IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

Civil Appeal No. ABU 0002/2012
(High Court Civil Action No. HBC 195 of 2005S)

BETWEEN : **CHIEF EXECUTIVE OFFICER FOR EDUCATION**

First Appellant

: **MINISTRY OF EDUCATION**

Second Appellant

AND : **1. ESEKIA JEROMA GIBBONS**
2. LITIA RAVULA
3. ASENACA VUIBAU
4. RAM CHANDAR

Respondents

CORAM : **Chandra, JA**
Basnayake, JA
Mutunayagam, JA

COUNSEL : Mr. R Green with Mr. J. Pickering for the Appellants
Mr. R. Naidu for the 1st Respondent
2nd, 3rd and 4th Respondents absent and unrepresented

Date of Hearing : 12 September 2013

Date of Judgment : 3 October 2013

JUDGMENT

Chandra JA

[1] I agree with the reasons and conclusions arrived at by Basnayake JA.

Basnayake JA

[2] This is an appeal by the 1st and the 2nd appellants (4th and 5th defendants and hereinafter referred to as the appellants) to have the judgment dated 23 November 2011 of the learned High Court Judge of Suva set aside. The plaintiff too filed a cross appeal for an enhancement of the award which was withdrawn at the hearing of the arguments. By this judgment the plaintiff (1st respondent and hereinafter referred to as the plaintiff) was awarded aggravated damages against all the defendants (1st to 5th defendants) in a sum of $25,000 together with interest at $6961.31 and costs at $3500.

[3] The cause of action arose on 21 March 2005. At that time the plaintiff was a boy aged 10 years attending Vatuwaqa Primary School. The action was filed through his mother as next friend. The 1st defendant (2nd respondent) was a teacher of Vatuwaqa Primary School. She was in the employment of the 5th defendant. The 4th and the 5th defendants were the Chief Executive Officer of Education and The Ministry of Education respectively. They were made parties on the basis of vicarious liability. The 2nd defendant (3rd respondent) was the Head Teacher of the Primary School. The 3rd defendant (4th respondent) was a trustee of the Primary School. The 1st, 2nd and 3rd defendants did not take part in the trial.

The plaintiff's case

[4] This action originated from a writ of summons dated 28 April 2005 to claim damages for battery, injury to feelings and for breach of a child's constitutional rights of being free from cruel and degrading treatment and from interference with his personal privacy pursuant to sections 25 and 37 of the Constitution and Article 37 (a) of the Convention on the Rights of the Child (CRC).

[5] At the relevant time the plaintiff was a student in class 5. On the day in question the 1st defendant was attending on the students who were in the plaintiff's class (class 5) and another class, namely, Form 1 with senior pupils. It was a combined class due to the absence of a teacher. The 1st defendant had found the plaintiff talking in class several times and warnings by the 1st defendant had gone unheeded. The plaintiff had then been told by the 1st defendant to go to the front of the class room and to pull down his pants which he had done. Underneath, the plaintiff had been wearing boxer pants and underwear. The 1st defendant had then ordered a Form 1 student named

Apimeleki, to pull down the plaintiff's boxer pants. Apimeleki had done as he was told. The plaintiff was then left with his shirt and underwear for about two or three minutes. The plaintiff had worn his boxer pants and the shorts when told by the 1st defendant to get back to his seat.

The defence

[6] The appellants did not dispute the facts. The appellants however refuted liability on the ground that the act committed by the 1st defendant was outside the scope and the course of employment and therefore that the appellants cannot be held vicariously liable. The plaintiff averred in paragraph 17 of the plaint that the acts committed in this case were contrary to the provisions in Article 37 (a) of the Convention on Rights of the Child. In paragraph eleven of the statement of the amended defence the appellants neither admitted nor denied the averments contained in paragraph 17.

[7] The grounds of appeal of the 4th and the 5th defendants

1. *That the learned Judge has erred in fact and law in applying the above Convention without citing any enabling legislation that incorporates the Convention into our National Legislative Framework.*
2. *That the learned judge has erred in fact and law in considering the tort of battery, when the same was not particularised sufficiently in the pleadings, nor included in the pre trial minutes as an issue to be considered during the trial.*
3. *That the learned Judge has erred in fact and law in disregarding the need to have a psychologist or any other medical professional assess the impact or gravity of any such treatment will have on a child.*

The Judgment

[8] The applicability of the Convention on the Rights of the Child

There are three grounds of appeal raised in this case. The first ground relates to the applicability of the Convention. The learned counsel for the plaintiff submitted that this ground was never taken up at the trial. At the trial the issue was whether the defendants contravened Article 37 (a) of the Convention. The defendants in their answer neither admitted nor denied this averment. The defendant never took up the position that the Convention is not applicable for the reason that it was not incorporated into domestic law. Hence the learned Judge did not have a special task in finding whether the Convention could apply or not. The learned Judge however held

that the CRC was ratified by the Fiji Government and that the CRC had been applied in many cases in Fiji and thus is applicable. The issue was whether the acts breach Article 37 (a) of the Convention.

[9] Having set out the facts in detail the learned High Court Judge considered the application of the Convention on the Rights of the Child as follows:-

> *"51.The next issue is whether the schoolteacher's actions were contrary to Article 37 (a) of the CRC.*
>
> *52. It is not disputed that Fiji has ratified the Convention on the Rights of the Child in the year 1993.*
>
> *53. It is further not disputed that the CRC has been applied in our country in very many cases".*

[10] Having said that the learned Judge went on to consider Articles 16 (1), 28(2) and the fact that they are interconnected. Now I will reproduce paragraphs 54, 55, 56, 57, 58, 59, 62, and 63 of the judgment which are as follows:-

> *"54. The only provision that has been pleaded and is framed to be tried as an issue is Article 37 (a) of the CRC. However, in closing the submissions, Mr. Naidu has addressed breaches of Articles, 16 (1), 28 (2) and 37 (a) of the CRC. Mr. Pratap has only addressed in a generic manner.*
>
> *55. It will not be unfair or prejudicial if I consider breaches of other articles in addition to what is pleaded as the additional articles are co-related in the sense that it deals with child care and protection. The Articles read as follows:-*
>
> *"16 (1). No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.*
>
> *(2) The child has a right to the protection of the law against such interference or attacks*
>
> *28 (2). State parties shall take appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.*
>
> *37. The state parties shall ensure that:*
>
> *(a) No child shall be subjected to torture or other cruel, inhumane or degrading treatment or punishment..."l*
>
> *56. Did the teacher breach Article 16 of the CRC? I answer this issue in the affirmative. The child was forced to expose his undergarments, which*

children of the child's age know and understand it to be private garment. 60 to 80 students watched this child in his undergarments and laughed at him. This has caused the child much embarrassment because he knows that he is not expected to expose his undergarments.....When the child had removed his undergarment, his body was exposed albeit with his private garments. The teacher was not permitted to administer such acts on the child and thus she has unlawfully interfered with his privacy. This also means that the teacher breached Article 28 (2) of the CRC.

57. Did the teacher breach Article 37 (a) of the CRC? The Article states that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.....

58. The plaintiff has submitted that at the very least, the child received an inhumane and degrading treatment by the teacher. I accept the submission of the plaintiff's counsel on the definition of degrading. The term was defined in the text Clayton R and Tomlinson, H: "Law of Human Rights" Vol. 1, Oxford University Press, New York, 2000.....at p 295 at par 8.35:-

"..a punishment may be degrading where it constitutes 'an assault on a person's dignity and physical integrity'

59. I have, held already, that the child indeed had been humiliated, embarrassed and angered. I further hold that the child felt shameful and that he was attacked physically and mentally. His dignity was interfered with. He felt how he felt because he realised that the treatment that he received was not at all proper but degrading. It is further inhumane to treat a child with an intention to embarrass the child. .....I hold that there was a breach of Article 37 (a) of the CRC.....

62. In this case the child felt so humiliated that he stopped going to school from the very next day and he never returned to the school thereafter. He also failed to discuss the issue with his parents because of the embarrassment he suffered.....

63.....I hold..... ..that the child was treated with actions which degraded him".

[11] It appears that the learned counsel for the defendants (4th and 5th) does not attack any of the above findings. Instead for the first time he has taken up the position that the CRC cannot apply because it was not adopted as domestic law.

Where only questions of law are involved, so long as the parties have the opportunity to present full argument, a new point may be allowed to avoid the costs and delay of further proceedings (Trevor Robert Gallagher v Nadi Contractors Limited and Another (SC No. CBV 003 of 2003S) (21 May 2004), Multicon Engineering Pty Ltd v Federal Airports Corporation (2000) 47 NSWR 631, 645). The appeal courts have a discretion to allow new points of law to be raised, particularly where the new matter

sought asserts a material error of law in the disposition of the proceedings below (Kala Wati and Another v S.L. Shankar Ltd and another CA No. ABU 78 0f 2006 & 86 of 2006S (18 April 2008) quoting *Coulton v Holcombe* (1986) 162 CLR 1, Hampton Court Ltd v Crook [1957] HCA 28; (1957) 97 CLR 367).

[12] The learned counsel for the plaintiff submitted that some provisions of the CRC have been incorporated in to Fiji Municipal law by statutes such as the Domestic Violence Decree 2009, Family Law Act 2003 and Human Rights Commission Decree No. 11 of 2009. One of the objects of the Domestic Violence Decree is to implement the CRC. Section 26 of the Family Law Act provides that courts when exercising jurisdiction under the Act must have regard for the CRC. The learned counsel submitted that Judges of the High Court of Fiji continued to refer to the CRC for guidance when adjudicating matters concerning children (HAC 73 of 2013, HAC 11 of 2011 and 14 of 2011, HAC 10 of 2011, HAC 8 of 2011 and 68 of 2009, Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh (1995) 183 CLR 273).

[13] Considering the totality of the judgment I find that the learned Judge made reference to the provisions of the CRC only as guidance. While considering the issue with regard to damages the learned Judge posed this question; "what heads of damages are appropriate for this case? The child is entitled to damages for battery and for injury to his feelings and dignity" (para 69 at pg. 29 HCR). The learned Judge considered aggravated damages to be awarded based on the case Kasim v Commissioner of Police (Fiji High Court Criminal case No. HBC 471 of 1999). "This child's suffering was not for a day or two. It is a lifetime suffering and he would be reminded of the incident every time he meets his ex-school colleagues and seniors. The fact that he has changed schools for being humiliated cannot be erased from his memory"...(Para 78 at pg 31 HCR). "Having considered all the circumstances of the case, I award a sum of $25,000 as aggravated damages for battery and injury to feelings and dignity of the child" (Para 79). The learned counsel for the appellants conceded in his oral submissions that the learned Judge is able to use the CRC for guidance. This is exactly what the learned Judge did. Therefore the 1st ground of appeal has to fail.

The matter relating to battery

[14] The learned counsel for the appellants submitted that the pleadings did not intend to rely on battery as a cause of action in this case. It was never pleaded as a fact in issue and not particularised. It was not an issue listed in the pre trial conference minutes.

The learned Judge in paragraph 5 of her judgment states that "*a claim was filed for battery and injury to feeling as well as for etc...*". In paragraph 6 the learned Judge states that "*the remedies sought are, damages for battery and injury to feelings and dignity etc..*". With regard to the issue involving battery the learned judge summarises the evidence of the plaintiff (at pg 12) as follows: "*he was wearing boxer shorts underneath his pants. Mrs. Ravula then told a Form 1 student, Mr. Apimeleki to pull down his boxer shorts. Apimeleki did as he was told to.....*"

At pages 18 and 19 of the judgment the learned Judge set out the issues out of which issue No. 7 (a) is as follows:-

"*7. Whether the plaintiff is entitled to any of the following:*

(a) Damages for battery and injury to feelings;"

[15] At page 29 the learned Judge considers the question of battery as follows:

> "*The issue being did the act of pulling the child's pants down by Apimeleki on the instructions of the teacher constitute battery on the child? .....The evidence is very clear and unchallenged. Although the teacher did not touch the child, she instructed and forced Apimeleki to carry out the acts. Apimeleki could not or would not have been in a position to refute the instructions, because, for him, those were lawful instructions. If he refused, he would be in a difficult situation with the teacher so, to be obedient, he did what he did. Apimeleki came in direct physical contact with the child at the instigation of the teacher and so the teacher has committed the tort of battery. The child's boxer was forced down leaving him embarrassed and humiliated. A cause of action for battery in the absence of body to body contact has been recognised in very many cases and one example of such a case would be, striking a horse whereby it throws its rider: Dodwell v. Burford (1669)1 Mod 22; 86 ER 703*"

At page 31 the learned Judge states thus *"having considered all the circumstances of the case, I award a sum of $25,000 as aggravated damages for battery and injury to feelings and dignity of the child".*

[16] The learned counsel for the plaintiff submitted that the tort of battery was sufficiently particularised in paragraph 11 of the plaintiff's statement of claim and these facts were agreed to by all the parties in the minutes of the pre trial conference. The appellants did not dispute the facts alleged in this case. It is the act of pulling down the pants that constitute the tort of battery. This was done by a senior student on the orders of the 1st defendant (teacher). The learned counsel for the plaintiff relied on the case of Drane v Evangelaou & Others [1978] 1 WLR 455 at 458 where Lord Denning MR held that:

> *"the particulars of the claim alleged that the landlord had interfered with the rights of the plaintiff and his de facto wife....to quiet enjoyment of the said premises by unlawfully evicting them from the said premises on..Counsel for the defendant submitted that the claim was for breach of covenant for quiet enjoyment. He cited a passage from Woodfall on Landlord and Tenant 27th ed. Para 1338: "Since the claim is in contract, punitive or exemplary damages cannot be awarded." The Judge at once said: "What about trespass? Does the claim not lie in trespass? Counsel for the defendant urged that trespass was not pleaded. The Judge then said: "The facts are alleged sufficiently so it does not matter what label you put upon it." The Judge was right. The plaintiff in the particulars of claim gave details saying that three men broke the door, removed the plaintiff's belongings, bolted the door from outside: and so forth. Those facts were clearly sufficient to warrant a claim for trespass. As we said in In re Vandervell's Trusts (No. 2) [1974] Ch. 269, 321-322:*
>
> *"It is sufficient for the pleader to state material facts. He need not state the legal result. If, for convenience, he does so, he is not bound by, or limited to, what he has stated. He can present, in argument, any legal consequences of which the facts permit".*

[17] I am of the view that in this case there are ample facts which are undisputed. If those facts constitute the tort of battery the plaintiff has done the needful. The 2nd ground therefore has to fail.

Need for expert evidence?

[18] The learned counsel for the appellants submitted that the impact of this incident on the plaintiff's future, how it has affected his past and how he is dealing with his trauma now are questions best left to experts to canvass. The learned counsel submitted in the written submissions that he will address the issue of expert witness and the test for battery. This is with regard to the quantum of damages. I must mention at this stage that there is no ground of appeal with regard to the quantum of damages at all. The

learned counsel for the plaintiff correctly submitted that in that event the learned counsel for the appellants has no basis to make this submission.

[19] The learned counsel for the appellants submitted that in paragraph 44 of the judgment the learned Judge rejected the need for expert evidence. Again this submission is not factually correct. It is not that the learned Judge rejected the need for expert evidence, but that no party called any expert evidence. The learned Judge had to decide the case without the assistance of an expert. The learned counsel submitted that the incident occurred in 2005, and the trial was held in 2011. There is a six year interval. The state of mind of the plaintiff in 2005 may differ from his state of mind in 2011. The humiliation he endured in 2005 may not be affecting him now. Humiliation and injury to feelings in most cases do not last for more than a year [Kasim v. Commissioner of Police [2001] 2 FLR 415].

[20] The learned counsel further submitted that the evidence adduced in court was insufficient to satisfy the test of battery. An expert witness should have been called to state whether the action of the 1st defendant (teacher) went beyond the bounds of what was generally accepted as standards of conduct.

[21] The 2nd issue raised in this case was whether the child suffered injury to his feelings and dignity.

With regard to injury to feelings the learned Judge said:-

> "4. (pg 10 of the HCR) *The child says that the incident traumatized him and caused injury to his feelings and dignity. He thus refused to attend the school from the very next day and hence his school had to be changed. He started attending Gospel Primary School from 18th April, 2005.*
>
> 5. *A claim was filed for battery and injury to feelings as well as.....*
> 6. *The remedies sought are, damages for battery and injury to feelings and dignity....*

At page 21 the learned Judge deals with regard to feelings as follows:-

> "31. *The 2nd issue for determination is whether the child suffered injury to his feelings as a result of which he had to leave his school and find another.*
>
> *32. The child was in class 5 at the time the incident happened. He had sufficient understanding to have feelings of fear, anger, happiness, sadness, embarrassment, humiliation and likewise. He was asked to stand in front of a class of 60-80 students facing them with only a short shirt and an underwear. Without any reservations, I accept the child's evidence that he felt embarrassed, ashamed and angry.*

33. Further it is not contradicted that the students of his class, as well as the seniors, teased the child on the afternoon of the incident when he was on his way to his home. He had felt embarrassed and had not liked the teasing .I do not accept that anyone unless a person has no powers of feeling or reasoning, which I find this child to have had, would feel anything less than being traumatized, humiliated, distressed, embarrassed and angry; So much so that we cannot describe the feeling when such an incident happens in front of colleagues, friends and seniors.

34. Everyone expects to be treated with respect amongst family, friends and in public.

35. This child lost all before his colleagues, friends and the public.

78....."*This child's suffering was not for a day or two. It is a life time suffering and he would be reminded of the incident every time he meets his ex school colleagues and seniors. The fact that he has changed his school for being humiliated, does not erase it from his memory"...the humiliation was so great, that the apology did not relieve this child.....The reconciliation is a mitigating factor of which I have taken account*" (pg 31 HCR).

[22] It appears that the learned Judge mainly considered the injury to feeling at the time of the incident. In a passing reference she said that this incident will not be forgotten by the plaintiff. The learned Judge said that the impact was so great that the plaintiff, even at that tender age (class 5) refused to go to school from the very next day and that the parents had to look for another school. The plaintiff had not told his parents about the incident as he was so embarrassed and ashamed. According to the evidence this incident had kept coming back even in the new school as this incident was in the news.

[23] The learned counsel for the plaintiff submitted that the appellants never disputed the facts. "*The element of men's rea in the offence of battery is satisfied by proof that the defendant either intentionally or recklessly applied force to another* (venna [1975] 3 All ER 788 at 793 quoted in Smith & Hogan on Criminal Law (sixth edition pg. 381 FN 17)). What more proof does the learned Judge requires to decide whether the tort of battery had been established? What is the expert evidence require in cases such as assault. The learned Judge has to decide by applying the law to the evidence.

[24] The learned counsel for the plaintiff submitted that if the child was mentally affected, there would have been medical evidence which would help to claim a fair amount as damages. The learned counsel further submitted that by not disputing the facts the appellants have conceded that the plaintiff was entitled to some damages. The expert

evidence would probably assist in computing the amount of damages. As the quantum awarded has not been challenged, the third ground of appeal too has to fail.

[25] Having considered very carefully the submissions of the learned counsel for the plaintiff and the appellants I am of the view that this appeal cannot sustain. Hence the appeal is dismissed with costs fixed at $4000.

[26] There is one more matter that I would like to mention. On 25 January, 2012 the plaintiff too filed a notice of appeal to vary or set aside the damages awarded and to substitute it with a higher figure. At the commencement of the arguments, the learned counsel for the plaintiff sought permission of court to withdraw this counter appeal. The learned counsel for the appellants objected. However the learned counsel was not able to show any ground as to how the appellants had become prejudiced. Hence I allow the application for withdrawal and dismiss the cross appeal without costs.

Mutunayagam JA

[27] I also agree with the reasons and conclusions arrived at by Basnayake JA.

Orders of the Court

1. Appeal is dismissed.
2. Counter appeal dismissed on its withdrawal.
3. Costs in a sum of $4000 to be paid by the appellants to the plaintiff.

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HON. JUSTICE SURESH CHANDRA
JUSTICE OF APPEAL

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HON. JUSTICE ERIC BASNAYAKE
JUSTICE OF APPEAL

.....
HON. JUSTICE ARIAM MUTUNAYAGAM
JUSTICE OF APPEAL