IN THE HIGH COURT OF FIJI

WESTERN DIVISION AT LAUTOKA

DISTRICT REGISTRY

NO: HBC 210 OF 2009

BETWEEN : **DAKSHIL PATEL** of Thomson Crescent, Simla, Lautoka, student by his next friend **LALIT PATEL** of Thomson Crescent, Lautoka, Manager

PLAINTIFF

A N D : **LALITA DEVI NAIR** of Lautoka, School Teacher

FIRST DEFENDANT

A N D : **THE ATTORNEY GENERAL OF FIJI**

SECOND DEFENDANT

Counsel : Mr R P Chaudhary for plaintiff

Mrs M Lee for defendants

Date of Hearing : 29 September 2015

Date of Judgment : 16 February 2016

J U D G M E N T

INTRODUCTION

[01] The plaintiff's claim against the defendant stems out of an incident occurred on 22 November 2006 at Lautoka Central Primary School. Through his amended statement of claim filed 17 May 2011 he claims, inter alia, special damage and general damages.

THE SETTING

[02] The background facts as I have gathered from the pleadings are as follows: the Plaintiff is a minor and sues by his father and next friend Lalit Patel. He was a class 1 student at LAUTOKA CENTRAL PRIMARY

SCHOOL (*the school*). The First Defendant was the class 1 teacher at the school and was a Civil Servant employed by the Government of Fiji in the Ministry of Education.

[03] On 22 November 2006 the Plaintiff sustained serious injury to his left eye in the class 1 class room when a fellow student struck him in his left eye with a pencil. He complained of severe pain and ice pack was placed on his eye. The teacher noticed his left eye was red and teary. He was then brought to hospital and subsequently admitted for surgery.

STATEMENT OF DEFENCE TO AMENDED CLAIM

[04] In the statement of defence to amended claim, while admitting the plaintiff was injured on 22 November 2006 at the school, the defendant states that the accident arose from an inevitable accident notwithstanding the exercise of reasonable care and adequate supervision on the part of the 1st Defendant to avoid the same. The defendant, in the alternative, also states that the accident was caused and/or contributed to by the negligence and carelessness of the plaintiff.

MINUTES OF PRE-TRIAL CONFERENCE

[05] At PRE-TRIAL Conference ('*PTC*') held between Solicitors for the Plaintiff and Solicitors for the Defendant on 1 May 2013 the following facts were admitted:

i. That at all material time the Plaintiff was a student in class one at Lautoka Central Primary School.
ii. That all material time the First Defendant was the Plaintiff's class teacher and was a civil servant employed by the Government of Fiji.
iii. That on 22nd November 2006 the Plaintiff sustained injuries in the school.

[06] The Issues that are defined at PTC:

a. The extent and the details of injuries sustained by the Plaintiff.
b. The circumstances in which the Plaintiff sustained by the Plaintiff.
c. Whether the Plaintiff sustained the injuries due to the negligence of the First Defendant.
d. Whether the accident resulting in the injuries was an inevitable accident.
e. Whether the accident was caused by the plaintiff's negligence and/or whether the plaintiff is guilty of contributory negligence.
f. The loss and damage suffered by the Plaintiff.
g. The quantum of damages and compensation payable to the Plaintiff.

PLAINTIFF'S EVIDENCE

[07] The plaintiff called three witnesses. First was Dakshil Patel (plaintiff). The second witness was Dakshil's father Lalit Patel and the third witness was Dr Luisa Cikamatana Rauto.

[08] The evidence of Dakshil was that: he remembered the incident that took place on 22 November 2006 in school. He was six years old at that time. He is now 15 years old. It was beginning of the recess period. Many students had left the class room and some including him were in the process of leaving the door. The teacher (first defendant) had already moved out of the class room and was outside in the veranda talking to another teacher. He stated that he was in the process of moving out of the classroom a student by the name of Saurav threw a pencil which struck him in his left eye. He does not know Saurav deliberately aimed at him but he was throwing in the direction of another student Nihal.

[09] Dakshil was cross examined by counsel for the defendants. It was put to him the incident happened during lunch hour. Dakshil's answer was that during lunch hour the teacher is inside and everyone is inside. He said it was recess time the teacher was not in the class. It was put to Dakshil that he was careless. His answer was that he saw them (Saurav

and Nihal) and they so him. He stated that after he was injured his teacher took him to sick bay where an ice pack was put on his eye and he was later taken to the hospital by his teacher where he was treated and later his father came.

[10] The second witness was Lalit Patel. He is the father of Dakshil and his next friend in the action. His evidence was that, he was called by someone about the incident when he was at a funeral. He does not know who called, but said it was around 2pm. He did not know exactly when the accident happened. He said he approached the Head Teacher for an incident report, but it has not been given. He stated that his son does feel some embarrassment about his left eye not being normal. Lalit Patel also withdrew his special damages claim as insurance has paid the claims.

[11] The plaintiff's third witness Dr Luisa's evidence was that, she solely dealt with Dakshil's medical report of his left eye. She presented two of her own medical reports dated 28 November 2006 and 23 November 2011 (Plaintiff's exhibit 3 and 4). There was no objection to these. The medical report dated 23 November 2011 was in the defendant's list of documents and was addressed to the Solicitor General. Dr Luisa also had with her Dakshil's hospital folder. She was also shown a report dated 1 April 2015 by Dr Trevor Gray of Auckland (plaintiff's exhibit 5) and also commented on this report and adjusted the percentage incapacities in her report dated 23 November 2011. In that report Dr Luisa states '*...if he has an intraocular lens implant surgery in future the vision may change.*'

THE DEFENDANT'S EVIDENCE

[12] The defendant called three witnesses. First witness was Lalita Devi Nair who was plaintiff's class teacher in 2006. The second witness was Ms Milika the present head teacher of the school and the third witness Mr Bimal Kumar who was a teacher at the school when the incident happened.

[13] The first witness Lalita Devi Nair stated in evidence that, she was Dakshil's class teacher in 2006. The incident happened during lunch hour. She was three metres away when the incident took place. When she was entering the class she heard Saurav asking whom the pencil belonged to. He had picked up the pencil from the floor. Someone said 'mine.' He turned and the pencil hit Dakshil's eye. Dakshil and Saurav were sitting on their tables. Saurav was on the first table and Dakshil was on the second table. She stated that Dakshil was taken to sick bay. Ice pack was put on his eye. She informed the head teacher and later took Dakshil to the hospital. She stated that the incident did not happen at recess time and she denied talking to Mrs Nandan. Her statement was recorded in 2010 after the claim was filed in court. At the time Dakshil's parents had told her, *'it was all right. It was an accident and not your fault'*. They had not lodged any complaint then.

[14] Under cross examination Ms Nair stated that she saw the incident and gave statement to the Head Teacher. She was asked about class diary and school log book. Her answer was that she had recorded this in the class diary. Since she has long retired she is not aware of the diaries or school log book.

[15] The second witness for the defendant was Ms Milika the present Head Teacher of the school. She tendered Dakshil's school record from class 1 to class 8. The plaintiff did not dispute this.

[16] Mr Bimal Kumar was the third and last witness for the defendant. He was a teacher at the school when the incident happened. He tendered a letter he wrote to Senior Education Officer on 6 April 2010. He did not see anything. He appears to be a formal witness.

ANALYSIS

[17] This is a claim in negligence. The plaintiff claims general damages against the defendant. The plaintiff was a class 1 student at the time when the incident occurred. The defendant was his class teacher.

[18] At trial, plaintiff confined his claim only to general damages. He stated that he is not claiming special damages, for he has been indemnified by his insurer for the special damages.

[19] The plaintiff alleges that his teacher was negligent in supervising the student. The plaintiff's evidence was that the incident happened during the recess period.

[20] The teacher denies both negligence and liability. She states that this was an inevitable accident notwithstanding the exercise of reasonable care and adequate supervision on her part to avoid the same. Her evidence was that the incident happened at lunch time when children had returned from washing their hands and were seated about to have their lunch.

[21] It is pertinent to note that the incident happened in 2006. However, the plaintiff filed his writ of summons in November 2009.

[22] Initially, the plaintiff claimed damages against three defendants. Subsequently the plaintiff amended his writ of summons and statement of claim with leave of the court. The plaintiff decided to withdraw the action against first and second defendants and to proceed only against the third defendant (this defendant). In the original writ, the first defendant was the Gujarat Education Society of Lautoka as controlling authority of the school, and second defendant was Ramesh Prasad as Administrator of the school. The plaintiff filed amended claim against the teacher (the defendant) only.

MATERIAL FACTS NOT PLEADED

[23] Both parties filed their respective written submissions. They have cited a number of case authorities to support the point they had raised in their submissions. I am grateful to both counsel for their comprehensive submissions.

[24] The defendant submits that, the defendants [sic] have failed to plead material facts which have caught the defendants by surprise at the

trial. This has also affected the way they have prepared for the trial. They have cited a deluge of cases on this point.

[25] On the other hand, the plaintiff contends that the submissions that the plaintiff's pleadings are defective does not have any merits. Simply because the defendant's version of events is different or at variance from the plaintiff's version does not mean that the plaintiff's pleadings are defective or that material facts have not been pleaded. The plaintiff further submits that the issue regarding the plaintiff's pleadings was not raised by the defence at trial. It is being raised in submissions. If it was raised during the course of the trial the court could have made a ruling there and then.

Law on pleadings:

[26] I would now turn to the law relating to pleadings. O. 18, r.6 and r.7 of the High Court Rules ('HCR') are relevant law for the present purpose. O.18, r.6 deals with facts that are to be pleaded while r.7 matters which must be pleaded specifically.

[27] HCR O.18, r.6 spells out:

> ***'Facts, not evidence, to be pleaded*** *(O.18, r.6)*
>
> *6.-(1) Subject to the provisions of this rule, and rules 9, 10 and 11,* ***every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence,*** *as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.*
>
> *(2) Without prejudice to paragraph (1), the effect of any document or the purport of any conversation referred to in the pleading must, if material, be briefly stated, and the precise words of the document or conversation shall not be stated, except in so far as those words are themselves material.*
>
> *(3) A party need not plead any fact if it is presumed by law to be true or the burden of disproving it lies on the other party, unless the other party has specifically denied it in his pleading.*

(4) A statement that a thing has been done or that an event has occurred, being a thing or even the doing or occurrence of which, as the case may be, constitutes a condition precedent necessary for the case of a party is to be implied in his pleading.'

[28] While dealing with matters which must be specifically pleaded HCR O.18, r.7 provides:

***'Matters which must be specifically pleaded** (O.18, r.7)*

7.-(1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality –

(a) which he alleges makes any claim or defence of the opposite party not maintainable; or
(b) which, if not specifically pleaded, might take the opposite party by surprise; or
(c) which raises issues of fact not arising out of the preceding pleading.

(2) Without prejudice to paragraph (1), a defendant to an action for the recovery of land must plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant is not sufficient.

(3) A claim for exemplary damages must be specifically pleaded together with the facts on which the party pleading relies.' (Emphasis provided).

[29] Interestingly, the plaintiff in his amended statement of claim filed 17 May 2011 after obtaining leave of the court to withdraw claims against former 1st and 2nd defendants under para 5 states:

'...
***5.** That on or about the 22nd day of November 2006 the plaintiff sustained serious injury to his left eye in the class1 classroom when a fellow student struck him in his left eye with a pencil.*

PARTICULARS OF INJURIES

***Master Dakshil sustained injury to his left eye while at school on 22nd November 2006 by a pencil from a fellow classmate.** He complained of severe pain and ice pack was placed on his eye. The teacher noticed his left eye was red and teary. He was then brought to hospital and subsequently admitted to surgery.'* (Emphasis provided).

[30] It will be noted that the statement of claim fails to state the time when the incident happened whether it happened at recess or lunch time. However, the plaintiff when giving evidence maintained that the incident happened at recess period.

[31] The question then arises whether a party to an action is entitled to lead evidence at the trial in respect of a fact which is not pleaded.

[32] Conversely, the defendant gave evidence at the trial and stated that the incident occurred at lunch time. Further, in para 7 of the amended statement of defence filed on 14 September 2010 pleaded:

> '...
>
> *7. That in relation to paragraph 7 the Defendant states that follows:*
>
> ***a. The plaintiff was injured on or about the 22nd day of November 2006.***
>
> ***b. The injury to the plaintiff eye was caused by pencil.***
>
> ***c. The plaintiff was not struck in the left eye.***
>
> ***d. A fellow class mate had found a pencil on the classroom floor and was in the process of showing it to class members to ascertain its ownership.***
>
> ***e. The plaintiff was standing behind the class mate said 'mine'.***
>
> ***f. The injury to the left eye occurred as the plaintiff was moved forward behind the classmate who was also in the process of turning around to give the pencil.'***

[33] The plaintiff in his reply to the statement of defence has barely denied the allegations of fact pleaded in para 7 of the amended statement of defence.

[34] Plaintiff claim is founded on negligence of the defendant as the class teacher of the plaintiff. In the statement of claim the plaintiff has pleaded negligence as cause of action. Since negligence is pleaded as

the cause of action, the statement of claim must plead the facts giving rise to that cause of action. HCR O.18, r.14 (2) provides:

> *'(2) A statement of claim must not contain any allegation or claim in respect of a cause of action unless that cause of action is mentioned in the writ or arises from facts which are the same as, or include or form part of, facts giving rise to a cause of action so mentioned; but subject to that, a plaintiff may in his statement of claim alter, modify or extend any claim made by him in the indorsement of the writ without amending the indorsement.'*

[35] **The Supreme Court practice** 1991 (Volume 1) at paragraph 18/7/11 states that:

> **'All Material Facts** it is essential that a pleading, if it is not to be embarrassing, should state those facts which will put those against whom it is directed on their guard, and tell them what is the case which they will have to meet (*per* Cotton L.J. in *Philipps v. Philipps* (1878) 4 Q.B.D. 127, p.139. "Material" means necessary for the purpose of formulating a complete cause of action; and **if anyone material statement is omitted, the statement of claim in bad** (per *Scott L.J. in Bruce v. Odhams Press Ltd* [1936] 1 All E.R. 287 at 294). **Each party must plead all the material facts on which he means to rely at the trial; otherwise he is not entitled to give any evidence of them at the trial.** No averment must be omitted which is essential to success. Those facts must be alleged which must, not may, amount to a cause of action (West Rand Co.v. Rex [1905] 2 K.B. 399; see *Ayers v. Hanson* [1912] W.N. 193). **Where the evidence at the trial establishes facts different from those pledged, *e.g.* by the plaintiff as constituting negligence, which are not just a variation, modification or development of what has been alleged but which constitute a radical departure from the case as pleaded, the action will be dismissed** (*Waghorn v. George Wimpey & Co. Ltd* [1969] I.W.L.R. 1764; [1970] 1 All E.R. 474). Moreover, if the plaintiff succeeds on findings of fact not pleaded by him, the judgment will not be allowed to stand, and the Court of Appeal will either dismiss the action (*Pawding v. London Brick Co.* (1971) 4 K.I.R. 207) or in a proper case will if necessary order a new trial (Lloyde v. West Midlands Gas Board (1971) 1 W.R.L 749; [1971] 2 All E.R. 1240, CA). Similarly, a defendant may be prevented from relying at trial on a ground of Defence not pleaded by him (Davie v. New Merton Board mills Ltd [1956] I W.L.R. 233; [1956] 1 All ER 379; but cf. *Rumbold v. L.C.C.* (1909) 25 T.L.R. 541, CA, which has not cited in Davies case; for the subsequent history of *Davie's* case, see [1959] A.C. 604, HL).'

[36] The plaintiff ought to have pleaded all material facts that give rise to his cause of action. The facts when (whether at recess or lunch time)

and how the incident occurred are, in my opinion, material facts in the case of negligence. The plaintiff ought to have specifically pleaded these facts.The plaintiff is required by O.18, r. 6 (1) to plead all material facts on which he relies for his claim. The plaintiff has only pleaded that, ***'sustained injury to his left eye while at school on 22nd November 2006 by a pencil from a fellow classmate'.*** The statement of claim fails to state the material facts such as the time (at recess or lunch time) and the manner how the incident happened.

[37] Each party must plead all the material facts on which he means to rely at the trial; otherwise he is not entitled to give any evidence of them at the trial. No averment must be omitted which is essential to success, see 18/7/11(supra).

[38] In this case the plaintiff has failed to plead material fact namely the time at which and how the incident happened. Therefore the plaintiff is not entitled to give evidence of them at the trial. The plaintiff has already given evidence in respect of those facts at the trial. The defendant did not take such objection at that time. The defendant has taken the objection in her written submission filed after the trial. Evidence must be objected at the time when it is sought to bring. Nonetheless, legal objection may be raised at any time before judgment is delivered. The plaintiff has led evidence on the facts which he did not plead. This might have taken the defendant by surprise. The plaintiff was under obligation to divulge all the material facts in his statement of claim. I would therefore reject the plaintiff's contention that such issue was not raised at early stage, and if they had taken the objection on non-disclosure of material facts the plaintiff could have amended his pleadings. I accordingly disregard the plaintiff's evidence given at the trial in respect of the time and manner in which the accident happened.

EXISTENCE OF DUTY OF CARE BETWEEN TEACHER AND STUDENT

[39] Negligence is dependent on duty of care being owed. The plaintiff case is founded on negligence. The first question then to be asked is that whether the defendant teacher (Ms Nair) owed a duty of care to the plaintiff student (Dakshil).

[40] The teachers are acting under the authority of the state employer and not under authority derived from parents.

[41] In **Richard v State of Victoria** (1969 V. R. 137), the leading Australian decision in which allegations of negligence in relation to failure to supervise student in the classroom were considered, the Full Court of the Supreme Court of Victoria noted that during school hours a child is beyond the control and protection of his parents and placed under the control of a teacher who is 'in a position to exercise control over him and afford him, in the exercise of reasonable care, protection from injury.

[42] The Full Federal Court of the Australian Capital Territory in ***El Sheik v Australian Territory School Authority*** (2000) FCA 931 (11 July 2000), in this case plaintiff was a 15-years old student who suffered serious injury as a result of play fight with another student which took place at a school run by the ACT School Authority. The allegations of negligence were based on lack of supervision and policies and procedures to reduce the likelihood of injuries to students. On the question of whether schools were owed a duty to prevent any incidents which may cause harm to their students, held that to be an impossible task in the school ground setting. For the majority, Willcox J said:

> *'An educational authority can, and should, prevent rough 'horse play' incidents going on for a significant time or escalating into a level of violence that is likely, under normal circumstances, to constitute a danger to life and limb; but it seems to me that is all it can do.*

Although I accept that an educational authority has a duty to take reasonable steps to protect students from significantly violent behaviour, or from prolonged unwelcome physical attention, I do not think it can realistically be said that the duty extends to protecting an apparently normal 15 year old boy from receiving, over a short period of time, playful kicks from his friend, even painful playfight kicks.'

[43] In Fiji, a teacher's liability towards student was decided in the case of ***Ranji Roshendra Lal v Jainendra Singh & Others*** HBC 225 of 1996L where a 10-year old student sustained injury in a class devoid of a teacher or any other means of supervision. The defendants (the headmaster and teacher of that class) admitted liability. In ***Aminesh Chand v Sudhakar Chandra & Others*** HBC 0135 of 2000L, in this case a student of Khalsa Primary School, Ba sustained injury where another student of the same school threw a stick at him and which hit his left eye resulting in loss of sight of that eye. The cause of injury and the extent of injury were not in dispute, but liability by all defendants was disputed, Jiten Singh J concluded that the second defendant (the teacher) failed to provide the standard of supervision which the circumstances warranted. He was too far away and his attention was not focused on the children. I find there was breach of duty of care, which the school owed to the students. I do not lose sight of the fact that these were class 6 student, aged about 12 years and therefore quite immature to realise consequences of their own follies. Children of this age would need a far more intrusive supervision than that provided by a teacher 20 meters away.

[44] Undoubtedly, case authorities of Australia, the UK and Fiji establish that the school has a duty of care towards its students. Dakshil was a class 1 student. The defendant was his class 1 teacherat that time. The defendant teacher owed a duty of care to provide adequate supervision to the plaintiff student.

BREACH OF DUTY OF CARE

[45] The defendant owed a duty of care towards the plaintiff. The next question would arise is whether there was breach of the duty of care by the defendant.

[46] The defendant was the class1 class teacher. There were 35 plus students in that class. Understandably, the defendant owed duty of care to the 35 plus students of class 1 including the plaintiff.

[47] The plaintiff stated only in evidence that the incident happened during recess. He did not plead in his statement of claim that the incident happened during recess. I have already disregarded his evidence on this point and the manner in which the incident happened, for he is not entitled to give evidence in respect of facts which he did not plead.

[48] The defendant pleads how the incident occurred in the amended statement of claim. She states that,the injury to the plaintiff eye was caused by pencil where a fellow class mate had found a pencil on the classroom floor and was in the process of showing it to class members to ascertain its ownership.The plaintiff was standing behind the class mate said 'mine'.The injury to the left eye occurred as the plaintiff was moved forward behind the classmate who was also in the process of turning around to give the pencil.

[49] In evidence too, the defendant stated that the incident happened during lunch hour. She was three metres away when the incident took place. When she was entering the class she heard Saurav asking whom the pencil belonged to. He had picked up the pencil from the floor. Someone said 'mine.' He turned and the pencil hit Dakshil's eye. In cross examination she was adamant and confirmed what she said in examination chief.

[50] In the absence of evidence by the plaintiff as to how the incident happened, I accept the defendant's evidence on how the incident occurred.

[51] It is immaterial that whether the plaintiff was injured during recess or during lunch period. The pertinent question is whether there was breach of duty of care on the part of the defendant. In other words, was there supervision by the defendant?

[52] Lord Denning in **Clark v Mon Mouthshire County Council** (1954) 118 J.P 244 (C.A.), Jiten Singh J cited this case in ***Amnish Chand v Sudhakar Chandra & Others*** (HBC 0135 of 2000L), assessed the duty of a teacher as follows:

> **'The duty of a school master does not extend to constant supervision of all the boys all the time. That is not practicable. Only reasonable supervision is required.'**

[53] In ***Van Oppen v Clerk to the Before Charity Trustees*** [1989] 3 A11ER 389 Balcombe LJ of the Court of Appeal quoted with approval the remarks of Boreham J at first instance:

> *'There are risks of injury inherent in many human activities, even of serious injury in some. Because of this, the school, having the pupils in its care, is under a duty to exercise reasonable care for their health and safety. Provided due care is exercised in this sphere, it seems to me that the school's duty is fulfilled.'*

[54] Turning back to the present case, the plaintiff sustained injury when he was attempting to get, claiming it belonged to him, the pencil from another student. The incident appears to have happened all of a sudden. The plaintiff was a class1 student. There were 35 plus students in that class. As class1 class teacher the defendant was present in the class though three metres away. Even if the defendant had exercised reasonable supervision, she could not have prevented the incident as it happened unexpectedly. I can see no evidence on how the defendant was in breach of the duty which she owed to the plaintiff. In the circumstances, I would conclude that there was no breach of duty of care by the defendant.

CONTRBUTORY NEGLIGENCE

[55] The defendant alternatively pleaded contributory negligence on the part of the plaintiff. Since I have found that there was no breach of duty of care by the defendant I need not lay a hand on the issue of contributory negligence. I would simply say that the issue of contributory negligence does not arise.

CONCLUSTION

[56] For the reasons set out above, I conclude that the incident occurred with great rapidity. The claim in negligence fails. I hold that the incident was accidental. The plaintiff fails to establish, on balance of probability, that the defendant could have supervised in a way which would have prevented the incident or would have had reduced the chances of happening so. In the circumstance I would dismiss the plaintiff's claim, but without costs.

FINAL OUTCOME

[57] The final outcome of this judgment is that:

1) Plaintiff claim is dismissed.
2) No order as to costs.

HIGH COURT OF FIJI LAUTOKA

.....

M H Mohamed Ajmeer
JUDGE

At Lautoka

16 February 2016

Solicitors for plaintiff: Messrs Chaudhary & Associates

Solicitors for defendants: Office of the Attorney General