IN THE SUPREME COURT OF PAPUA NEW GUINEA
AT WAIGANI

[1978] PNGLR 184; SC130

THE GOVERNMENT OF PAPUA NEW GUINEA — Appellant

- and -

ELIZABETH LAUWASI UGUNA MOINI — Respondent

JUDGMENT

Prentice CJ Kearney J Pritchard J
28-31 April 1978
29 May 1978

NEGLIGENCE - Fatal accidents legislation - Essentials of cause of accident - Motor vehicle accident - Death of child pedestrian - Payback killing of driver and passenger by bystanders - Legal causation of payback - Novus actus interveniens - Whether death of plaintiff's husband (passenger) reasonably foreseeable - Public policy.

NEGLIGENCE - Damage - Causation - Novus actus interveniens - Fatal accidents legislation - Motor vehicle accident - Death of child pedestrian - Payback killing of driver and passenger by bystanders - Public policy.

CONSTITUTIONAL LAW - Underlying law - Pre-Independence cause of action - Negligence - Motor vehicle accident - Payback killing reasonably foreseeable - Whether common law inappropriate to circumstances of country - Constitution Sch. 2.2(1)(b)[ccxcvi][1].

In an action brought under the provisions of the *Law Reform (Miscellaneous Provisions) Act* 1962 for damages on behalf of a plaintiff widow and the children of the marriage, it appeared that the plaintiff's husband was travelling as a passenger in a motor vehicle owned by the Government of Papua New Guinea, when the vehicle became involved in an accident near Goroka in the Highlands, in which a child pedestrian was killed, and immediately after the accident the plaintiff's husband and the driver of the motor vehicle were fatally injured in a payback killing by irate villagers and the trial judge held the plaintiff entitled to damages. On appeal therefrom:

Held

(1) There was sufficient evidence to support a finding on the balance of probabilities that the payback killing would not have occurred without the negligent act of the driver and therefore could be said to be "caused by" the driver's negligence.

Chapman v. *Hearse* (1961) 106 C.L.R. 112; *Cuckow* v. *Polyester Reinforced Products Pty. Ltd. and Ors.* (1970) 19 F.L.R. 122; *Quinn* v. *Burch Bros. (Builders) Ltd.* [1966] 2 Q.B. 370 and *Rowe* v. *McCartney* [1976] 2 N.S.W.L.R. 73 at p. 80 referred to.

(2) The test to be applied in ascertaining whether the killing of the plaintiff's husband was a reasonably foreseeable consequence of the breach of the duty of care owed by the driver of the motor vehicle to his passenger was whether or not a reasonable man should have foreseen that failure on his part to maintain proper control and management of the motor vehicle resulting in death or injury to another user of the road would be likely to bring about violent retaliatory action against himself and other occupants of the vehicle at the hands of the kinsmen of the person killed or injured.

Overseas Tankship (U.K.) Ltd. v. *Morts Dock & Engineering Co. Ltd.* (*The Wagon Mound*) [1961] A.C. 388 followed and applied.

Moini v. *The Government of Papua New Guinea* [1977] P.N.G.L.R. 40 affirmed.

(3) Deliberate and unlawful acts by third parties following a negligent act do not absolve the negligent party if it can be shown that the acts of the third parties are such as would be known by the ordinary reasonable man as to be a likely consequence of the negligent act.

Chapman v. *Hearse* (1961) 106 C.L.R. 112 followed and applied. *Haynes* v. *Harwood* [1935] 1 K.B. 146; *Stansbie* v. *Troman* [1948] 2 K.B. 48; *Dorset Yacht Co. Ltd.* v. *Home Office* [1970] A.C. 1004; *Weld-Blundell* v. *Stephens* [1920] A.C. 956 and *Chomentowski* v. *Red Garter Restaurant Pty. Ltd. and Anor* (1970) 92 W.N. (N.S.W.) 1070 referred to.

Moini v. *The Government of Papua New Guinea* [1977] P.N.G.L.R. 40 affirmed.

(4) In the circumstances the question to be asked was whether a person in the position of the driver would know whether negligent driving causing death or injury to a villager in the Eastern Highlands of Papua New Guinea would be likely to set in motion violent physical retaliatory action against the occupants of the vehicle driven by him.

Moini v. *The Government of Papua New Guinea* [1977] P.N.G.L.R. 40 affirmed.

(5) Public policy, in the motor car age, requires that road users (pedestrians, drivers or passengers) be provided with compensation against breach of duty by drivers which causes foreseeable damage, including in Papua New Guinea compensation for foreseeable payback injury or killing.

(6) The accident having occurred prior to Independence, was founded, as to alleged vested right and substantive law on *Constitution* Sch. 2.2.(1), which requires the adoption, application and enforcement of the principles of common law and equity in England at that date: and insofar as the principles of common law might not allow compensation for foreseeable payback injury or killing, such principles of the common law should be regarded as inappropriate to the circumstances of Papua New Guinea pursuant to *Constitution* Sch. 2.2.(1)(b).

(7) *Semble*, liability on the highway committed after Independence is capable of extending as an underlying law pursuant to *Constitution* Sch. 2.3, to foreseeable injury or death from payback in circumstances comparable to this case and to a requirement therefore that a driver compensate a widow-plaintiff under the *Law Reform (Miscellaneous Provisions) Act* 1962, for the death of her husband.

(8) The appeal should be dismissed.

Appeal

This was an appeal against a decision of the National Court (*Moini* v. *The Government of Papua New Guinea* [1977] P.N.G.L.R. 40) awarding damages to the widow of a man killed in a payback following an accident involving a motor vehicle in which the deceased was a passenger, and a child pedestrian.

Counsel

D. F. Rofe Q.C. and J A. Ross, for the appellant (defendant).

D. I. Cassidy and D. J McDermott, for the respondent (plaintiff).

Cur. adv. vult.

29 May 1978

PRENTICE CJ: This is an appeal against a decision of the National Court given in February 1977, awarding damages to the widow of a man who, it is now conceded, was travelling as a passenger in a vehicle owned by the Government, when the vehicle became involved in an accident in 1972 near Goroka, and who immediately after the accident was, together with the vehicle's driver, murdered by irate villagers, one of whose number (a child pedestrian) had been killed in the said accident.

On the hearing of the appeal most of the grounds of appeal were abandoned. Those with which the court had to concern itself were as follows:

> "3. No evidence was offered from which an inference of negligence at the time when anyone was killed could or should have been made or made against the defendant.
>
> 7. There was no finding or evidence by which it could be said that the defendant should have foreseen the death of Moini or the damages sued for.
>
> 10. There was no evidence from which it could be found that the plaintiff suffered any damage as a result of any action for which the defendant was responsible. On the facts and circumstances of this case there should have been entered a verdict for the defendant."

Both the statement of claim on the one hand, and the statement of defence and grounds of appeal on the other, seem to have been the results of careless drafting. This factor has lengthened considerably the time required for argument of this appeal and is to be regretted.

It is convenient that the relevant parts of the pleadings be set forth at once. The statement of claim alleged the death of one Moini, and the plaintiff's status as his widow, and contained the following paragraphs:

> "3. The said vehicle was being driven by the said LUKE ROVIN now deceased as servant or agent of the defendant ...
>
> 4. The said vehicle was travelling on the Highlands Highway from Goroka in the direction of Lae when it ran off the road and turned over.
>
> 5. The said overturning of the motor vehicle was caused solely by the negligence of the said LUKE ROVIN in the driving, management and control of the motor vehicle.
>
> 6. The said LUKE ROVIN died at Goroka on the 24th day of December, 1972.
>
> PARTICULARS OF NEGLIGENCE
>
> (a) Failing to keep any or any proper lookout;
>
> (b) Driving at a speed that was excessive in the circumstances;
>
> (c) Failing to keep the motor vehicle under any or any proper control;
>
> (d) Driving the motor vehicle without due regard to the safety of the passenger in the vehicle;
>
> (e) Failing to stop, slow down or alter the course of the motor vehicle at a time or in a manner in which a reasonably prudent man would have stopped, slowed down or altered the course of his vehicle.
>
> 7. As a result of the said accident wherein a child pedestrian LINDA SAPULO was struck and killed by the said motor vehicle a disturbance or riot broke out and in the course of the disturbance or riot the said PETER CLAVER MOINI was killed ..."

As appears from his Honour the trial judge's judgment, par. 7 of the statement of defence was amended at the trial so as to read:

> "Save that the defendant admits that a child pedestrian Linda Sapulo was struck and killed by the said motor vehicle and that the said Peter Claver Moini died on the 24th December, 1972 the defendant denies each and every allegation contained in par. 7 of the statement of claim."

At the outset of this appeal, counsel for the respondent objected to the competence of certain of the remaining grounds of appeal on the basis that they related to questions of fact as to which

leave had not been sought as required by ss. 4 and 14 of the *Supreme Court Act*, and that the period for seeking an extension having expired no leave might now be granted; see *Osineru Dickson* v. *Luka Orere and Ors.* (*Re Goilanai No.* 2)[ccxcvii][2] (and succeeding decisions of this Court). But I am satisfied, that however inappropriately expressed, the remaining grounds of appeal are intended to raise questions of law.

By way of riposte appellant's counsel has sought to challenge the foundation of the verdict, as I understand his argument, because it had been brought in on an issue not properly pleaded to the court. I must confess myself unable to follow quite how Mr. Rofe sought to ground such a submission on any of the appeal points set out above.

Having set out the relevant portions of the pleadings, the trial judge expressed himself as follows:

> "In consequence the issues arising for determination, as I comprehend them, are as follows:
>
> (1) Was the driver of the vehicle negligent?
>
> (2) Was the vehicle at the relevant time being driven by Rovin?
>
> (3) As a result of the accident and the killing of the child Linda Sapulo did a riot or disturbance break out in the course of which Moini was killed?
>
> (4) Was the killing of Moini a reasonably foreseeable consequence of negligent driving?"

His Honour dealt with the issue of whether negligence had occurred in the driving of the vehicle, and the issue (then open) as to the identity of the driver, and then proceeded "I turn now to the third issue raised, namely, whether as a result of the accident and the killing of the child Linda (emphasis mine) a riot or disturbance broke out in the course of which Moini was killed". When one views this passage of the judgment in the setting of the evidence called, it becomes clear I think, that his Honour was here concerning himself with whether the killing of Moini could be said to have been *caused* in a real (or legal) sense by the negligent driving ("the accident") and its accompanying fact, the death of the child. Having in turn dealt with that issue, his Honour proceeded "It is now necessary to consider the fourth issue raised, that is, was the killing of Moini a reasonable foreseeable consequence of the breach of the duty of care owed by Rovin as the driver of the vehicle to Moini. This consideration flows from the judgment of the Privy Council in *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engineering Co. Ltd.* (*The Wagon Mound*)[ccxcviii][3]. In that case the general principle laid down was that "the essential factor in determining liability for the consequence of a tortious act" (emphasis mine) "is whether the damage is of such a kind as a reasonable man should have foreseen".

He summarized for himself the question to be:

> "Applying these principles to the present case the question which arises is whether or not a reasonable man should have foreseen that failure on his part to maintain proper control and management of the vehicle resulting in death or injury to another user of the

road would be likely to bring about violent retaliatory action against himself and other occupants of the vehicle at the hands of the kinsmen of the person killed or injured."

The transcript and judgment make it clear to my mind that at the trial the parties were concerned with the questions of whether the deceased driver drove his vehicle negligently and thereby killed a child, and whether in so doing he was in breach of a duty owed his passenger, whether his negligent driving was a cause (in the legal sense) of his passenger's death (albeit by criminal retaliatory action of others), and whether that result ought reasonably to have been foreseen by a reasonable person in the deceased driver's position. I am unable to find any basis for appeal in this regard therefore or for retrial even were one to assume that that matter could properly be raised under the grounds of appeal filed.

It was first argued that there was no evidence of any negligent driving on the part of the appellant's driver Rovin; and as a rider to this submission it was put that a driver's only duty to a passenger was so to drive as not to injure *him* by carelessness; that he did not owe a duty to his passenger specifically to avoid running down a pedestrian. Then followed three submissions which collectively were expressed by the assertions that the widow's loss was not established as having been caused by any breach of duty of care owed by Rovin (the driver) to Moini (her husband). The three constituents of this submission were:

(a) that it had not been established that a fault on Rovin's part was a "legal" cause of the killing of Moini — setting aside any question of foreseeability;

(b) that if it had been established that Moini's death proceeded from (was "legally" caused by) Rovin's tortious fault, the chain of causation should be held to have been broken by the deliberate violence of the villagers. Their criminal intervention was so foreign and unwarrantable to the initial fault, that it should exclude causation, as being the new intervening act of an outsider;

(c) that there was no evidence entitling the court to conclude that the deliberate killing of Moini in the circumstances was a consequence that a reasonable man in Rovin's position would reasonably have foreseen as a likely or probable consequence of negligent driving. An additional submission was tacked to this — to the effect that public policy required the court to refuse to endorse the proposition that the deliberate killing of a car occupant by a third party is an event that reasonable drivers would reasonably foresee as a possible or likely result of negligent driving.

As to whether there was evidence of negligent driving the respondent argued in this Court, and presumably at the trial, that the evidence established both that the thing (the accident) spoke for itself to establish negligent driving; and that a number of inferences from it were warranted as to specific causal features of negligent driving as enumerated in the statement of claim. That such dual submissions may be made is established by *Mummery* v. *Irvings Pty. Ltd.*[ccxcix][4] as explained in *Anchor Products Ltd.* v. *Hedges*[ccc][5].

The appellant contends that the trial judge's findings that "the only reasonable inference to be drawn from the evidence is that the accident occurred as the result of some fault on the part of the driver", and that "the accident can be attributable only to excessive speed in the

circumstances or the negligent failure of the driver to observe pedestrians on the road" are mere conjecture or surmise and not warrantable inferences (*Holloway* v. *McFeeters*[ccci][6]; *Luxton* v. *Vines*[ccciii][7]). As factors persuading against the drawing of inferences of negligence, he suggests that Rovin may have had to swerve to the left to avoid the girl, or that he was driving at a proper speed yet the girl moved across his path. But these are mere suggestions of possibilities, unsupported by the evidence, and amounting conceivably to negligence in the girl which would not necessarily exculpate the driver. The trial judge was concerned with probabilities. He was not concerned as in a criminal trial with whether all reasonable hypotheses consistent with lack of negligence had been excluded but with whether the evidence raised a more probable inference in favour of the negligence alleged. His Honour made a careful summary of the evidence. He was of course familiar with the nature of the Highlands Highway and the manner of its use by pedestrians. He accepted that Rovin's vehicle was travelling at an estimated speed of 55 m.p.h. quite shortly before the accident. He had regard to the evidence of one villager that as Rovin's vehicle approached their party (which included the girl killed) it was "travelling fairly fast ... so fast that it could have an accident ... it was running straight along the road ..."; and of another that "it was coming very fast — the car got surprised and turned to the side and got on to the little girl and went into the drain." There was no suggestion of mechanical failure or sudden emergency; the vehicle went off the road into a ditch and overturned. In my view his Honour was entitled to find that the circumstances appearing in evidence did more than give rise to conflicting inferences of equal degree of probability, that it supported reasonable and definite inferences. I consider that his Honour's conclusions, though they may have fallen short of certainty, ought not to be regarded as mere conjecture or surmise, (see *Luxton* v. *Vines*[ccciii][8]). I would reject the appellant's submission on this aspect.

The appellant's submission as to the nature of a driver's duty to a passenger, raised under the first submission, can, I think, be dealt with somewhat later in the judgment.

It is necessary that the question whether Rovin's negligent driving was a "cause" of Moini's death be considered separately from that relating to foreseeability, as the concepts of causality and foreseeability differ, and the term "reasonably foreseeable" is not, in itself, a test of causation. (*Chapman* v. *Hearse*[ccciv][9]). That a particular consequence may be foreseeable on the happening of an event, does not necessarily mean that it was caused by an earlier event. Because one event caused another it does not necessarily follow that the second event was a foreseeable consequence of the first. The judgment of Fox J in *Cuckow* v. *Polyester Reinforced Products Pty. Ltd. and Ors.*[cccv][10], and the judgments in the Court of Appeal in *Quinn* v. *Burch Bros. (Builders) Ltd.*[cccvi][11] though a contract case, illustrate the point. One does not proceed to consider the ambit of foreseeability unless one first decides that the particular piece of negligence in fact caused the damage in question *Chapman* v. *Hearse* (supra). It seems that the question of whether causal connection exists is pre-eminently what might be described as a "jury question"— a question of fact (see the judgment of Glass JA. in *Rowe* v. *McCartney*[cccvii][12] and the cases there cited).

At p. 110 of the appeal book his Honour states:

> "I turn now to the third issue raised, namely, whether as a result of the accident and the killing of the child Linda a riot or disturbance broke out in the course of which Moini was killed."

To my mind his Honour is clearly concerning himself there with whether the consequences of Rovin's negligence and the accident were the riot and killing of Moini. His Honour inferentially answered the question in the affirmative, because he moved immediately to the question of foreseeability to investigate the question of what used to be known as remoteness of damage, after having found that Moini died from the villagers' "retaliatory action" immediately following the accident. Mr. Rofe contends that such a finding of causality was not open, because a proper appreciation of the "retaliation" evidence would lead one to the conclusion that such a killing can follow a perfectly faultless piece of driving, and can indeed be visited on the occupants of a vehicle which was not involved in the accident which raised the anger of the villagers to a pitch of violence. This submission appears to me to involve specious reasoning. The fact that a blameless piece of driving resulting in an accident could activate villagers to retaliatory violence, does not prevent a negligent piece of driving involving such a consequence being considered the cause of that consequence in a case where negligent driving was demonstrated. Putting it another way, the fact that innocent driving resulting in the death of a child may produce a payback, does not mean that where in a particular case a child is killed by negligent driving, a subsequent payback may not be found to be "caused" by that negligent driving. I am satisfied that there was evidence from which his Honour could find on the balance of probabilities that the payback killing in this case would not have occurred without the negligent act of the driver Rovin, and therefore could be said to be "caused by" (in the way in which the law treats causation) Rovin's "negligence". It follows that I would not allow the appeal on this ground.

Most of the cases relating to "intervening acts" have been cited to this Court, commencing with *Haynes* v. *Harwood*[cccviii][13] in which the Court of Appeal in the United Kingdom held there was no absolute rule that an intervening act of a third party not the defendant, is in itself enough to break the chain of causation between the wrongful act and the damage and injury sustained by the plaintiff. Greer L.J enunciated therein that "if what is relied on as novus actus interveniens is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence." At the trial in the instant case his Honour was referred to the dicta of Lord Sumner in *Weld-Blundell* v. *Stephens*[cccix][14] which has since been subjected to criticism; and also to *Stansbie* v. *Troman*[cccx][15] and *Dorset Yacht Co. Ltd.* v. *Home Office*[cccxi][16] in which acts of third parties were held not to be within the maxim because they constituted in the one case, the acts to guard against which the duty lay; and in the other, something likely to happen if the duty were not fulfilled. As was pointed out, Lord Reid in the latter case stated "If the intervening action was likely to happen I do not think that it can matter whether that action was innocent or tortious or criminal. Unfortunately tortious or criminal action by a third party is the 'very kind of thing' which is likely to happen as a result of the wrongful or careless act of the defendant". (emphasis mine).

Chomentowski v. *Red Garter Restaurant Pty. Ltd. and Anor.*[cccxii][17] is an instance of criminal intervention which it was held that the relevant duty required the defendant to guard against. That culpable intervening conduct of third parties would not break the chain of causation if within the test of foreseeability was recognized by American courts, notably in *Marshall* v. *Nugent*[cccxiii][18], as pointed out in *Chapman* v. *Hearse*[cccxiv][19]; and the joint judgment of the High Court in the last mentioned case enunciated that (at p. 125) "once it be established that reasonable foreseeability is the criterion for measuring the extent of liability for damage the test must take into account all foreseeable intervening conduct whether it be wrongful or otherwise."

The immediate reaction of the villagers in the circumstances of this case, was I consider, in keeping with a recognized (though utterly deplorable) social phenomenon. It was somewhat analogous to that of the stallholders in *Scott* v. *Shepherd*[cccxv][20], an instinctive reaction, not the subject of deliberation. I will proceed now to consider the question of its foreseeability; but I do not think that the criminal nature of it was, in the particular circumstances, such as to warrant a finding that the defendant's responsibility for his negligence had thereby alone been terminated.

There was a good deal of evidence called from other drivers and the police as to whether the death of Moini was "foreseeable", and indeed the actions of the driver and his passenger (one of whom was a doctor) in immediately fleeing from the scene once their vehicle overturned speak eloquently on the subject; which warranted the conclusion that any reasonable driver of a motor vehicle in Papua New Guinea in the Highlands in 1972 should reasonably have foreseen the possibility of what did happen, actually happening. In many parts of Papua New Guinea the payback is becoming a thing of the past. But it is indeed a matter of notoriety that inspires dismay, that some 40 years of government administration in the Highlands, including criminal sanctions, insurance, and special provisions for automatic compensation to tribal non-dependent relatives, have not yet removed among Highlanders the instant reaction towards payback for tribal loss of blood or death. This customary reaction has been brought to districts from which it had long since vanished. It must be known to all driving members of the community that even in Port Moresby, as a matter of prudence, one does not stop after a motor vehicle accident (the injunctions of the law on the subject seem to be a dead letter), but proceeds straight to the nearest police station — in some districts even to seek sanctuary for oneself against payback, despite completely blameless behaviour. Many criminal trials before the National Court involve the conviction of persons for taking part in such paybacks. Two that occur to me that I have myself heard were *Kuk Pum and Ors.* v. *The Queen*[cccxvi][21], an attempt to murder a plant operator following injury to a tribal brother, and *Regina* v. *Suk Ula and Ors.*[cccxvii][22], a payback on the road an hour out of Port Moresby, conducted by tribal "brothers" not on the driver of the vehicle involved (who fled to safety) but on one of the passengers who lay injured nearby. A third, a decision of Raine J on appeal (*R.* v. *K. J and Anor.*)[cccxviii][23] in 1972 related to the murder of a fleeing driver in the Goroka district. There have been many others.

Foreseeability is a question of fact that must be determined in the light of the particular circumstances obtaining (*Chomentowski* v. *Red Garter Restaurant Pty. Ltd. and Anor.*)[cccxix][24]. No doubt in certain parts of some African countries a driver's duty to his passenger would involve his taking precautions that his passenger be not injured by the charge of an elephant or the slash of a lion through an open window. In certain parts of Australia the hazards to which his duty would extend would include the leaps of kangaroos across the road at night. In Papua New Guinea in many districts a foreseeable risk is that of injury to a passenger from the sudden intrusion of pigs on the road. It is a matter for regret that in the Highlands in 1972 the possibility of a payback killing following upon a road accident was a matter that would be expected to be in a reasonable driver's mind.

The evidence supports the conclusion on this subject to which the trial judge came, and I think it is incontestably a matter of notoriety that a reasonable man in Rovin's position would reasonably have foreseen the killing of Moini and/or himself as the likely consequence of his killing of the child and overturning of his vehicle.

It was submitted that as a matter of public policy, the likelihood of payback killings following road deaths should not be recognized by this Court and that the court should encourage people with claims for loss to sue the real wrongdoers, rather than the driver involved in the road accident. It appears that this was not argued at the trial.

One hopes that the more wrongdoers are themselves pursued, the quicker the "pay-back" will disintegrate; that this can be achieved by property demands upon the guilty parties is not supported by history. Papua New Guinean society itself has always temporarily settled vendetta situations by group payments; but that has not struck at the payback "institution" itself. The Government itself of recent years has seen fit to recognize the likelihood of payback in passing special legislation which hopes to assuage tribal thirst for vengeance. There is accordingly provision for almost automatic compensation to limited amounts for tribal blood loss without establishing "fault", in the sense understood by the introduced law of tort.

It seems that public policy in the motor car age, requires, as the third party insurance legislation recognizes, that road users (pedestrians, drivers or passengers) be provided with compensation against breach of duty by drivers which causes foreseeable damage. To allow the foreseeable principle to embrace the likelihood of payback killing through the intervention of third parties, to my mind would no more put the court's imprimatur on payback killing, than the court's and the legislature's recognition of the need to compensate and insure against damage from a driver's negligence puts an imprimatur on breach of traffic regulations ("criminal" activities) and negligence.

I do not find myself shrinking from acceptance, as a matter of fact, that an instant payback killing was the very kind of thing that could be expected to follow an accidental killing in that part of the Highlands at the time (and I should like to stress my view that each set of facts must be taken separately and is not to be a precedent for decision on any other set of facts — see *Qualcast* (*Wolverhampton*) *Ltd.* v. *Haynes*[cccxx][25]), if the "offending" vehicle did not drive on. I would find no difficulty therefor in spelling out the defendant's driver's duty to his passenger at that location and time as being so to drive with all regard to road usage, prudence and caution as not by his negligence to injure him or expose him to the possibility of a payback killing or injury in the event of the driver's killing or injuring a pedestrian or failing to drive his vehicle thereafter to a police station to report his misfortune. I would answer the difficulty raised by the rider to the appellant's second submission in this way.

The plaintiff's action herein was brought after Independence but (as the fatal accident occurred prior to Independence) would presumably be founded, as to alleged vested right and substantive law, on s. 2 of the *Organic Law on Immediate Transitional Constitutional Provisions*.

My analysis of the overseas cases leads me to the conclusion that the decision in this case was within the principles of the law of negligence on the highway as developed under the Common Law of the United Kingdom prior to and at Independence. If I am wrong in this conclusion, then I would consider the Common Law of the United Kingdom insofar as it might on that view not allow for compensation for foreseeable payback injury or killing, inappropriate to the circumstances of Papua New Guinea (*Constitution* Sch. 2.2(1)(b)).

I would be prepared on that basis, to hold in the process of determining an underlying law (*Constitution* Sch. 2.3)), that liability for negligence on the highway committed after Independence is capable of extending to foreseeable injury or death from payback in circumstances comparable to those in this case and to a requirement therefore that a driver compensate a widow-plaintiff under the *Law Reform* (*Miscellaneous Provisions*) *Act* 1962, for the death of her husband.

For the above reasons I would dismiss the appeal and order the appellant to pay the plaintiff's costs.

KEARNEY J: I agree.

PRITCHARD J: In this matter I have had the benefit of reading the judgment of his Honour the Chief Justice and I agree with his conclusions and the reasons given for them.

I would merely like to add one matter. Reference was made in submissions by counsel to the statement by Lord Sumner in *Weld-Blundell* v. *Stevens*[cccxxi][26] reading as follows:

> "In general (apart from special contracts and relations and the maxim respondeat superior), even though A is in fault, he is not responsible for injury to C which B, a stranger to him, deliberately chooses to do."

In the situation of the accident which led to this action I do not believe that the village people who retaliated immediately by killing Dr. Rovin and Mr. Moini were "strangers" in the sense his Lordship was referring to. They had just been met in no uncertain fashion by Dr. Rovin driving his vehicle into their midst and killing one of their members. It would be a very different situation had the payback occurred days later by other relatives of the deceased.

I believe this situation fits the concept of the extension of responsibility envisaged by Dixon J (as he then was) in *Smith* v. *Leurs*[cccxxii][27] where his Honour says:

> "... apart from vicarious responsibility, one man may be responsible to another for the harm done to the latter by a third person; he may be responsible on the ground that the act of the third person could not have taken place but for his own fault or breach of duty. There is more than one description of duty the breach of which may produce this consequence. For instance, it may be a duty of care in reference to things involving special danger. It may even be a duty of care with reference to the control of actions or conduct of the third person."

His Honour the Chief Justice has indicated the high duty of care appropriate to this country. I agree with him that in spelling out such duty this Court does not condone in any way the practice of retaliatory payback killing such as occurred in this case.

Appeal dismissed. Judgment and order of the National Court confirmed. Appellant to pay respondent's costs of appeal.

Solicitor for the appellant: C. Maino-Aoae, State Solicitor.

Solicitor for the respondent: M. Kapi, Public Solicitor.

[redacted]

[ccxcvi]Constitution Sch. 2.2(1)(b) provides "... the principles and rules that formed, immediately before Independence Day, the principles and rules of common law and equity in England are adopted, and shall be applied and enforced, as part of the underlying law except if, and to the extent that ... (b) they are inapplicable or inappropriate to the circumstances of the country from time to time."

[ccxcvii][1976] P.N.G.L.R. 120.

[ccxcviii][1961] A.C. 388.

[ccxcix](1956) 96 C.L.R. 99.

[ccc](1966) 115 C.L.R. 493.

[ccci](1956) 94 C.L.R. 470 at p. 475.

[cccii](1952) 85 C.L.R. 352.

[ccciii](1952) 85 C.L.R. 352 at p. 358.

[ccciv](1961) 106 C.L.R. 112.

[cccv](1970) 19 F.L.R. 122.

[cccvi][1966] 2 Q.B. 370.

[cccvii][1976] 2 N.S.W.L.R. 73 at p. 80.

[cccviii][1935] 1 K.B. 146.

[cccix][1920] A.C. 956.

[cccx][1948] 2 K.B. 48.

[cccxi][1970] A.C. 1004.

[cccxii](1970) 92 W.N. (N.S.W.) 1070.

[cccxiii](1955) 58 Am. L.R. 2d. 251.

[cccxiv](1961) 106 C.L.R. 112.

[cccxv](1773) 96 E.R. 525.

[cccxvi][1974] P.N.G.L.R. 103.

[cccxvii][1975] P.N.G.L.R. 123.

[cccxviii][1973] P.N.G.L.R. 93.

[cccxix](1970) 92 W.N. (N.S.W.) 1070.

[cccxx][1959] A.C. 743 at p. 755.

[cccxxi][1920] A.C. 956 at p. 986.

[cccxxii](1945) 70 C.L.R. 256 at p. 261.