IN THE HIGH COURT IN FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 542 of 2006

BETWEEN

SAKIUSA ROKOTAKALA of FMF Married Quarters, 31/4, Nabua, Suva, Student, a minor who sues by his father and next friend **MARIKA ROKATAKALA** of FMF Married Quarters 31/4, Nabua, Suva, Soldier.

PLAINTIFF

AND

SAVAIRA SINGALEVU of Nabua Fijian Primary School, Mead Road, Nabua, Suva, Class Teacher of 6:02.

FIRST DEFENDANT

AND

MALAKAI TADULALA the Manager/Chairman; **ISIMELI BOLA** the Treasurer and other members of the Management Committee and Controlling Authority of **NABUA FIJIAN PRIMARY SCHOOL** of Mead Road, Nabua in Suva an educational institute registered under the provisions of the Education

Act (Cap 262) of Fiji all sued on their own behalf and on behalf of all the other members of the Management Committee.

SECOND DEFENDANT

AND

CHIEF EXECUTIVE OFFICER – EDUCATION of Marela House, 19 Thurston Street, Suva.

THIRD DEFENDANT

AND

MINISTRY OF EDUCATION of Marela House, 19 Thurston Street, Suva.

FOURTH DEFENDANT

AND

THE ATTORNEY GENERAL OF FIJI of Level 7, Suvavou House, Victoria Parade, Suva.

FIFTH DEFENDANT

Counsel	:	Mr. A. Vakaloloma for the Plaintiff Ms. S. Ali with Ms. A Chetty for the Defendants
Dates of Hearing	:	27th & 28th February, 2017
Written submissions filed on	:	13th March, 2017 and 22nd March, 2017
Date of Judgment	:	31st March, 2017

JUDGMENT

[1] The plaintiff instituted these proceedings to recover damages for the injury caused to his left eye during the school hours. Since plaintiff was a minor his father sued the defendants as his next friend.

[2] In the course of the trail it was brought to the notice of the court by the learned counsel for the defendants that page 5 of the amended statement of clam of the plaintiff was missing. On perusal of the amended statement of claim filed on record the court found that page 5 was missing. When this matter was brought to the notice of the court the counsel for the plaintiff did not explain why this page was missing. However, it appears that the amendment effected by the plaintiff was to remove the name of the 2nd defendant from the summons. Therefore, no injustice would be caused to any of the parties if the court proceeds to determine the matter on the averments contained in the original statement of claim.

[3] The particulars of negligence as averred in the statement of claim are as follows;

(i) Failing to realise the danger posed by students of the school playing with and throwing stones at each other during school hours;

(ii) Failing to prohibit or stop children from throwing stones at each other during recess;

(iii) Failing to provide and full supervision to the school students during recess time thus failing to have any concern for the safety of the students in the school by negligently allowing the students to throw stones in the school premises during school hours; and

(iv) Exposing the plaintiff to a risk of which they knew or ought to have known could occur from throwing stones.

[4] At the pre-trial conference the parties admitted the following facts:

1. The 1st defendant was at all material times the class teacher of the deceased at Nabua Fijian Primary.
2. The 2nd defendant at all material times was the head teacher of Nabua Fijian Primary School.
3. At all material times the plaintiff was a class 6 student of the Nabua Fijian Primary School (Stream 6:02).

[5] The plaintiff sustained eye injury in school during the morning recess. It is his evidence that while he was roaming around with his friends someone threw a stone at him and it hit his left eye. In cross-examination he said that some children were playing beside the washroom and it was one of them who threw the stone at him.

[6] Sepeti Soronivalu was a student in the same school and on the day of the incident. It is his evidence that during recess time some children were throwing stones and one student threw a stone and it hit one of the plaintiff's eyes. At that time the teachers were having a meeting in the office. When the witness and some of the students saw blood in the plaintiff's eye they took him to the wash room. After the recess time the cleaning lady who came to clean the washroom saw the injured child and took him to the office and the plaintiff was later taken to the hospital by the principal.

[7] Dr. Jai Narayan is the doctor who examined and treated the plaintiff when he was admitted to the CWM hospital with the eye injury. He testified that at the time the plaintiff was admitted to the hospital his eye was badly damaged and the chances of recovery were very slim. He tendered in evidence two medical reports (P1 and

P2) prepared by him according to which the injured eye of the plaintiff has become totally blind. The report "P2" says further that the patient was given the option of removing the eye and replacing it with an artificial eye but the patient preferred to keep his eye as it was.

[8] Witness Samuela Moce, according to his own evidence, was the teacher on duty on the day of the incident. It is his evidence that they discouraged students from going to the area where the plaintiff sustained injuries because that area is closer to the railway track and the footpath was broken. He also testified that that every week children are reminded of that and signs were displayed in the area. It is also evidence of this witness that during the recess he supervised the children and he was assisted by the prefects. When the bell rings for the recess the teachers must direct the children to Block 'A' and the safest path to the washroom is from Block 'A'.

[9] The witness referred to the following Rules of the school to show that they have taken all precautionary measures for the safety of the children [D4];

> 18. Take notice of "Out of Bounds" areas during school hours. Stay away from these areas.
>
> 23. During school break – (recess and lunch) All students are to be in front of Block A. All students in the top floor must come down.

[10] In cross-examination the witness said that the footpath used by the plaintiff was not an "out of Bound" are but the students were not encouraged to use it. The witness stated further that he should have been supervising the children during that time but he was not there. The witness also stated in cross-examination that the plaintiff at the time of the accident was 12 years of age and since the children of that age play dangerous games the need be supervised. It was revealed in evidence that the teachers did not have a tea interval during recess. It is clear from her own evidence that the witness had failed to discharge properly the duties of the supervising teacher.

[11] Mr. Rupeni Taulilagi was the head teacher of the school at the time the plaintiff sustained injuries. His evidence is that there are adequate measures to maintain

the safety of the children and the teachers are trained on occupational health safety. The witness also said that they have procedures in handling behavioural problems. The witness, in his evidence, referred to Guidelines for Teaching Staff 2006 and tendered it in evidence marked as "D5".

[12] Dr. Shankar Prasad Saha is a consultant ophthalmologist. His observations are that the plaintiff's left eye is totally blind and there is no chance of recovering the sight of the injured eye.

[13] There is not dispute between the parties that the first to fourth defendants owed a duty of care towards the students during the school hours. In discharge of such duty the school management has laid down certain rules for the students to follow. The question is making such rules alone is sufficient to secure the safety of the children.

[14] The witnesses for the defendants attempted to place the entire responsibility of the incident on the plaintiff who was a twelve year old child. There is no evidence whatsoever, that the plaintiff acted contrary to any of the rules laid down by the school. It was said that the plaintiff should have used the path leading to the wash room from Block A without using the path alongside the "out of bound" area. It was admitted by the witnesses for the defendants that this path was not out of bound for the children. Therefore, it cannot be said that the injury was caused to the plaintiff due to his own negligence.

[15] The manner in which this incident occurred is not in dispute. At that time some of the students had been playing in "out of bound" area by throwing stones at each other and one on the stones hit the left eye of the plaintiff. The supervising teacher should have advised the students not to play with stones and removed them from the area where they were not supposed to be. But the teacher after the students left the class room during recess time had gone to have tea with the other teachers. In my view the teacher in charge of supervision of the students during the recess has filed to discharge her duties properly and acted more diligently this incident could have been avoided.

[16] It is position of the defendants that they have taken all precautionary measures to avoid accidents in that they have displayed on the notice board the School Rules and also that at the commencement of every recess time, before the children leave the classroom they are told where to gather and the things they should not get involved in. The question is whether the publication of the rules and advising the student are sufficient to avoid incidents of this nature among the students. The plaintiff was twelve years old at the time he sustained injuries. The other students would have been around the same age. One cannot expect the children of this age read the notifications and follow the rules. That may be the reason why the school management appointed a teacher to supervise the students during the recess. Had the teacher on duty was cautious enough she could have stopped the children playing with stones and remove them from the "out of bound" area. In the circumstances the court is of the view that the injuries caused to the plaintiff was due to the neglect of the duty of care owed towards the students by the defendants.

[17] The learned counsel for the defendants submitted that the school and the teachers were not responsible for the injuries sustained by the plaintiff and in support of this argument the learned counsel cited the decision in the case of **Australian Capital Territory Schools Authority v El Sheik & Ors** [2000] FCA 931. In that case the respondent received an injury when he was kicked by another pupil what the respondent described as "play fight that got serious". In that case immediately before the incident the respondent and the other student who caused the injury had lunch together in the school canteen and walked towards the oval area where some 80 to 100 pupils were engaged in various forms of recreational activity. Suddenly, the pupil who caused the injury called the respondent to a fight and started kicking him which caused the injury.

[18] The learned counsel also relied on the decision in **Angelo Lepore v State of New South Wales & Anor** [2001] NSWCA 112. In that case the second defendant on numerous occasions had directed the plaintiff to into a store room where he required the plaintiff to remove his clothing and thereafter fondled him on his penis. On some occasions he had brought other children into the room and

undresses them and fondled them in the presence of the plaintiff. On one occasion he forced the plaintiff to fondle him outside of his clothing in the area of his penis.

[19] In both these cases the court held that the there was no tortuous liability on the school. The facts and the circumstances in which the incidents happened in those cases are different to that of the matter before this court. The Australian courts have arrived at those findings on the facts of each case. As I have already stated in this case the plaintiff has had no involvement in throwing stones. He was on his way to the wash room when his eye was struck with a stone. Had the management of the school was careful enough to remove the students from "out of bound" area or to stop them from playing with stones this accident could never have occurred. Therefore, the decisions cited above are of no relevance to the matter before this court.

[20] The learned counsel for the defendants submitted that it should be noted that the plaintiff in his evidence admitted that there was a 'bullying, fighting game' and he wanted to join them. Whatever he thought there is no evidence that the joined them and played. He has had absolutely no participation in the game nor has he entered to restricted area. Mere thought of doing something negligent does not amount to negligence.

[21] The plaintiff claimed General damages for pain and suffering, loss of amenities of life and loss of earning capacity.

[22] In calculating damages for pain and suffering the court must bear in mind that there is no relationship between pain and money and therefore, the court must award a sum as damages arbitrarily but it has to be reasonable.

[23] A claimant is entitled to recover for his pain and suffering – the two terms have never been clearly distinguished by courts – actual and prospective, resulting from the tort feasor's conduct. This will include his nervous shock and any other psychiatric symptoms but not sorrow or grief. [***Markesinis and Deakin's Tort Law, 7th Edition, at page 848***].

[24] In the case of **H. West & Son Ltd v Shephard** [1964] AC 321 at page 341 Lord Reid made the following observations on loss of amenities of life;

> There are to views about the true basis of this kind of compensation. One is that the man is simply being compensated for the loss his leg or the impairment of his digestion. The other is that his real loss is not so much his physical injury as the loss of those opportunities to lead a full and normal life which are now denied to him by his physical condition – for the multitude of deprivation and even petty annoyance which he must tolerate.

[25] It is important in each case to consider precisely what has been lost. All the personal circumstances of the injured individual must be taken into account. That includes age, lifestyle, hopes and expectations, and disabilities existing before accident. .....losses compensated under this heading include: impairment of one of five senses; loss or impairment of sexual life; diminution of marriage prospects (an item which is additional to the pecuniary loss that may result from such an event); destroyed holiday; inability to play with one's children; and many others. [***Markesinis and Deakin's Tort Law, 7th Edition, at page 849***].

[26] In the instant case the plaintiff had just stated his life. He lost his sight of the left eye when he was 12 years of age. He is now working as a Computer Graphic Designer but he says that he cannot work for a long time on the computer because the injured eye becomes painful. It is not difficult for any reasonable person to understand the pain he would have suffered when the injury was cause and even thereafter. The deprivation of the sight of the left eye, as I have already stated, is permanent.

[27] The learned counsel brought to the attention of the court the decision in the case of **Kumar v Bainivalu Primary School (Head Teacher)** [2016] FJHC 115.2011 (25 January 2016). In that case the plaintiff who was about 7 years of age suffered eye injury while in school. From the facts of the said case it appears that the injury sustained by the plaintiff has not been as serious as the injuries sustained by the plaintiff in this case before this court. However, the court in that case awarded $124,000.00 as general damages. Taking all these factors into consideration I award $150,000 to the plaintiff as general damages. The plaintiff in this matter has not sought special damages. The plaintiff is also entitled to interest on the said sum in terms of section 4 of the Law Reform (Miscellaneous Provisions)(Death and

Interest) Act (cap 27) as amended by Law Reform (Miscellaneous Provisions)(Death and Interest) Decree 2011 from the date of the judgment until the entire sum is paid in full.

[28] **Orders of the Court**

1. The 1st to 4th defendants are ordered to pay the plaintiff **$150,000.00** with interest on the said sum in terms of section 4 of the Law Reform (Miscellaneous Provisions)(Death and Interest) Act (cap 27) as amended, until the entire sum is paid in full.
2. The 1st to 4th defendants are also ordered to pay the plaintiff $5,000.00 as costs of the action.

Lyone Seneviratne

JUDGE.

31ST March, 2017