days from the date of this judgment [i.e. 16 May 2019].
77. The Claimant is entitled to his costs on standard basis against the Defendant, such costs shall be determined failing agreement.

DATED at Port-Vila this 16th day of April 2019

BY THE COURT



**Vincent LUNABEK
Chief Justice**

