

MALAKAI ROKOTAKALA NARISIA v THE MINISTER FOR MINERAL RESOURCES, RAGHWAN, MINISTER FOR JUSTICE & ATTORNEY GENERAL (HBC0192 of 2006L)

5 HIGH COURT — CIVIL JURISDICTION

WICKRAMASINGHE J

1 May 2012

10 **Personal injuries — negligence — statutory regulation — fireworks — sale to children — duty of care — breach of duty — damages — regulatory responsibility — contributory negligence — parental responsibility — plaintiff was injured when he lit firecrackers brought from a local shop — proceedings commenced against owner of shop and against responsible Minister and Attorney-General for failure to carry out their duties — whether proprietor of shop was to be held responsible for**
 15 **plaintiff's injuries — whether Minister and Attorney-General had complied with their regulatory obligations — whether plaintiff's guardians were to be held liable for contributory negligence — Explosive Act regs 20, 84 — Firearms Act — Trade Standard and Quality Control Decree.**

20 The plaintiff, who was eight years old at the time of the incident, lived in Narewa, Nadi. Both parents of the plaintiff were employed and the grandparents and a maternal aunt looked after the plaintiff and his siblings. The second defendant ran a small grocery shop in the village; and, on the date of the accident, he had sold firecrackers to the plaintiff. On the date of the incident, the family had gone on a picnic with the grandparents and his
 25 cousins. After swimming and playing at the beach, the plaintiff had also lit firecrackers he had purchased from the second defendant at the beach along with others. After returning home, the plaintiff had joined some of his friends in front of his grandfather's house to play; and, at one point had played with the firecrackers which exploded injuring his hand and eye. The adults had been inside the house. Although it was not evident how many firecrackers the plaintiff had purchased, it appears he had many as he used them both at
 30 the beach and at the place where the incident occurred. The plaintiff then commenced proceedings against the second defendant for the injuries suffered. Proceedings were also commenced against the Minister for Mineral Resources and the Attorney-General (the first and third defendants) for their failure to regulate sale of firecrackers.

35 **Held –**

(1) Government policy clearly established that several measures were taken to curb the injuries cause by firecrackers. The father of the plaintiff in his evidence said that there were several awareness programs relating to use of firecrackers although the second defendant said he was unaware of them.

(2) It was known that firecrackers were dangerous and were to be used strictly under
 40 parental guidance. Although it would be mandatory that each firecracker had to be perfectly manufactured, the evidence about usage revealed the existence of occasional defective crackers.

(3) In those circumstances, the statutory controls and supervision of firecrackers of the second defendant's shop by the first and the third defendants were inadequate to protect
 45 persons in the position of the plaintiff. As such, both those defendants were liable for the plaintiff's injuries.

(4) There was no statutory duty imposed on the second defendant restricting the sale. However, it was also clear that the second defendant had a common law duty of care towards the plaintiff not to permit the sale of fire crackers. In those circumstances, the second defendant was also to be held liable.

50 (5) The adults inside the house ought to have known that the children outside were playing with firecrackers due to the sound. None worried which resulted in the injury.

Clearly, the adult caretakers including the parents of the plaintiff also had a duty of care towards the plaintiff. Damages were therefore to be reduced to allow for contributory negligence.

Damages awarded.

Cases referred to

5 *Apimeleki Kava v Jiko Fisheries Ltd* BHC 283 of 1996; *Bullock v Miller* [1987] Aust Torts Reports 80–128; *Kumaran v Satendra Prasad Construction Ltd* [2005] FJHC 568; HBC 127/2003L (12 August 2005); *Maikeli Junior Nasolo v Evangeline Veena Singh & Ravendra Nath Sharma* Lautoka High Court Civil Action No HBC 118/2002L; *Moses Archan Jhon v Tebara Transport Limited* HBC 327 of 2003, cited.

10 *Burfit v Killie* [Kings Bench Division (Atkinson J.)], April 4, 1939; *Todorovic v Waller* [1981] 150 CLR 402, considered.

15 *R. Singh* instructed by *Messrs Patel & Sharma* for the Plaintiff.

S.D Turaga instructed by *Office of the Solicitor-General* for the 1st & 3rd Defendants.

Vasantika Patel instructed by *Vasantika Patel Law* for the 2nd Defendant.

20 Wickramasinghe J.

INTRODUCTION

25 [1] It is a cardinal principle that a court of law must not be emotively moved despite sympathetic causes. The matter before me is such a cause where an eight year old- plaintiff lost the permanent vision in the left eye whilst playfully pulling a defective fire cracker with his friends on 10 October 2003. He is seeking damages from the shop keeper, the second defendant who sold the fire cracker to him and the government for lack of regulatory framework and supervisory controls over the sales of fire crackers. The action is filed by the father as the next friend of the plaintiff, who is a minor.

30 BACKGROUND FACTS

[2] The following facts in this case are admitted by all parties.

35 [3] The plaintiff who was eight years old at the time of the incident lived in Narewa, Nadi. Both parents of the plaintiff were employed and the grandparents and a maternal aunt looked after the plaintiff and his siblings. The second defendant ran a small grocery shop in the village; and, on the date of the accident, he had sold firecrackers to the plaintiff.

40 [4] On the date of the incident, the family had gone on picnic with the grandparents and his cousins. After swimming and playing at the beach, the plaintiff had also lit firecrackers he had purchased from the second defendant at the beach along with others. After returning home, the plaintiff had joined some of his friends in front of his grandfather's house to play; and, at one point had played with the firecrackers which exploded injuring his hand and eye. The adults had been inside the house. Although it was not evident how many firecrackers the plaintiff had purchased, it appears he had many as he used both at the beach and at the place where the incident occurred.

HEARING

50 [5] In support of the plaintiff's case PW1 plaintiff; PW2 Dr Mark Rudel, Eye specialist Suva Private Hospital; PW3 Malakai Narisia(father); PW4 Emele Buluilagi Naria (mother) gave evidence. DW1, the second defendant gave

evidence in support of his defence and DW2 Dr Taraivini Rakabu Medical Officer DW2 Seema Sharma Assistant Director Department of Fair Trading and DW3- Venasio Marara gave evidence in support of the defence of first and third defendants.

5 **Cause of action**

[6] The statement of claim sets out the following causes of action.

Against the first and Other defendants

10 The plaintiff alleged at paragraph 8 of the Statement of Claim that the first defendant, the Minister for Mineral Resources, had failed in his duty of care under the Explosives Act, to the safety of the minor in regard to the following responsibilities:

- 15 (a) failure to prohibit the importation of the harmful explosive;
 (b) failure to prohibit the distribution of the harmful explosive;
 (c) failure to prohibit the sale and or retail of the harmful explosive;
 (d) failure to regulate the importation, distribution, sale and/or retail of the harmful explosive.

20 **Against the second defendant**

At paragraph 9 of the Statement of Claim, the plaintiff alleged that the second defendant breached the following duty of care to the plaintiff.

- (a) The second defendant sold the harmful Explosives to the plaintiff, a minor;
 (b) The second defendant failed to warn the plaintiff of the dangers inherent in the use
 25 of the harmful explosives.

EVIDENCE

[7] The plaintiff in his evidence reconfirmed the admitted facts, which led to the injury in detail. On the date of the incident he and his cousins had been under his
 30 grandfather's care, as they had gone on a picnic and were swimming, playing and pulling firecrackers. He explained the incident in detail how he pulled the firecracker and a spark went to his eye losing his vision. When the incident took place, about ten children had been playing without any adult supervision. He explained the pain and his suffering during that time. He said currently he could
 35 not see anything from the eye.

[8] The parents who gave evidence for the plaintiff informed court that they were both working on the day of the accident and the plaintiff was under the care of the grandparents. No sooner they learnt about the incident they had returned and taken the plaintiff to a local doctor who treated the child on eye drops. Later
 40 when there was no improvement, the child was shown to a second doctor who had recommend that the child be admitted to the Lautoka Hospital. Dr Mark Rudell then saw the patient and immediately transferred to New Zealand for further treatment.

[9] The second defendant, Raghwan, 80 years old, in his evidence said that he had been running the shop for about 15 years and knew the plaintiff and his father well as his customers and neighbor. He said he purchased the fire crackers from Rups Big Bear and has a stock of approximately \$30 to \$40 in his shop. Most of the fire crackers were small crackers and star sparklers. He said he purchased the crackers for Deewali festival. In his evidence, he said he does not have a license
 50 to sell the firecrackers and was unaware that he needs a license to sell firecrackers. He said price control officers visited the shop every three to four

months but was never told he needs a license to sell the firecrackers. He also admitted that he did not have a safety instruction of using fire crackers outside his shop.

5 [10] The 2nd Defendant warned the minor plaintiff at the time of purchase not to play with it until he got home after asking who was at home at the time. The minor Plaintiff had told him that his aunty was at home. He then told the minor Plaintiff to show the firecracker to his aunt.

10 [11] The witness also maintained that neither of the parents had visited the second defendant about any injury to the minor plaintiff's left eye after playing with the pulling firecracker. The second defendant was not served with any letter before action. The first time he became aware of this matter was when he was served with the writ of summons in this action.

15 [12] He also said that there are four other retail shops in the neighborhood that sell firecrackers. He admitted selling firecrackers to children 8 or 9 during the Deewali season.

20 [13] DW-1 Dr Taraivini Rakabu, a medical officer with the Eye Department at CWM Hospital in Suva, stated in cross-examination by the Plaintiff's counsel that it was not possible to say whether it was the infection or the injury itself, which made the eye blind.

25 [14] DW2 Seema Sharma in her evidence said that in 1999 a 13 year old boy lost his life which resulted in the government banning the sale of all types of fireworks for three months. The temporary ban had been thereafter extended till 2001. On 12 July 2002, the temporary ban had been lifted for 'pulling fireworks'. In addition, the inspection for licensed shops commenced 2 to 3 weeks prior to the Diwali throughout Fiji. She also confirmed that team of officers from Fair Trading and Mineral Resources Department carries out the inspections and the price control officers do not assist in the inspections for firecrackers. She also said that pulling firecrackers are imported and not locally manufactured. She also said that many awareness programs are carried out through out Fiji in all languages since 2000. Since 2004 sale of pulling crackers had been banned in Fiji keeping in line with the UN standard protection of person and property. In cross-examination she said that during inspections of the shops they confiscate articles. she said she does not have the information of mechanism used in finding the importer.

35 [15] DW3 Venasio Marasa in his evidence said that Fiji does not have local manufactures of firecrackers and most of the firecrackers are imported from China. The industrial explosives from New Zealand and fireworks are regulated by individual license. Regulation 20 of the Explosive Act requires the retailer to obtain a license for sale. Regulation 84 specifies an age limit for sale. He also said there were awareness weeks before to Diwali. He also said that pulling fireworks were always dangerous and they were totally prohibited in 2004. In cross-examination, he said inspections were generally carried out on the main roads and main streets in Nadi and Nasusori and not in Narewa.

45 **UNDISPUTED FACTS**

[16] The first defendant in his written submissions set out the agreed facts reached at the Pre- Trial Stage, and the facts that were uncontested at the hearing which I reproduce below.

50 (a) that the 1st Defendant has the powers and duty to prohibit the manufacture, importation, distribution or sale of fireworks within the jurisdiction pursuant to the Explosive Act (Cap 189) and its Regulation;

(b) that the 2nd Defendant operates a shop opposite Narewa village and that he is well known to the villagers;

(c) that the minor, on his own accord purchased fireworks from the 2nd Defendant shop on the morning of 10th of October 2003;

5 (d) that the minor bought a packet of firecrackers knowing full well that his father [Plaintiff] expressly forbids him to buy or play with the same;

(c) the type of firecrackers bought by the minor is widely known as “pulling firecrackers” and it ignites when strings tied to its opposite ends are pulled away from each other;

10 (d) that the minor had taken his packet of firecrackers when we went picnic with his friends and grandfather on the beach on the morning of 10th October 2003 and had ignited some fire-crackers there;

(r) subsequently, after they had returned to the village, the minor wanted to pull another pulling fire-cracker but it exploded in his face and immediately felt the pain in his left eye and his vision became blurry;

15 (f) at the time of the accident to the minor, both parents were at work;

(g) that the minor first underwent treatment at a General Medical Practitioner, Nadi and when his situation did not improve, Plaintiff referred him to the Eye Department, Lautoka Hospital and subsequently at Auckland, New Zealand to undergo operation;

(h) that the minor’s had lost his sight in his left- eye;

20 (i) that the 2nd Defendant did not have a requisite license to sell fire- crackers pursuant to the Explosive Act and that he was not aware of the said requirement;

(j) that the 2nd Defendant was not aware of the legal requirement that explosives cannot be sold to people under the age of eighteen (18) years old;

25 (k) that the “pulling fireworks” was permitted type or exempted from the list of declared fireworks considered dangerous pursuant to Legal Notice No 40 – Fiji Island Gazette No 17 Friday, 12th July, 2002 on the “Declaration of Firecrackers and Fireworks as Dangerous Goods” pursuant to the Trade Standard and Quality Control Decree 1992 (Decree No 24 of 1992);

30 (l) that in Legal Notice No 45 – Fiji Island Gazette No 19 Friday, 18th June, 2004 on the “Declaration of Fireworks as Dangerous Goods” pursuant to the Trade Standard and Quality Control Decree 1992 (Decree No 24 of 1992) the “pulling/string firecrackers” was declared as a non – permitted /prohibited fireworks under the said Declaration.

ISSUES

35 [17] The issues for the determination of the court are as follows:

(a) The extent of the injury sustained by the minor on the 10th October 2003;

(b) What type of medical treatment did the minor obtain for the injuries sustained by him?

40 (c) Whether the first defendant breached its duty under the Explosives Act (Cap 189) by allowing the importation, sale and or retail of the fireworks, and, by failing to regulate the importation, distribution, sale and/or retail of the said fireworks?

(d) Whether the second defendant breached his duty of care in selling the said firework to the Plaintiff (minor)?

(e) If liability is determined, what is the appropriate quantum of damages to be paid by the first and/or second defendants jointly and/or severally.

45 LEGAL MATRIX

Liability of first and third defendants

50 [18] Paragraph 2 of the written submissions of the first and third defendants sets out their defence in detail. Primarily the defence is that the defendant had taken adequate measures to educate the public and the injury sustained by the plaintiff was resulted due to the negligence of the plaintiff’s parents.

[19] The first and third defendant's supplementary bundle of documents confirms that with effect from 12 November 1999¹, the government had imposed a temporary ban on supply and sale of firecrackers. The said notice states that the ban was necessary to 'allow for the consultations within government and to
5 review submissions for the general public in formalizing appropriate regulatory controls on fire crackers. The said ban was thereafter further extended for another six months. (Legal notice 37- Gazette notification of 15 April 2000)². The temporary ban for several firecrackers including pulling fireworks was then lifted
10 on 17 May 2000 (legal notice 51). Thereafter by gazette of 12 July 2002, No 17 (legal notice 40)³ the government after considering a report from the Trade and Advisory Standards Council declared firecrackers and fireworks as dangerous goods with the exclusion of certain firecrackers, which included pulling fireworks. On 18 June 2004, the government declared pulling firecrackers as
15 dangerous goods considering a report of the Trade and Advisory Standards Council⁴. The gazette especially says that the it was satisfied that the declaration is necessary to avert risk of injury and the government policy at that time determined that the matter cannot be dealt by prescription of safety standards. On 22 October 2004, the Mineral Resources Department published a public notice
20 *inter alia* prohibiting the purchase of firecrackers by persons less than 18 years of age⁵.

[20] The above government policy clearly established that several measures were taken to curb the injuries cause by firecrackers. The father of the plaintiff
25 in his evidence said that there were several awareness programs relating to use of firecrackers although the second defendant said he was unaware of them.

[21] Mr Turanga who appeared for the first and third defendants explicitly set out the provisions of the law relating to sale of explosives.

[22] Having considered the statutory provisions carefully, I find that as at 10
30 October 2003, the measure afforded by the government were somewhat different to the current measures.

[23] The government placed age restrictions only from 22 October 2004, that too, by prohibiting a person less than 18 years of age purchasing same. Therefore
35 as at 10 October 2003, there were no statutory measures to either prevent or restrict sale of firecrackers to minors⁶. Up to date the second defendant was not charged for the sale of the firecracker to the plaintiff and the reason could be the inadequacy of the law as it stood on that date. Moreover the second defendant's shop was not supervised relating to the sale of the firecrackers. Admittedly, only
40 main shops are supervised during the leading to festive seasons. The temporary ban that was in force subsequently permitted the sale of firecrackers in 2001. An uncontested evidence at the trial revealed that a child's head was blown off by using a firecracker, which resulted the government finally prohibiting the sale of pulling firecrackers in Fiji in October 2004. Until such time in 2004, the statutory
45 measures were inadequate.

1. Supplementary bundle - Doc 1

2. Supplementary bundle - Doc 3

3. Supplementary bundle - Doc 4

4. Supplementary bundle - Doc 10

50 5. Supplementary bundle - Doc 11.

6. Supplementary bundle - Doc 11.

[24] The sample of the firecracker that was used by the plaintiff was produced in court. It is approximately the size of a short matchstick with two strings attached to the end. When the two strings are pulled, it explodes with a sound. Clearly, this is a firecracker manufactured for children. The packet does contain usage instructions. However, a minor would hardly understand those instructions. Moreover the size and the manner of using the firecracker is as such one needs to hold it either at eye level or a bit below or up as one must pull the strings on either side of the firecracker. In my mind, it is a type of a firecracker that could cause immense harm and dangers if a defective one is found. It is known that firecrackers are dangerous and must be used strictly under parental guidance. Although it would be mandatory that each firecracker must be perfectly manufactured, the usage reveals the existence of occasional defective crackers. These are consideration that must be made before permitting its importation.

[25] The Legal Notice No 40 gazetted on the 4 July 2002 [Document No 6] by the Minister for Commerce, Business Development and Investment declared “..Firecrackers and fireworks as dangerous goods *except for those permitted firecrackers and fireworks specified in the Schedule listed*. The pulling firecracker therefore became a permitted item for sale. It is only on 22 October 2004, where the sale and its importation became prohibited. And the plaintiff got harmed permanently before the ban.

[26] In the circumstances, I conclude as at 10 October 2003, the statutory controls and supervision of firecrackers of the second defendant’s shop by the first and the third defendants were inadequate and thus they become liable for the plaintiff’s injuries.

Liability of the second defendant

[27] The issue is as at 10 October 2003 whether the second defendant was statutorily restricted to sell firecrackers to a minor. Ms Patel in her written submissions said that

[28] It is the first and third defendant’s case that Reg. 84 made under the Explosive Act restrict the sale of fireworks to persons under the age of 18 years of age.

[29] Regulation 84 reads: “*No person under the age of 18 years shall handle, charge or explode an explosive or be permitted to do so.*”

[30] Ms Patel argues that the restriction in regulation 84 is restricted to the rubric ‘Part IX’ which deals with ‘CIVIL ENGINEERING WORKS’ in the Explosives Regulations. She argues that regulation 84 does not apply to buying or selling fireworks. Sale, Possession and Purchase are regulated under Part VII of the Explosives Regulations, which do not regulate the age for sale, possession or purchase. She therefore argues that the minor plaintiff could have purchased any firework in any of the shops mentioned by Seema Sanjini Sharma and Mr Vanasio Nasara’s evidence where fireworks were sold or even at Rups or Vinod Patel or M.H’s in Nadi. I agree with Ms Patel’s argument and find that even to date there is no age restriction on the sale of fireworks in Fiji. The restriction placed in 2004 only related to purchase thereby making limitations against offenders being charged for the specific offence.

Common law liability

[31] Moreover, as regards the Second Defendant, reference is made to the case of *Burfitt v A. & E Killie [Kings Bench Division (Atkinson J.)]*, April 4, 1939, in which Atkinson J Stated at 375 that:

5 “The seller of goods who is not the manufacturer cannot control the manufacture, but it rests with him to determine to whom he will sell and to whom he will not. The duty resting upon him may, in some cases, be adequately performed by a proper warning. If it cannot, the duty must be to refrain from the sale. In *Bottomley v Bannister*, Scrutton LJ, who was really quoting what he had himself said in *Hodge & Sons v Anglo American Oil Co.* at 187, said at 473:

10 I go on to say: “it is not quite clear what is the distinction between the other agency, which is no excuse, and the conscious act of volition, which is an excuse. Probably the owner fulfills his duty if he entrust the dangerous thing to a competent person who knows or is warned of the danger. I think that if the danger is caused by: (1) the negligence of the defendant in handing without warning a dangerous thing to a third party (2) the act of that third party in dealing reasonably with the thing, in ignorance of its dangerous character, the Defendant would not be excused. If, however the Defendant hands the dangerous thing, with warning of its character, though on to a competent person who knows of its character, though neither the warning nor the knowledge is of the exact amount of the danger, I do not think the Defendant is liable to third parties for the action of the receiver, which is unreasonable in view of this knowledge or warning. His action, I think, is *nova causa interveniens*.”

15 This seems to recognize that a warning is not sufficient discharge of duty if the person to whom the chattel is delivered is not a competent person.”

20 Further, reference is made to the case of *Maikeli Junior Nasolo v Evangeline Veena Singh & Ravendra Nath Sharma*, Lautoka High Court Civil Action No HBC 118/2002L in which Connors J, in finding the Defendants liable on a claim for damages for personal injuries suffered by the minor from a motor vehicle accident, stated as follows:

25 “In *Anare Robinson v Joseph Shackley & Another*, HBC 0022 Of 1990, the court adopted the words of Underwood J in the Tasmanian Supreme Court case of *Bullock v Miller* (1987) Aust Torts Reports 80-128: “ young children have limited perception, foresight and ability to make a decent judgment. Young people lack the capacity to recall and apply previously gained knowledge so as to avoid injury. Imperviousness, selfishness and single-mindedness are all anorectic behavior are all characteristics of children. The extent to which they govern behavior in situations involving the risk of injury greatly diminishes with maturity.”

30 With the authority of the above decisions, we submit that in the present case the decision of selling the harmful fireworks to the Plaintiff (Minor) rested with the Second Defendant. This duty could not have been adequately discharged by a proper warning in view of the Plaintiff (Minor’s) age. In those circumstances it is our humble submission that the Second Defendant’s duty was to refrain from selling the harmful explosives to the Plaintiff (Minor). It would have been a different story if the harmful explosives were sold to a competent person who understood the nature of the harmful explosives but the present case is a clear case of negligence in failing to restrain from selling harmful explosives to an incompetent person such as a minor.

40 [32] Ms Patel also argues that the dicta in *Burfit v Kille* [1939] 2 ALL ER 372 can be readily distinguished from the facts of this case. In *Burfit*, the items sold were a pistol and blank ammunition to a boy aged 12. Furthermore, under the Firearms Act 1937, the sale of the ammunition was unlawful to someone who was under 17 years of age.

45 [33] As held in the case of *Bullock v Miller* (supra) the young plaintiff at the age of 8 only could have limited perception foresight and ability to make a decent judgment. Even if explained, the dangers posed using a defective firecracker could not have been understood even if the warning label that was produced as exhibit 8 was explained to the young plaintiff.

50 [34] The second defendant says he asked the plaintiff who was at home and when the plaintiff said his aunt was at home, he then said to show it to her. He had not warned him of any of the dangers of the pulling firecracker or at least said

not to pull the firecracker close to his eyes. I admit that there was no statutory duty imposed on the second defendant restricting the sale. But I am fully satisfied that the second defendant had a common law duty of care towards the plaintiff not to permit the sale of ‘pulling fire crackers’

5 [35] In the circumstances, I hold that second defendant is in breach of his common law duty of care as alleged in paragraph 9 of the statement of claim.

PARENTAL LIABILITY

[36] Clearly the liability does not stop with first, second and third defendants. Admittedly the plaintiff was in the grandparents and aunts care when both parents went to work. The father of the plaintiff says he had advised the plaintiff not to play with firecrackers. I do not have similar evidence that he advised the caretakers of the child not to permit the plaintiff to play with firecrackers. Indeed the mother simply gave the money to an eight year old child to buy as he pleases without adult supervision. The plaintiff in his evidence admitted that he played with the firecrackers throughout the day before the grandfather. At no time was the plaintiff advised not to play with the pulling firecracker by the grandfather. When the incident took place, the plaintiff was back at home and the plaintiff was playing with his friends without any type of adult supervision. As Ms Patel argues, the adults inside the house ought to have known that the children outside were playing with firecrackers due to the sound it emanates. None worried which resulted the injury. Clearly, the adult caretakers including the parents of the plaintiff also had a duty of care towards the plaintiff. I therefore conclude that the parents of the plaintiff also contributed to the negligence by breaching the duty of care owned to the plaintiff as parents to a minor.

DAMAGES

[37] The Plaintiff prays for the following orders:

- (a) medical expenses;
- (b) General Damages and interest,
- (c) Costs on Solicitor /Client Indemnity basis; and
- (d) Any other order deemed just by court.

SPECIAL DAMAGES

35 [38] At the hearing, all parties agreed that the plaintiff sustained special damages of \$1500. Accordingly, I award \$1500 as special damages.

GENERAL DAMAGES

[39] Mr Singh, counsel for the plaintiff cites following authorities in support.

40 [40] The principles applicable to the assessment of damages were stated by Gibbs CJ and *Wilson J in Todorovic v Waller* (1981) 150 CLR 402 at 412 in these terms:

45 *“Certain fundamental principles are so well established that it is unnecessary to cite authorities in support of them. In the first place, a plaintiff who has been injured by the negligence of the defendant should be awarded such a sum of money as will, as nearly as possible, put him in the same position as if he had not sustained the injuries.. Secondly, damages for one cause of action recovered once and forever; and (in the absence of any statutory exception) must be awarded as a lump sum; the court cannot order a defendant a defendant to make periodic payments to the plaintiff. Thirdly, the court has no concern with the manner in which the plaintiff uses the sum awarded to him; the plaintiff is free to do what he likes with it. Fourthly, the burden lies on the*
50 *plaintiff to prove the injury or loss for which he seeks damages.”*

In *Kumaran v Satendra Prasad Construction Ltd* [2005] FJHC 568; HBC127/2003L (12 August 2005) the High Court of Lautoka awarded \$50,000 for pain and suffering (future and past) for loss of an eye to a gentleman who was 61 years of age at the time of incident.

5 In *Moses Archan Jhon v Tebara Transport Limited* HBC 327 of 2003 the High Court awarded the sum of \$45,000 to gentleman aged 20 at the time of the accident for pain and suffering.

In *Apimeleki Kava v Jiko Fisheries Limited* BHC 283 of 1996 the court awarded the sum of \$50,000 to a gentleman at the age of 29 at the time of the accident for pain and suffering for loss of an eye.

10 Mr Singh argues that as it is a minor who has lost total sight and use of his one eye, due to his age, the burden of living with this condition for the rest of his life and there being no hope of any sight returning to his eye general damages would be three fold, (\$150,000) for future. This would cover damages for pain and suffering both past and future, loss of amenities in life, enjoyment of life and disfigurement. General damages also encompass the loss of future earnings.

15 [41] The extent and the injuries suffered by the plaintiff is not contested. The plaintiff suffered permanent impairment. Documents 1 to 5 in the agreed bundle of documents sets out the injuries and the medical conditions of the plaintiff, which is undisputed.

20 The plaintiff in his evidence explained the pain and suffering, he underwent. He also explained how his life is restricted due to the injury such as being unable to participate in any sports, assist parents in the house construction, inability to stay under the sun for long periods. His friends at school call him names and that also gives embarrassment to him and he has become shy to go out socially

25 [42] Having considered the evidence in totality, I award a global figure of \$40,000 as general damages.

[43] I have already given my reasons that all defendants are liable for damages and the plaintiff's parents are liable for contributory negligence

30 [44] In the circumstances, I apportion the damages as follows.

- (a) Plaintiff's parents -contributory negligence – 50%
- (b) Breach of statutory duty of the first and third defendants – 30%
- (c) Breach of duty of care by the second defendant – 20%

35 **Interest**

[45] I award the defendants to pay 6% interest on their portion of damages.

Costs

40 [46] I summarily assess costs as \$3000. The first and third defendants shall pay \$2000 and the first defendant shall pay \$1000 to the plaintiff.

[47] All monies to be paid within 21 days hereof.

[48] Orders accordingly.

Damages awarded.

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Alex de Costa
Solicitor

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