IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 19 OF 2014

BETWEEN: **SAHALIYAH MUBRIKAH KAHN** a minor by **ABDUL MUHAIMIN KHAN** her father/next friend

Plaintiff

AND: **VINODAN CHETTY**

First Defendant

AND: **COURIER DOCUMENTS PARCEL LTD**

Second Defendant

CORAM: **The Hon. Mr. Justice David Alfred**

COUNSEL: **Mr. S. Prasad with Ms Preetika for the Plaintiff**

Mr. A. Kohli for the First and Second Defendants

Dates of Hearing: **13, 14 and 15 March, 2017**

Date of Judgment: **16 March, 2017**

JUDGMENT

1. This is what is commonly called in legal circles a motor vehicle accident (MVA).

2. According to the Statement of Claim, the Plaintiff was crossing the road when the 1st Defendant (Defendant) drove motor vehicle No. EW609 (vehicle), owned by the 2nd

Defendant, so negligently that he caused it to collide with the Plaintiff as a result of which she suffered serious injuries.

3. It is alleged that the accident was caused solely by the negligence of the Defendant. Amongst the particulars of negligence alleged against him are that:

   (i) He failed to have "any proper regard for the safety of the Plaintiff who was crossing the road"

   (ii) He failed "to give precedence to the Plaintiff who was crossing the road"

4. Particulars of the injuries suffered by the Plaintiff are set out as are the special damages.

5. At this time it will be pertinent to state that Counsel on both sides in the course of the hearing agreed that the total special damages (on a 100% liability basis) would be $3,636.69.

6. The Defendants, each of whom filed a Statement of Defence, contend that the accident was caused solely or contributed to by the Plaintiff. The particulars of her negligence include the following:

   (i) She ran into the path of an oncoming vehicle.

   (ii) She failed to ensure her presence was known to the Defendant.

   (iii) She failed to ensure the roadway was clear before attempting to cross it.

7. The Plaintiff in her Reply to the Statements of Defence joins issue with the Defendants and states inter-alia, (a) the "Plaintiff was crossing the road with all due care and attention".

8. The Agreed Bundle included, amongst other documents:

   (1) The Plaintiff's birth certificate showing she was born on 16 August 2005. This would make her 8 years old on the date of accident which was 11 October 2013.

   (2) Dr Alipate Natoba's medical report dated 8 January 2014.

   (3) Dr Anand Rahalkar's report dated 7 May 2014

(4) The Police Statement of Mohammed Ismail

(5) The Record of Interview of the Defendant.

(6) The Police Sketch plan and key.

9. The hearing commenced with the Plaintiff's first witness, Dr Roland Felix Schultz (PW1) giving evidence. He identified the Plaintiff who was seated in the public gallery of the court. He had examined her on a number of occasions and tendered his medical report dated 23 June 2016 as Exhibit P1. He said only the father came, and not the mother, for the examinations. The mother was not present. He said the grandmother was the primary carer and not the mother. That was what was he was given to understand. He asked another colleague to determine the Plaintiff's pre and post accident psychological condition. He said post traumatic illness disorder (PTSD) normally resulted from wars and the trauma can last for 20 years. There will be healing if the therapy is good. It depends on the motivation of the victim.

10. Under cross-examination, PW1 said he did not know the Plaintiff prior to the accident and was not in a position to tell of her pre-accident position. He was told the mother was not able to come to Suva. The grandmother was the primary care giver since the Plaintiff was 2, 3 or 4 years old.

11. PW1 agreed that the class teacher is in a better position than the head teacher to give an assessment of the child. It would be very helpful to have the school reports of her writing but he did not ask for them. He concluded by saying it was correct that no one can say definitely that the disability was due to the accident.

12. The next witness was Abdul Muhaimin Khan (PW2) the Plaintiff's father. He said at the time of the accident he was at home. He heard a loud sound and ran towards the main road. He was in front and his wife was behind. He told her to see the girl while he fetched the car. When he arrived at the scene people told him the girl and mother had been taken to hospital and he went there.

13. The next witness was Madam Ferin Nisha (PW3), the mother of the Plaintiff. She said she was not there when the accident occurred. After the accident she and the

grandmother used diapers for the Plaintiff. She identified the Plaintiff seated leaning on her grandmother in the court.

14. At this juncture the Plaintiff's Counsel informed the Court that after the accident the Plaintiff continued going to school and today she is in class 6.

15. PW3 said the Plaintiff wanted to be a doctor in class 1 and they still have hope she will become a doctor.

16. Under cross-examination, she said she had no book evidence of the Plaintiff's writing before the accident. She did not have the class 1 books nor the term reports which were with the school.

17. In answer to Counsel's question that the Plaintiff is well behaved in court, PW3 said it all depends on her mood. It is the same as the Plaintiff was before.

18. The next witness was Jai Chand Prasad (PW4) the driver of the school bus. He said he made a police report, Exhibit P3. He saw the CDP van (Defendant's), coming from the opposite direction at a speed of 80 – 90 kmh. Later when he returned to that scene he was informed a schoolgirl had had an accident there.

19. Under cross-examination, PW4 said he could not see the place where he dropped the students. The Police did not take a statement there on the day of the accident. He did not know whether the Plaintiff and the male student ran across the road. He did not see Fariz nor the Plaintiff. He did not hear a bang.

20. The next witness was Mohammed Ismail (PW5). The police statement, signed by him, was given one day after the accident. He recalled the accident. They had reached home and were waiting to cross the road. He was waiting because the bus had moved forward and he saw a van coming. There were 8 – 10 students there waiting for the road to clear and then for them to cross. He tried to stop them but Fariz and the Plaintiff ran and tried crossing the road, Fariz in front and the Plaintiff behind him. He shouted aloud that a vehicle was approaching. The van driver saw Fariz and swerved to the right to save Fariz and hit the Plaintiff.

21. Under cross-examination, PW5 said he remembered the statement given the next day, his recollection was good and he told the police the truth. He said Fariz and the Plaintiff suddenly ran across the road and he, PW5, tried to stop the rest of the students. He said he stood by his police statement.

22. The Plaintiff now called Dr Jaoji Vulibeci (PW6), the Medical Superintendent of the Labasa Hospital. He has been a doctor for 24 years. The Court noticed the word "internal" had been written with a biro in his report, while the whole report had been printed. PW6 said he did not write "internal "and in his report it is "intracranial". On the Court's instructions he stroked out "internal" and wrote "intracranial" and initialled and dated his correction. He tendered his report as Exhibit P5. He said he saw the Plaintiff in 2013 and read from his report, which Counsel for the Defendants confirmed is an agreed document. The letters "NNR" in the report stand for "No Need to Return". This was given by Dr. Allan.

23. PW6 said the Plaintiff had some psychological problem which might be permanent based on the MRI and Dr Allan. At this juncture, Counsel for the Defendants objected as Dr Allan's report is not in writing.

24. The penultimate witness was Kushael Dawesi Naiker (PW7) who said he was with the Labasa Police Traffic Department for the past 4 years. He took the cautioned statement of the Defendant which he tendered as Exhibit P6. He said he conducted the interview in English, in the Traffic Office. The Court makes no further reference to this statement for reasons which will be stated later in this judgment.

25. The final witness was Sumal Kumar (PW8), the team leader enforcement with the Land Transport Authority, Labasa. He said under the Official Fiji Road Code 2012, one should slow down if approaching a bus when children are getting on or off.

26. When cross-examined, he said a person cannot be charged for not following the Road Code. There is no law which requires a driver to slow down to 16 kmh when approaching a school No one has been charged in Fiji for not slowing down to 16 kmh.

27. With that the Plaintiff closed her case and the Defendants began theirs.

28. The Defendants' sole witness was the 1st Defendant (DW1). At the material time he was driving a van. He saw a bus had stopped and children were getting out of it. It did not have any sign but he knew it was a school bus. He saw a boy running when the van was 5 – 6 metres from him. He swerved his steering to the right. If he did not do so, the child would have been hit. As he swerved to the right, a girl came in. She was 2 metres from the van and she was running from the right to the left as are faces Labasa. Within one second the van hit the 2nd child. After the collision the van went and stopped in front. He had never come across such a situation in the 4 years (4 times a day) he had travelled on that stretch of the road. Usually a parent or an adult or an older student would be there to guide them. He was trying to save one and the other was hit as it happened so suddenly. He was driving at a normal speed of 40 – 50 kmh where the speed limit was 80 kmh.

29. Under cross-examination, DW1 said he agreed if he had braked the accident would not have occurred. He did not agree there was an ample space for him there. He did not hit the Plaintiff on his wrong side of the road. If he did not swerve he would not have hit the Plaintiff but he would have hit the boy. He did not have enough space to go through. The Plaintiff was at fault because she came from behind the bus.

30. With this the Defendants closed their case. Counsel now began their oral submissions and cited various authorities.

31. Counsel for the Plaintiff said the principle in **Donoghue v Stevenson** applied. The Defendant had a duty of care which he breached. He should have taken extra care. Counsel confirmed it is not an offence to exceed 16kmh in a school area and also confirmed the school bus had gone on. He said the Defendant is 100% liable and the Plaintiff not liable at all.

32. With regard to Quantum, Counsel submitted the Court should award $80,000 for pain and suffering, $50,000 for loss of amenities, $95,546.88 for loss of wages for 18 years and $5,000 for future expenses.

33. Counsel for the Defendants then submitted. Ismail, PW5, had stood by his statement to the Police, and Counsel submitted this gave the true picture. PW7 had stated the place of impact was on the Defendants' correct side of the road. The Defendants were not liable at all. However, if the Court found there was contributory negligence, then the Plaintiff should be 75% liable.

34. As for quantum he submitted the award should be $50,000 for pain and suffering. Dr Vulibeci has said it was a case of "NNR", and that he had not been furnished with all the information he required. The decision made for the Plaintiff not to give evidence deprived the Court of observing and independently assessing her condition. He said other judges have said that their observing the Plaintiffs have enabled them to assess whether the condition of the Plaintiffs are real or put on.

35. Finally Counsel submitted that because future care had not been pleaded it cannot be allowed.

36. Plaintiff's Counsel in his reply now said the Plaintiff is 25% contributorily negligent if at all.

37. At the conclusion of the arguments, I said I would take time to consider my decision. Having done so, I now deliver my judgment.

38. At the outset I would state that the parties are bound by their pleadings and the judgment will therefore be based on what has been pleaded rather than what Counsel attempts to make out of the evidence that came out in the hearing. I opine the statement of the Defendant to the Police cannot be considered here, as that will be an issue in any Police prosecution of the Defendant and in the light of the Constitutional protection against self – incrimination.

39. I now turn to consider first the issue of liability and then that of quantum.

LIABILITY

40. Following on from what I have stated above, the facts are contained within a small compass. It is the Plaintiff's case that she was crossing the road when the accident occurred (see para 4, para 5 (a) and (e) of the Statement of Claim). This is substantiated by the sworn testimony of the Plaintiff's own witness, PW5 that he told the police the truth. So, I turn to his Police statement, Exhibit P4. In this statement he says that all of a sudden a girl (Plaintiff) and Fariz ran across the main road. The driver of the van swerved to the right to save Fariz but he could not save (Plaintiff) as she was also running to cross the road. In effect the Plaintiff's witness is saying the same thing as the Defendant who testified that he saw the boy running, he swerved to the right and then the girl came in running 2 metres from the van and he could not do anything. I accept the evidence of the Police sketch plan that the place of impact was on the Defendant's correct side of the road.

41. To my mind this is a classic example of what we judges call an "agony of the moment" situation. In the Privy Council decision in **Ng Chun Pui & Others v Lee Chuen Tat and Another** [1998] RTR 298, Lord Griffiths said the trial judge "also failed to give effect to those authorities which establish that a defendant placed in a position of peril and emergency must not be judged by too critical a standard when he acts on the spur of the moment to avoid an accident."

42. The best expounding of the applicable judicial view was expressed by Raja Azlan Shah J. in: Govinda Raju & Anor .v. Laws: [1966] 1 M.L.J. at page 190. He said: "The plaintiff saw the motor vehicle swerving into his path. Perplexed by being exposed to the danger created by the defendant he also swerved to his right in an attempt to avoid the accident but failed. To my mind, when a plaintiff is perplexed or agitated when exposed to danger by the wrongful act of a defendant, it is sufficient if he shows as much judgment and control in attempting to avoid the accident as may reasonably be expected of him in the circumstances. To that extent I am satisfied that the plaintiff had so acted in the circumstances. What is done or omitted to be done in the agony of the moment cannot be fairly treated as negligence. I therefore hold that there is no contributory negligence on the part of the plaintiffs". This was a decision

of the High Court of Malaya. Transposing "defendant" for "plaintiff" and vice versa, in my view, this is exactly what occurred in the instant case.

43. In the result, if the Plaintiff had been an adult, I would have dismissed her claim with costs. But she is not, and so I go to expound my decision here. The Plaintiff, though not held to the same degree of care as a grown-up woman is still required to observe some degree of care in the interests of her own safety. It is the duty of the Court to determine this degree. I am of opinion that a 8 year old school girl should be aware of the danger to herself of crossing the road in the face of an oncoming vehicle. I find that the Plaintiff had failed to conform to the standard of care that can be reasonably expected of an eight year old schoolgirl in her position. On the facts and on the law, I find and I so hold she is fifty (50%) percent contributorily negligent. Consequently the damages she is entitled to will be reduced by 50 percent. With that I turn to assess the damages.

QUANTUM ON A 100% BASIS

44. The injuries are stated in the medical reports tendered. The Plaintiff is obviously relying mainly on Dr Schultz's report, Exhibit P9. I find this is not an adequate or comprehensive report. It fails because the Doctor did not interview the mother of the Plaintiff who from her evidence in Court would have been in the best position to tell of the Plaintiff's physical and mental condition, pre and post accident, as the normal primary caregiver. Further the report is not accompanied by any report from the female doctor who also conducted related medical interviews. Finally the Doctor did not ask for the school records of the Plaintiff.

45. All in all, the Court is unable to set great store by Dr Schultz's report and will accept his written description of himself as "semi-retired" and that the "disability might be reasonably attributed to the accident. But this is not sufficient to satisfy the standard of proof in a civil case which is a balance of probabilities.

46. The Court considers Dr Vulibeci's report as the more accurate and comprehensive one. In doing so, the Court will express its judicial opinion that the alleged PTSD of which Dr. Schults is the sole proponent has not been established. The more realistic

and positive prognosis of Dr Vulibeci is accepted. In my opinion, the general damages for pain and suffering and loss of amenities that are both adequate and apposite will be the sum of $50,000.

47. The overall burden of proving her claim lay on the Plaintiff. If I may say so, from the statement of claim through the presentation of her case to the submission on her behalf, this has not been done.

48. Consequently, the Court having taken note of each and every other claim canvassed is unable due to the absence of cogent evidence to make any award for any of them.

49. In the result I enter judgment for the Plaintiff as follows:

The 1st and 2nd Defendants are to pay the Plaintiff:

(i) General Damages in the sum of $25,000
(ii) Special Damages in the sum of $1818.35.
(iii) Costs summarily assessed at $3,000.
(iv) Interest on the general damages at 6% p.a. from the date of service of the writ to judgment and thereafter at 4% p.a to realisation.
(v) Interest on the special damages at the rate of 3% p.a. from the date of accident to judgment and thereafter at 4% p.a to realisation.

50. I further order that:

(a) The general damage and all interest thereon are to be paid to the Chief Registrar of the High Court to be placed in an interest bearing fixed deposit with a licensed Bank in Fiji till the Plaintiff reaches the age of eighteen.

(b) The special damages and all interest thereon and the costs are to be paid to the father of the Plaintiff, Abdul Muhaimin Khan.

Delivered at Labasa, this 16th day of March, 2017.

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DAVID ALFRED
JUDGE
HIGH COURT OF FIJI