A **RUSIAH SABDARIN & ORS v. MOHD JAINAL JAMRAN & ORS**

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
LEONARD DAVID SHIM J
[SUIT NO: BKI-22NCvC-88-11-2020]
18 JULY 2023
B [2023] CLJ (JT18)

Abstract – *Every school has a statutory duty to prepare its pupils for examinations. This duty ultimately starts with the teacher, who has a statutory function in ensuring that the pupils are properly taught as per the school's schedule. A teacher who is frequently or continuously absent for a very long period of time from teaching, without valid reasons, is in breach of his statutory duty under the law. Such conduct does not only jeopardise the pupils' opportunity to obtain good grades and to receive better education in the future, but also amounts to a breach of the pupils' constitutional right to have access to education.*

C

D

TORT: *Duty – Statutory duty – Breach – Absenteeism of teacher – Failure of teacher to turn up to teach for long period of time – Teacher frequently absent and later wholly-absent – Claim by students against teacher, principal, Director General of Education, Minister of Education and Government of Malaysia – Whether alleged tortfeasors in breach of statutory duties – Statutory functions of tortfeasors – Whether failed to ensure students properly taught subject in question – Whether failed to prepare students for examinations – Education Act 1996, s. 19 – Public Officers (Conduct and Discipline) Regulations 1993, reg. 3C(2)*

E

F

TORT: *Misfeasance – Misfeasance in public office – Absenteeism of teacher – Failure of teacher to turn up to teach for long period of time – Teacher frequently absent and later wholly-absent – Claim by students against teacher, principal, Director General of Education, Minister of Education and Government of Malaysia – Whether alleged tortfeasors in breach of statutory duties – Whether breach of statutory duties amounted to tort of misfeasance in public office – Whether there was targeted malice with requisite intention to harm and injure claimants – Whether claim for misfeasance in public office established*

G

TORT: *Liability – Vicarious liability – Absenteeism of teacher – Failure of teacher to turn up to teach for long period of time – Teacher frequently absent and later wholly-absent – Claim by students – Whether Director General of Education, Minister of Education and Government of Malaysia vicariously liable for acts and/or omissions of teacher and principal of school – Government Proceedings Act 1956, ss. 5 & 6*

H

I

TORT: *Damages – Claim for – Claim for exemplary, general and aggravated damages – Absenteeism of teacher – Failure of teacher to turn up to teach for long period of time – Teacher frequently absent and later wholly-absent – Claim by students against teacher, principal, Director General of Education, Minister of Education and Government of Malaysia – Whether claimants suffered damages as result of acts and/or omissions of tortfeasors – Factors considered in awarding damages – Appropriate amount to be awarded*

CONSTITUTIONAL LAW: *Fundamental liberties – Rights in respect of education – Absenteeism of teacher – Failure of teacher to turn up to teach for long period of time – Teacher frequently absent and later wholly-absent – Claim by students against teacher, principal, Director General of Education, Minister of Education and Government of Malaysia – Whether students' constitutional rights violated – Federal Constitution, arts. 5(1) & 12*

STATUTORY INTERPRETATION: *'life' – Federal Constitution, art. 5(1) – Whether 'life' in art. 5(1) should be given generous and liberal interpretation – Whether includes right to education*

The plaintiffs were students of SMK Taun Gusi ('school') and enrolled in the class identified as 4 Sains Sukan ('4SS'). The present case arose out of the absenteeism of the first defendant, an English language teacher, from classes and the effect it had towards the plaintiffs. The second to fifth defendants were the principal of the school, the Director General of Education, the Minister of Education and the Government of Malaysia, respectively. It was the plaintiffs' case that the first defendant was frequently absent between March to July 2017 and wholly-absent for the months of August to October 2017. In addition to exemplary, general and aggravated damages, the plaintiffs sought declarations that the defendants: (i) were in breach of their statutory duties under the Education Act 1996 ('EA') by failing to ensure that the plaintiffs were taught the English language during the material time for the year 2017; (ii) were in breach of their statutory duties under the Act by failing to prepare the plaintiffs for examinations as prescribed under the EA; (iii) had committed misfeasance in public office; and (iv) violated the plaintiffs' constitutional rights to access to education, guaranteed to the plaintiffs under art. 5, read together with art. 12 of the Federal Constitution ('FC'). Disputing the plaintiffs' claim, the defendants argued that: (i) the first defendant was present at all material times during the English classes for 4SS; (ii) the first, second and third defendants were employees and/or servants and/or agents only to the fifth defendant; (iii) if the issue of vicarious liability was raised on the fifth defendant as the employer and/or master and/or principal to the first, second and third defendants, the strict requirements of ss. 5 and 6 of the Government Proceedings Act 1956 ('GPA') must apply; (iv) the third and fourth defendants would not be vicariously liable in any way for the actions of the first and second defendants pursuant to ss. 5 and 6 of the GPA; (v) the second defendant had taken all appropriate and

necessary actions on the problems faced at the material time. The issues that arose were: (i) whether the first defendant failed to consistently teach the plaintiffs the English language subject, beginning from March 2017 until the end of his allocated schedule for the plaintiffs' class, thereby failing in his duties to prepare the plaintiffs for their English language subject examination; (ii) whether the second defendant had notice of the first defendant's failures and had taken reasonable steps to exercise disciplinary control and supervision over the first defendant; (iii) whether the third, fourth, and fifth defendants were vicariously liable for the acts and/or omissions of the first and second defendants; (iv) whether the defendants took reasonable steps to safeguard the rights of the plaintiffs; and (v) whether the plaintiffs suffered any damages as a result of the acts and/or omissions of the defendants.

Held (allowing claim):

(1) The school's schedule for 2017 was from January to November 2017 and the first defendant was required to teach the English language at Class 4SS three times a week. The first defendant testified that he was present and teaching English language classes for 4SS at all material times, in accordance with the schedule given by the school in 2017, unless he was involved in school activities. However, there was no evidence to show that the first defendant was on leave or involved in other school activities during the long period of his absence. Further, the failure by the defendants to produce the 'buku kawalan' for the months of 18 to 20 July and August to October 2017 had not been satisfactorily explained. In the absence of any reasonable explanation for the non-production and/or withholding of the said buku kawalan, s. 114(g) of the Evidence Act 1950 was invoked and adverse inference was drawn against the defendants. The plaintiffs had proven, on a balance of probabilities, that the first defendant was consistently absent for many days from their English classes from March to July 2017 and was absent throughout the months/period from 18 July to October 2017. (paras 20-22)

(2) The second defendant testified that the students only informed him of the first defendant's absenteeism in November 2017 and it was too late for him to take appropriate action as it was only reported towards the end of the school's schedule for 2017. However, the defendants' statement of defence and the agreed facts clearly and expressly stated that the second defendant was notified of the first defendant's absenteeism sometime in May 2017. Therefore, the evidence of the second defendant, that he was only informed about the first defendant's absenteeism in November 2017, was not credible. Despite knowing about the first defendant's absenteeism since May 2017, the second defendant failed to take any reasonable steps to exercise disciplinary control and supervision over the first defendant. (paras 23 & 47)

(3) The first to fourth defendants were under a statutory duty to prepare the plaintiffs for their English language examinations, pursuant to s. 19 of the EA. Thus, the first to fourth defendants had a statutory function to prepare the plaintiffs for their English language examinations. In performing their statutory functions or duties, the second to fourth defendants must ensure that the English teacher that they provided was reasonably competent and present in class to teach English classes during the school's schedule or timetable for 2017. In the event of absenteeism by the teacher, the second to fourth defendants were under a statutory duty to take appropriate disciplinary action against the absent teacher. There was no legal immunity against civil liability provided in the EA for breach of s. 19 of the EA. Regulation 3C(2) of the Public Officers (Conduct and Discipline) Regulations 1993 ('POCDR') provides that an officer who fails to exercise disciplinary control and supervision over his subordinates or take action against his subordinate who breaches any provision of the POCDR shall be deemed to have been negligent in the performance of his duties and to be irresponsible and shall be liable to disciplinary action. Thus, the defendants were liable for breach of statutory duty and negligence. (paras 52, 54 & 55)

(4) There was no evidence of targeted malice with the requisite intention by the defendants to injure the plaintiffs. Although there was evidence of negligence and breach of statutory duties by the defendants, the evidence did not suggest an intention of harming the plaintiffs or reckless indifference to the probability of harming the plaintiffs or the students of Class 4SS. In the premises, the claim for misfeasance in public office had not been established on a balance of probabilities. (para 57)

(5) It was an agreed fact that the first to fourth defendants were employees and/or servants and/or agents of the fifth defendant. As the first and second defendants were found to be liable for negligence and breach of statutory duty, the third to fifth defendants were vicariously liable for the acts and omissions of the first and second defendants. (paras 60 & 63)

(6) Authorities had shown that the expression 'life' in art. 5(1) of the FC should be given a generous and liberal interpretation and includes rights such as livelihood, quality of life and right to education. Based on the principles enunciated by the Federal Court in *CCH & Anor v. Pendaftar Besar Bagi Kelahiran Dan Kematian, Malaysia* and other authorities and adopting a prismatic approach in construing art. 5(1), read together with art. 12 of the FC as broadly as possible, the right to be provided with a teacher who attends classes to teach and to prepare the plaintiffs for their English language examinations were an integral part of the plaintiffs' constitutional right of access to education under art. 5(1), read together with art. 12 of the FC and the said constitutional right had been breached by the defendants. (paras 74 & 75)

(7) The injury or loss sustained by the plaintiffs was not a pure economic loss. It was in the nature of emotional and/or psychological injury and trauma. English is a core subject for the Sijil Pelajaran Malaysia (SPM) examination and for enrolment into any higher level of education or university. The plaintiffs were each awarded nominal damages of RM30,000 for the loss of opportunity to obtain good grades in English and loss of a good opportunity in their lives to receive better education in the future. Further, the plaintiffs were humiliated by the absenteeism of the first defendant and the high-handed manner in which the second defendant scolded and humiliated the plaintiffs when they went to meet him to complain about the first defendant's absenteeism and to request for extra English classes. In addition to that, during trial, the plaintiff and the other students who gave evidence were subjected to a humiliating line of questioning for failing some other subjects which appeared to be an attempt to shift all blame from the absentee teacher to the students. Having regard to, *inter alia*, the injury to the plaintiffs' emotionally and/or psychological trauma or dignity caused by the hurt and humiliation and the negative impact of absenteeism, the defendants were each awarded aggravated damages in the sum of RM20,000. (paras 86-87 & 91-93)

Case(s) referred to:

Ahmad Radhiq Arbee Ahmad Rejal Arbee & Ors v. Kerajaan Malaysia & Ors [2020] 1 LNS 702 HC ***(refd)***

Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal [2011] 8 CLJ 766 FC ***(refd)***

CCH & Anor v. Pendaftar Besar Bagi Kelahiran Dan Kematian, Malaysia [2022] 1 CLJ 1 FC ***(refd)***

Dato' Dr Loke Kiing Loong v. Kerajaan Negeri Selangor [2015] MLJU 608 ***(refd)***

Guinness Anchor Marketing Sdn Bhd v. Man Seng Trading & Marketing Sdn Bhd [2022] 2 CLJ 81 CA ***(refd)***

Hu Sepang v. Inspector Keong On Eng & Ors [1991] 2 CLJ 999; [1991] 2 CLJ (Rep) 739 HC ***(refd)***

Koperal Zainal Mohd Ali & Ors v. Selvi Narayan (Pentadbir Bersama Estet Dan Tanggungan Chandran Perumal, Si Mati) & Anor [2021] 6 CLJ 157 FC ***(refd)***

Koperasi Kastam Diraja Malaysia Bhd v. Yi Go Group Sdn Bhd [2021] 10 CLJ 31 CA ***(refd)***

Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***

Malayan Banking Bhd v. Mohd Salleh Hj Mohd Noor [2006] 2 MLJ 333 ***(refd)***

Mohd Alif Anas Md Noor & Ors v. Menteri Pendidikan Malaysia & Ors [2022] 6 CLJ 431 HC ***(refd)***

Paramill Sdn Bhd & Anor v. Datuk Pairin Kitingan [2007] 6 CLJ 192 CA ***(refd)***

Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v. Poh Yang Hong [2016] 9 CLJ 297 FC ***(refd)***

Rookes v. Barnard & Ors [1964] AC 129 ***(refd)***

Saj Ranhill Sdn Bhd v. SWM Greentech Sdn Bhd & Anor [2023] 1 LNS 881 CA ***(refd)***

Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal [2017] 1 LNS 500 CA ***(refd)***

Shen & Sons Sdn Bhd v. Jutawarna Development Sdn Bhd & Ors [2015] 8 CLJ 125 HC ***(refd)***
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***
Superintendent Of Lands And Surveys, 4th Division & Anor v. Hamit Matusin & Ors [1994] 3 CLJ 567 SC ***(refd)***
Tony Pua Kiam Wee v. Government Of Malayia & Another Appeal [2020] 1 CLJ 337 FC ***(refd)***
Unni Krishnan, J/P v. State Of Andhra Pradesh [1993] 1 SCC 645 ***(refd)***
Vithal Kumar Jayaraman v. Azman Md Nor [2010] 3 CLJ 332 CA ***(refd)***

Legislation referred to:
Education Act 1996, s. 19
Evidence Act 1950, ss. 57(1)(a), 114(g)
Federal Constitution, arts. 5(1), 12
Government Proceedings Act 1956, ss. 5, 6(1)
Public Officers (Conduct and Discipline) Regulations 1993, regs. 3A(1), (2), 3C(1), (2), 23, 24, 25(1), (2), 26, Part IA, Part IB

For the 1st, 2nd & 3rd plaintiffs - Sherzali H Asli; M/s Asli & Cham Chambers
For the defendants - Mohd Hafizi Abdul Halim & Fazriel Fardiansyah Abdul Kadir; Jabatan Peguam Negara, Malaysia, Sabah

Reported by Lina E

JUDGMENT

Leonard David Shim J:

Introduction

[1] The plaintiffs were students enrolled in the class identified as 4 Sains Sukan ("4SS") under the tutelage of the first defendant at SMK Taun Gusi ("the school"). The present case ultimately arose out of the first defendant's absenteeism during English classes at the material time and the effect it has had towards the plaintiffs' inalienable right to education.

[2] As a consequence thereof, and by implication, the nature of the plaintiffs' cause of action is the failure of all five defendants to provide the plaintiffs with English classes during the relevant period in 2017. The plaintiffs contend that this omission constitutes breaches under the Education Act 1996 ("Education Act") on the part of the defendants, misfeasance in public office on the part of the first and second defendants, and infringements of the plaintiffs' constitutional rights guaranteed under the Federal Constitution.

[3] The reliefs sought by the plaintiffs against the defendants are as follows:

(i) a declaration that the defendants are in breach of their statutory duty under the Education Act by failing to ensure that the plaintiffs were taught the English language during the material time for the year 2017;

(ii) a declaration that the defendants are in breach of their statutory duty under the Education Act by failing to prepare the plaintiffs for examinations as prescribed under the Education Act;

(iii) a declaration that the acts of the defendants complained of amounts to misfeasance in public office;

(iv) a declaration that the defendants have violated the plaintiffs' constitutional rights to access to education guaranteed to the plaintiffs under art. 5 read together with art. 12 of the Federal Constitution; and

(v) exemplary, general and aggravated damages.

[4] The defendants' main contention in disputing the plaintiffs' claim can be summarised as follows:

(i) the first defendant was present at all material times during the English classes for 4SS;

(ii) defendants deny that the first defendant was frequently late or not fully present at the material time. See para. 4.1 of statement of defence ("SOD");

(iii) the first, second and third defendants are employees and or servants and or agents only to the fifth defendant. See para. 1.1 of SOD;

(iv) if the issue of vicariously liability was raised on the fifth defendant as the employer and or master and or principal to the first, second and third defendants, the strict requirements of ss. 5 and 6 of the GPA must be applied. See para 1.2 of statement of defence;

(v) the third defendant will not be vicariously liable in any ways for the actions of the first and second defendants pursuant to ss. 5 and 6 of the Act 395. See para. 1.3 of statement of defence;

(vi) the fourth defendant will not be vicariously liable in any ways for the actions of the first and second defendants pursuant to ss. 5 and 6 of the Act 395. See para 1.4 of statement of defence;

(vii) the claim for misfeasance is time-barred. See para. 7.3 of statement of defence;

(viii) that the second defendant had taken all appropriate and necessary actions on the problems faced at the material time. See paras. 5.2 and 6.2 of statement of defence; and

(ix) that the defendants had taken all appropriate and necessary actions on the problems faced at the material time. See para. 7.2 of statement of defence.

[5] The plaintiffs had called ten witnesses to support their claim as follows:

(i) PW1 Nurul Afirah binti Zainal Abidin;

(ii) PW2 Suriana binti Mohammad Salleh;

(iii) PW3 Rusiah binti Sabdarin;

(iv) PW4 Mohd Fadzley Izzani bin Lamsin;

(v) PW5 Calvina binti Angayung;

(vi) PW6 Nur Natasha Allisya binti Hamali;

(vii) PW7 Abdul Shahril bin Abdul Sahar;

(viii) PW8 Mohammad Hafiezzamani;

(ix) PW9 Dr Noor Aishah binti Rosli; and

(x) PW10 Nur Haizah binti Ejab.

[6] Meanwhile, the defendants called three witnesses to defend their case and the witnesses are as follows:

(i) DW1 Jainal @ Mohd Jainal bin Jamran;

(ii) DW2 Suid bin Hanapi; and

(iii) DW3 Norhana binti Idek.

Agreed Issues To Be Tried

[7] Before the trial commenced, parties had agreed to several issues to be tried as stated in encl. 50. These issues are reproduced verbatim below:

(i) whether the first defendant failed to consistently teach the plaintiffs the English language subject beginning from the period of March 2017 until the end of his allocated schedule for the plaintiffs' class thereby failing in his duties to prepare the plaintiffs for the English language subject examination;

(ii) if Question 1 is in the affirmative, whether the second defendant had notice of the first defendant's failures as described as aforegoing;

(iii) if Question 2 is in the affirmative, whether the second defendant took reasonable steps to exercise disciplinary control and supervision over the first defendant;

(iv) whether the third, fourth, and fifth defendants are vicariously liable for the acts and/or omissions if the first and second defendants;

(v) whether the first, second, third, fourth and fifth defendants took reasonable steps to safeguard the rights of the plaintiffs; and

(vi) whether the plaintiffs suffered any damages as a result of the acts and/or omissions of the first, second, fourth and fifth defendants.

A **Evidence Adduced At Trial**

[8] The plaintiffs had called ten witnesses (including themselves) to testify at the trial.

The Laws Governing The Conduct And Discipline Of Teachers

B **[9]** It is an agreed fact under para. 5 of encl. 51 that the first, second, third and fourth defendants are employees and or servants and or agents of the fifth defendant. It is therefore undisputed that the first and second defendants are bound by the relevant statutory provisions in the Public Officers (Conduct and Discipline) Regulations 1993 ("POCDR Regulations") and the C Education Act 1996 as well as an official guideline issued by the Ministry of Education. At this juncture, the relevant statutory provisions from the aforesaid statutes and guideline – which the plaintiffs are relying on are as follows:

POCDR Regulations

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[10] Regulations 3A (1) and (2) at Part IA of the POCDR Regulations imposes a duty to public officers/servants to comply with the regulations therein:

Duty To Comply With Regulations

E 3A (1) An officer shall comply with the provisions of these Regulations.

(2) The breach of any provision of these Regulations shall render an officer liable to disciplinary action in accordance with these Regulations.

[11] The regs. 3C(1) and (2) at Part IB of the POCDR Regulations imposes F a duty on every officer to exercise disciplinary control and supervision over his subordinates and the consequences for failure to do so:

Duty Of Disciplinary Control And Supervision

3C (1) It is the duty of every officer to exercise disciplinary control and supervision over his subordinates and to take appropriate action as soon G as possible for any breach of the provisions of these Regulations.

(2) An officer who fails to exercise disciplinary control and supervision over his subordinates or to take action against his subordinate who breaches any provision of these Regulations shall be deemed to have been negligent in the performance of his duties and to be irresponsible, and he H shall be liable to disciplinary action.

[12] Sections 23, 24 and 25 (1) & (2) of the POCDR Regulations provide the definition and consequences of being absent without leave:

Absence Without Leave

I 23. In this Part, "absence", in relation to an officer, includes a failure to be present for any length of time at a time and place where the officer is required to be present for the performance of his duties.

24. An officer's absence from duty without leave or without prior permission or without reasonable cause shall render him liable to disciplinary action.

25(1) Where an officer is absent from duty without leave or without prior permission or without reasonable cause, his Head of Department shall, as soon as possible, report that fact together with the dates and circumstances of such absence and any further information in respect of such absence to the appropriate Disciplinary Authority.

(2) The appropriate Disciplinary Authority may, after considering the report of the Head of Department under subregulation (1), institute disciplinary action against the officer.

Education Act 1996

[13] Section 19 of the Education Act imposes a duty of schools to prepare pupils for prescribed examination:

19. Schools to prepare pupils for prescribed examination

Every school shall prepare its pupils for examinations prescribed by or under this Act or any regulations made under this Act unless otherwise exempted by or under this Act.

Panduan Mengurus Pegawai Tidak Hadir Bertugas

[14] The Ministry of Education imposed a further protocol that is designed to regulate matters concerning absence without leave of public officers/servants. In this respect, the Jabatan Perkhidmatan Awam (JPA) provides an official guideline which can be found in the following link:

https://web.archive.org/web/20170715163606/https://moe.gov.my/images/KPM/BPM/Pekeliling/2017/Panduan_Mengurus_Pegawai_THB_version_JPA.pdf

and is commonly known as the Panduan Mengurus Pegawai Tidak Hadir Bertugas. A close examination of the said guideline shows that it refers to the PODCR Regulations, in particular regulations 24 and 3C. Refer to paras 14 and 15 above for the said statutory provisions. The plaintiffs submit that this court can take judicial notice of the aforesaid guideline under section 57(1)(a) of the Evidence Act 1950 ("Evidence Act"):

All laws or regulations having the force of law now or heretofore in force or hereafter to be in force in Malaysia or any part thereof;

Contentions, Evaluation And Findings

First Agreed Issue

[15] It is the plaintiffs' case that the first defendant was frequently absent between March to July 2017 and wholly absent for the months of August to October 2017. The evidence shows that the dates of the first defendant's

absences tallies with the JPNS record. For ease of reference, a table provided by the plaintiffs showing the particulars of the first defendant's absences at the material time is helpful.

Particulars of the First Defendant's absences

	Date of absence	Buku Kawalan reference	JPNS reference
March	30.03.2017	pp 327 to 328 of B2	p 411 of B3
April	03.04.2017	pp 331 to 332 of B2	p 412 of B3
	04.04.2017	pp 333 to 334 of B2	
	06.04.2017	pp 337 to 338 of B2	
	10.04.2017	pp 341 to 342 of B2	
	11.04.2017	pp 343 to 344 of B2	
	13.04.2017	pp 347 to 348 of B2	
	20.04.2017	pp 353 to 354 of B2	
	25.04.2017	pp 357 to 358 of B2	
	27.04.2017	pp 361 to 362 of B2	
May	04.05.2017	pp 366 to 367 of B2	p 413 of B3
June	12.06.2017	pp 370 to 371 of B2	p 414 of B3
	13.06.2017	pp 372 to 373 of B2	
	15.06.2017	pp 376 to 377 of B2	
	17.06.2017	pp 380 to 381 of B2	
	19.06.2017	pp 382 to 383 of B2	
	22.06.2017	pp 388 to 389 of B2	
July	06.07.2017	pp 396 to 397 of B2	p 415 of B3
	17.07.2017	pp 407 to 408 of B2	

[16] Crucially, the JPNS record for the months of August, September and October of 2017 shows that he was wholly absent. See pp. 414, 415 and 416 of B3. It is noted that the final exam for all subjects was held in November 2017.

[17] The first defendant had made a clear and unequivocal admission of his absences during cross-examination. The Court of Appeal illustrated the impact of such admissions in para. 27 of *Vithal Kumar Jayaraman v. Azman Md Nor* [2010] 3 CLJ 332; [2010] 2 MLJ 67. In view of this, this court was refer to the first defendant's admissions captured in the following relevant pages of the NOP:

(i) for March 2017 – see lines 11417 to 11457 at pp. 406 to 407 of the NOP;

(ii) for April 2017 – see lines 11456 to 11469 at pp. 407 to 408 of the NOP;

(iii) for May 2017 – see lines 11471 to 11483 at p. 408 of the NOP;

(iv) for June 2017 – see lines 11485 to 11511 at pp. 408 to 409 of the NOP;

(v) for July 2017 – see lines 11513 to 11526 at pp. 409 to 410 of the NOP;

(vi) for August 2017 – see lines 11658 to 11659 at p. 414 of the NOP; and

(vii) for September 2017 – see lines 11668 to 111670 at p. 415 of the NOP.

[18] PW10 had testified that she had secretly recorded the first defendant's absences at the material time and her reasons for doing so in lines 10328 to 10370 at pp. 366 to 368 of the NOP. PW10 testified that she had reported the absence of DW1 to the school before 2017 but the headmaster informed her that the evidence was insufficient and no disciplinary action was taken against the first defendant. These recordings were tendered and marked as exh. P9. Her evidence in this respect was not challenged during cross-examination.

[19] PW10 had testified that she gave extra English classes to the students in Class 4SS on her own accord upon request made by the first defendant's students. See lines 9950 to 9963 and lines 9971 to 9975 at p. 353 and lines 9977 to 9994 at p. 354 of the NOP. Apart from being asked to show videos of her giving extra English classes, this part of DW10's evidence was not challenged during cross-examination.

[20] First defendant, DW1 testified that he was present and teaching English Language classes for 4SS at all material times in accordance with the schedule given by the school in 2017 unless he was involved in school activities. However, DW1 did not produce the schedule for 2017 in court. Neither did DW1 produce any official letter or documentary evidence to show that he was involved in other school activities within or outside the school during his English language classes. It is undisputed that the school's schedule for 2017 is from January-November 2017 and the first defendant is required to teach the English language at Class 4SS three times a week.

[21] The failure by the defendants to produce the buku kawalan for the months of 18-20 July, August to October, 2017 has not been satisfactorily explained. If they could produce the buku kawalan for the months of January-17 July 2017 to show that the first defendant was present on some of the days during that period, it is unclear why they could not produce the buku kawalan for the period 18 July to October 2017. The buku kawalan for the months of July-October 2017 are material evidence which are in the possession and control of the first and second defendants at all material times. There is no evidence to show that the defendants have made genuine attempts

to search for the same and was unable to locate it. Further, there is no credible evidence to show that the said buku kawalan for the months of July-October 2017 were lost or destroyed. Sufficient time was given to the defendants to produce the missing buku kawalan when the trial was adjourned a few times but to no avail. In the absence of any reasonable explanation for the non-production and/or withholding of the said buku kawalan, the court is constrained to invoke s. 114(g) of the Evidence Act 1950 and draw an adverse inference against the defendants. See *Malayan Banking Bhd v. Mohd Salleh Hj Mohd Noor* [2006] 2 MLJ 333, in particular para. 13 therein, where the court drew adverse inference against the plaintiff for his failure to produce crucial documentary evidence:

> 13. … Such failure would give rise to the presumption that if the plaintiff had produced its audited statement of accounts, it would not be favourable to the plaintiff. Section 114(g) of the Evidence Act 1950 relates to the presumption raised from willful withholding of evidence from spoliation …

[22] The buku kawalan, JPNS official record, the admission by DW1 of his days of absence recorded in JPNS official record and the evidence of PW10 is sufficient to corroborate the evidence of the plaintiffs that the first defendant failed to consistently teach the plaintiffs the English language subject for Class 4 Sains Sukan from March until the end of the allocated schedule for the plaintiffs' class in November 2017. The defendants has failed to adduce credible evidence to prove otherwise. After weighing the evidence of both parties and having regard to the undisputed documentary records of JPNS, the court finds that the plaintiffs have proven on a balance of probabilities that the first defendant was consistently absent for many days from their English classes from March to July 2017 and was absent throughout the months/period from 18 July to October 2017. There is no evidence to show that the first defendant was on leave or involved in other school activities during the long period of his absence. In his evidence in chief, the first defendant, DW1 testified that he was present during the school schedule for 2017 unless he was involved in other school activities. However, under cross-examination, DW1 agreed that he was absent during the days and months recorded in JPNS record. The court have observed DW1's demeanour when giving evidence during the trial and does not find him to be a credible witness. In the premises, the first agreed issue is answered in the affirmative.

Second & Third Agreed Issues

[23] The second and third agreed issues are inter-related and will be considered and determined at the same time. The second defendant, DW2 testified that the students only informed him of the first defendant's absenteeism in November 2017 and it was too late for him to take appropriate action as it was only reported towards the end of the school's

schedule for 2017. However, para. 4.4 of the statement of defence and item 6 of the agreed facts (AF) clearly and expressly states that sometime in May 2017, the second defendant was notified of the first defendant's absenteeism. The defendants did not apply to amend their statement of defence until today. In the absence of any valid reason for such omission to amend the statement of defence, the defendants are bound by their own pleading and the agreed facts and the unexplained departure from their own pleading and the agreed facts appears to be an afterthought.

[24] The transcripts of 'recording 1' to 'recording 11' at pp. 131 to 200 of B1 and 201 to 224 of B2 were introduced through the witness statements and testimonies of the plaintiffs' witnesses. The content of the transcripts and the testimonies introducing the said recordings were not challenged during cross-examination. Put simply, this would mean that the recorded conversations and discussions that had transpired therein are deemed accepted by the defendants. See: *Paramill Sdn Bhd & Anor v. Datuk Pairin Kitingan* [2007] 6 CLJ 192; [2007] 7 MLJ 289 (CA).

PW1's Evidence

[25] Together with some of her classmates, PW1 had met with Cikgu Kamisah (class teacher of 4SS) and Cikgu Shamsul (assistant class teacher of 4SS) to complain about the first defendant's absences. Instead of taking action, they informed them that they do not want to get involved in the matter and to ignore the first defendant's transgressions. See: Q&A 5 of PW1-WS.

[26] On 2 November 2017, PW1, PW2 and Siti Norhayati ("Norhayati") met with Cikgu Johari to, among other things, inform him of the first defendant's absences. In this respect, he had confirmed that he knew about the first defendant's absences. This meeting was recorded and labelled as 'recording 4' in exh. P2 and the transcript of it can be found at pp. 190 to 200 of B1 and pp. 201 to 206 of B2. In particular, the court was referred to pp. 192 to 193 of B1 to highlight the following:

> [00:06:18] Norhayati: Tidak bah cikgu. Kami mahu bincang pasal Mr JJ.
>
> [00:07:00] Norhayati: Lama sudah kami lapor itu dengan guru lain
>
> [00:07:24] Johari: JJ itu sebenarnya lama sudah perangai dia memang begitu.
>
> [00:07:27] Johari: Kami sudah panggil itu. Memang JJ tu. Tapi persoalan begini, kadang-kadang orang ini cikgu ini kalau tidak masuk kelas kenapa? Apa sebab itu. Jangan persalahkan dia.

[27] In the interest of clarity and it is undisputed that JJ or Mr JJ or Cikgu JJ mentioned in any documents is the first defendant.

[28] During PW1's cross-examination, it was put to her that her testimony that the first defendant has been absent for seven months contradicts Norhayati's statement where she said to Cikgu Johari (in 'recording 4') that the first defendant was absent for three months. However, a valid explanation was provided by PW1 during her re-examination. See: lines 934 to 959 at p. 34 and lines 960 to 970 at p. 35 of the NOP.

[29] It is noted that the plaintiffs refrained from calling Norhayati to testify due to the concern surrounding any potential consequences arising from her status as a stateless person. This was explained by the first plaintiff (PW3) and the second plaintiff (PW6). See: PW3's testimony at lines 6096 to 6104 at pp. 215 to 216 of the NOP. PW6's testimony at lines 8140 to 8143 at p. 288 of the NOP.

PW2's Evidence

[30] She testified in Q&A 5 of PW2-WS that she and her classmates had appealed to Cikgu Shamsul, Cikgu Kamisah and Cikgu Ristomoyo regarding the first defendant's absences. Instead of acting on it, the said teachers advised them to self-educate themselves.

[31] On 31 October 2017, the third plaintiff (PW5) and herself had approached Cikgu Awang Erawan regarding the same issue. See Q&A 6 of PW2-WS. In this respect, Cikgu Erawan confirmed that he knew about the first defendant's absences. This meeting was recorded and labelled as 'recording 2' in exh. P2 and the transcript of it can be found at pp. 137 to 149 of B1. In particular, the court was referred to pp. 142 and 144 of B1 to highlight the following:

> [00:07:56] Suriana: kami mengadu dengan cikgu Syamsul.
>
> [00:10:36] Awang Erawan: Kalau benda ini berulang lagi, sebenarnya benda ini ahmm sebenarnya benda ini sudah, sudah sebelum ini sudah berlahu.
>
> [00:10:55] Awang Erawan: Bukan pertama kali tapi lebih baik kita tidak, sebab saya tidak mahu kamu membuat sesuatu tanggapan. Buat masa ini kalau boleh saya pun taknak dia dikenakan Tindakan disiplin dan sebagainya tetapi dia harus sedar bahawa apa yang dia buat sekarang dia adalah tak sepatutnya.

[32] She testified in Q&A 9 of PW2-WS that PW1, Norhayati and herself met with Cikgu Johari on 2 November 2017 to appeal the same issue. See Q&A 9 of PW2-WS. This corroborates PW1's evidence above where the discussion was recorded and labelled as 'recording 4' in exh. P2.

> 'Recording 4' can be found in exh. P2 and the transcript of it at pp. 190 to 200 of B1 and pp. 201 to 206 of B2.

[33] On 3 November 2017, the first plaintiff (PW3), two other classmates and herself met with DW3 (Cikgu Norhana binti Idek) to complain about the same issue. See Q&A 12 of PW2-WS. In fact, DW3 had also admitted that she knew about the first defendant's absences. This meeting was recorded and labelled as 'recording 5' in exh. P2 and the transcript of it can be found at pp. 207 to 217 of B2. In particular, the plaintiffs refer to pp. 209 of B2 to highlight the following:

> [00:04:09] Norhana: Iya kan, pengetua ada sebut dalam mesyuarat dia kata ada budak-budak jumpa dia, bagitahu cikgu tidak masuk. Jadi tiada pun ada budak jumpa cikgu bagitahu.
>
> [00:05:39] Norhana: Dia memang begitu perangai dia. Bukan sebab dia tidak suka itu kelas kah. Dia memang beberapa tahun memang ada kes-kes begitu tu. Dia awal-awal tahun dia masuk kelas. Sudah hujung-hujung tahun itu mula sudah berubah.

[34] Tellingly, DW3 failed to address or refute 'recording 5' in her witness statement or further examination-in-chief. This further confirms that the school administration, in particular the second defendant failed to act against the first defendant.

The First Plaintiff's Evidence (PW3)

[35] On 1 November 2017, the third plaintiff (PW5), PW4, Aisah and herself had met with the second defendant regarding the same issue concerning the first defendant. She had explained what had transpired during the said meeting in Q&A 6 of PW3-WS:

> 6. Pada 1.11.2017, saya Bersama Siti Aisah Binti Abd Thani, Mohd Fadzley Izzani & Calvina Angayung berjumap dengan Pengetua (Defendan Ke-2) untuk mengadu mengenai isu Cikgu tidak masuk kelas kami dan juga untuk meminta kelas tambahan. Semasa kami mengadu pada Pengetua dia memberi tahu kami patutlah mengadu lebih awal dan tidak menunggu sehingga akhir tahun.
>
> Semasa perbincangan tersebut, dia memarahi, menghina dan menyalahkan kami dengan mengatakan bahawa kami yang menjadi penyebab kenapa Cikgu JJ tidak mengajar kami tahun itu.
>
> Dia memberitahu kami bahawa tindakan disiplin tidak boleh diambil oleh sekolah kerana tiada bukti untuk menunjukkan bahawa Cikgu JJ tidak hadir kelas-kelasnya.

See also:

(i) PW3's testimony on the 1 November 2017 meeting with the second defendant at lines 2289 to 2320 at pp. 82 and 83 of the NOP; and

(ii) this meeting was recorded and labelled as 'recording 3' in exh. P1 and the transcript of it can be found at pp. 150 to 189 of B2.

[36] The second defendant (DW2) also failed to address or refute 'recording 3' in his witness statement or further examination-in-chief.

[37] PW3 corroborated PW2's evidence on what had transpired at the 3 November 2017 meeting with DW3 which she had also attended. See Q&A 10 of PW3-WS.

PW4's Evidence

[38] PW4 corroborated PW3's evidence on what had transpired at the 1 November 2017 meeting with the second defendant (DW2) which he had also attended. See Q&A 5 of PW4-WS.

Third Plaintiff's Evidence (PW5)

[39] PW5 testified that she had appealed to Cikgu Shamsul and Cikgu Kamisah and others between March till July 2017 regarding the same issue. She also made the same appeal to the second defendant circa May 2017 at Bilik Gerakan Asrama dan Inggeris. This was also never addressed or refuted by the second defendant in his witness statement or further examination in chief. See: Q&A 6 of PW5-WS. Lines 4635 to 4641 and 4642 to 4652 at pp. 164 to 165 of the NOP.

[40] She corroborated PW2's evidence regarding what had transpired at the 31 October 2017 meeting with Cikgu Awang Erawan which she had also attended. See Q&A 7 of PW5-WS.

[41] She corroborated the first plaintiff's (PW3) and PW4's evidence regarding what had transpired at the 1 November 2017 meeting with the second defendant (DW2). See Q&A 10 of PW5-WS.

Second Plaintiff's Evidence (PW6)

[42] She testified in Q&A 4 of PW6-WS, *inter alia*, that she had also complained to Cikgu Kamisah and Cikgu Shamsul. This corroborates the evidence of PW1, PW2 and the third plaintiff (PW5). See lines 7195 to 7199 at p. 254 of the NOP.

The First Defendant Had Leaked Exam Questions To The Students Of 4SS

[43] The second plaintiff (PW6), PW1, PW2 and PW10 had testified that the first defendant had leaked questions for the 2017 English final exam to the students of 4SS ("leaked questions"). See:

(i) second plaintiff (PW6) – lines 6927 to 6915 at pp. 241 to 244, lines 7273 to 7397 at pp. 257 to 261, lines 7404 to 7479 at pp. 262 to 264 and lines 8084 to 8125 at pp. 286 to 288 of the NOP;

(ii) in particular, see lines 7273 to 7397 at pp. 257 to 261 where exhibits P5 & 5A and P6 & 6A where tendered and exhibited through the second plaintiff (PW6) showing that the first defendant had leaked questions to the final exam;

(iii) PW1 – Q&A 18 of PW1-WS;

(iv) PW2 – Q&A 15 to 17 of PW2-WS; and

(v) PW10 – lines 10385 to 10397 at pp. 368 to 369 of the NOP.

[44] Revealingly, the second plaintiff (PW6) and PW2 had placed the relevant buku kawalan and 'leaked exam questions' on the desk DW3 to provide proof of the first defendant's indiscretions. This was recorded in the form of a video and labelled as 'recording 6' in exh. P2 and the transcript of it can be found at p. 218 of B1.

[45] Indeed, this was never refuted by the first defendant, second defendant and DW3 in their witness statements or further examination in chief.

[46] In view of the above, the court is inclined to agree with the plaintiffs' on the following:

(i) the first and second defendants have breached regs. 3A(1) of the PODCR Regulations;

(ii) the first and second defendants are liable to disciplinary action in pursuant to regs. 3A(2) of the PODCR Regulations;

(iii) the first defendant has breached regs. 23 and 24 of the PODCR Regulations;

(iv) second defendant has breached regs. 3C(1) & (2) and 25(1) of the PODCR Regulations; and

(v) the first and second defendants have breached s. 19 of the Education Act.

[47] From the body of evidence before the court and the admission in para. 4.4 of the statement of defence and para. 6 of the agreed facts, the court finds that the plaintiff has proven on a balance of probabilities that the second defendant had notice of the first defendant's absenteeism since May, 2017 and prior to the meeting between the students and the principal (DW2) on 1 November 2017, the students have informed their class teacher, Cikgu Kamsiah and assistant class teacher Cikgu Shamsul about the first defendant's absenteeism but were told to self-study. The evidence of DW2 that he was only informed about the first defendant's absenteeism in November 2017 is not credible and the court finds DW2 to be an unreliable witness. Despite knowing about the about DW1's absenteeism since May 2017, the second defendant, DW2 failed to take any reasonable steps to exercise disciplinary control and supervision over the first defendant. Thus, the second agreed issue is answered in the affirmative and the third agreed issue is answered in the negative.

[48] The evidence also shows that DW1 gave "soalan bocor" to the students for their English examination. DW1 admitted giving the "soalan bocor" but tried to explain that it was for the purpose of "spot question". DW1 was unable to contradict the plaintiffs' video recording and documentary evidence which suggests that the "soalan bocor" given was an exam question for the English subject in 2017. No objection was made when the video and oral evidence on the "surat bocor" was given during the trial. The court does not find the issue of "surat bocor" to be a radical departure from the plaintiffs' pleadings which is primarily centred on the first defendant's, DW1 consistent absence from teaching English language classes and the second defendant's failure to take appropriate disciplinary action for DW1's absenteeism or provide another English teacher or extra English classes to the students in breach of statutory duty under the Education Act and the fundamental constitutional right to education. The court finds that the "soalan bocor" issue is a mere development of what has already been pleaded or alleged by the plaintiffs in their statement of claim. It is related to the first defendant's absenteeism and the said issue should be considered by the court. See *Superintendent Of Lands And Surveys, 4th Division & Anor v. Hamit Matusin & Ors* [1994] 3 CLJ 567; [1994] 3 MLJ 185.

[49] The first defendant should have given extra English classes to help the students to catch up their English lessons due to his long period of absence without leave or valid reason and prepare the students for the 2017 Form 4 English language examination. DW1 should not have given leaked questions (soalan bocor) in order to boost the passing rate of his students to make up for his absenteeism and/or breach of statutory duty. It amounts to an unprofessional conduct and breach of confidential information which renders the sanctity of the examination meaningless and gives an unfair advantage to some students over others who were not given the leaked examination questions.

[50] In *Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v. Poh Yang Hong* [2016] 9 CLJ 297; [2016] 6 MLJ 413, the Federal Court held:

> (2) There has been a breach of the statutory duty imposed on the second defendant and its negligence in the manner in which it had maintained its record resulting in the loss occasioned to the plaintiff. The duty of care on the part of the second and the third defendants in the context of the present case was two-fold. Firstly, there is the statutory duty under the NLC to maintain the register of all lands caused to be registered at the registry, and in particular to ensure that the information contained in the register is correct, true and accurate and reflects the true and actual description of the title to the land as well as the true identity of the registered proprietor thereof. Secondly, there is the common law duty of care whereupon there can be a claim for negligence for the same alleged wrong.

…

(4) A common law duty of care can arise in the performance of a statutory function. The second defendant had a statutory function to ensure that the records entered in the register of titles and maintained in the office of the second defendant contained particulars which were accurate. A failure of that duty can give rise to the coexistence of statutory duty and common law duty of care.

[51] In *Hu Sepang v. Inspector Keong On Eng & Ors* [1991] 2 CLJ 999; [1991] 2 CLJ (Rep) 739; [1991] 1 MLJ 440, the High Court (per Lim Beng Choon J) held:

(2) Where a cause of action is based on breach of statutory duty the plaintiff must show that (a) the injury suffered was within the ambit of the statute; (b) the statutory duty imposed a liability to civil action; (c) the statutory duty was not fulfilled; (d) the breach of duty had caused the injury.

…

(6) If a statute creates a duty but imposes no remedy civil or criminal for its breach, there is a presumption that a person who is injured thereby will have a right of action, for otherwise the statute would be but a pious aspiration.

[52] In the present case, the first to fourth defendants are under a statutory duty to prepare the plaintiffs for their English language examination pursuant to s. 19 of the Education Act 1996. Thus, the first – fourth defendants have a statutory function to prepare the plaintiffs for their English language examination. In performing its statutory function or duty, the second – fourth defendants must ensure that the English teacher that they provide is reasonably competent and is present in class to teach English classes during the school's schedule or timetable for 2017. In the event of absenteeism by the teacher, the second – fourth defendants are under a statutory duty to take appropriate disciplinary action against the absent teacher.

[53] The loss and/or emotional injury suffered by the plaintiffs due to persistent absenteeism by the first defendant and lack of supervision and disciplinary control or action by the second to fourth defendants not only falls within the ambit of s. 19 of the Education Act 1996 and regs. 3C(1) and (2), 23, 24 and 25 of the POCDR Regulations but is reasonably foreseeable.

[54] There is no legal immunity against civil liability provided in the Education Act 1966 for breach of s. 19 of the Education Act 1966. Regulation 3C(2) provides that an officer who fails to exercise disciplinary control and supervision over his subordinates or take action against his subordinate who breaches any provision of these Regulations shall be deemed to have been negligent in the performance of his duties and to be irresponsible and shall be liable to disciplinary action. No criminal liability

is imposed for breach of s. 19 of the Education Act. Neither does the Education Act expressly provide for a civil liability in the event of breach of s. 19 of the Education Act. To hold otherwise would render the statute ineffective and would be but a pious aspiration. See *Hu Sepang* above. Thus, the court finds that the statutory duty under s. 19 imposes on the defendants a liability to civil action and that duty was not fulfilled by the first-fourth defendants who are the employees and/or servants and/or agents of the fifth defendant. The failure to fulfil their statutory duty caused hardship, loss and/or emotional injury to the plaintiffs.

[55] From the facts and evidence and applying the principles in *Poh Yang Hong* above, the court finds that the plaintiffs have proven on a balance of probabilities that the defendants are in breach statutory duty under the Education Act 1966 to prepare the plaintiffs for the Form 4 English language examination of 2017 and the common law duty of care. Thus, the defendants are liable for breach of statutory duty and negligence.

[56] The plaintiffs also contends that the defendants breach of statutory duty amounts to a tort of misfeasance in public office. In *Tony Pua Kiam Wee v. Government Of Malayia & Another Appeal* [2020] 1 CLJ 337; [2019] 12 MLJ 1, the Federal Court held:

> [182] The tort relates to deliberate dishonest conduct and abuse of power by a public officer. As stated in *Three Rivers* (per Lord Steyn) the rationale underlying the tort is that 'in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes …'.
>
> [183] The quintessence of the rule of law is that no man is above the law and that all men are equal before the law. This tort therefore serves to protect citizens against abuse of power by public officials. To that extent it is distinctive in that it combines both public and private law elements, unlike other torts which are wholly private in nature.
>
> [184] The key ingredients of the tort are:
>
> (i) an abuse of public power or authority;
>
> (ii) by a public officer;
>
> (iii) who either: (a) knew that he was abusing his public power or authority; or (b) was recklessly indifferent as to the limits of their public power or authority; and
>
> (iv) who acted or omitted to act either with: (a) the intention of harming the plaintiff (targeted malice); or (b) with the knowledge of the probability of harming the plaintiff, or with reckless indifference to the probability of harming the plaintiff or a class of persons of which the plaintiff was one.

> [185] It is therefore an intentional tort. The element which receives the most emphasis is that of bad faith, *ie*, the abuse of power and the targeted malice or the complete indifference to the effect of the abuse of power on the plaintiff or a class of such persons. It is also the element which makes this tort hard to plead and to prove as it is only in rare circumstances that such facts subsist as would allow the plea to remain on the record. In many instances the plea is struck out as it is simply insufficient. This is because it is not every act or omission on the part of a public officer which lends itself to the bringing of an action premised on this tort. It requires outrageous conduct with the requisite intention to injure and this serves as a safeguard to preclude a multitude of actions from being initiated.

[57] From the evidence adduced by the parties, the court does not find any evidence of targeted malice with the requisite intention by the defendants to injure the plaintiffs. There is evidence of negligence and breach of statutory duty by the defendants. However, the evidence does not suggest an intention of harming the plaintiffs or reckless indifference to the probability of harming the plaintiffs or the students of Class 4SS. In the premises, the court finds that the claim for misfeasance in public office has not been established on a balance of probabilities.

Fourth Agreed Issue

[58] The third, fourth and fifth defendants are relying on ss. 5 and 6 of the Government Proceedings Act 1956 ("GPA") to argue that they are not vicariously liable for the acts and or omissions of the first and second defendants.

[59] The plaintiffs submit that the third to fifth defendants' reliance of ss. 5 and 6 is misconceived in law. Firstly, the court in *Dato' Dr Loke Kiing Loong v. Kerajaan Negeri Selangor* [2015] MLJU 608 had explained what ss. 5 and 6 entails:

> [11] It is settled law that upon the provisions of section 5 and 6 of the GPA being read together, no tortious claim against the Government can be maintained unless the officer of the Government responsible for the tortious act is made a party …

[60] Secondly, and crucially, it is an agreed fact under para. 5 of encl. 51 that the first, second, third and fourth defendants are employees and or servants and or agents of the fifth defendant. See para. 12 above.

[61] This would mean that the defendants are not contending that the tortfeasors in the present case, namely the first and second defendants were not named as parties herein. Further, damages have also been pleaded against all five defendants, which means that the first and second defendants would also be personally liable. Section 6(1) is therefore not an issue. By virtue of this, the plaintiff contends that ss. 5 and 6 of the GPA are no longer a relevant consideration for this court.

[62] Alternatively, JPNS is under the purview and jurisdiction of the third and fourth defendants. The defendants had tendered the JPNS record at pp. 409 to 420 of B3. These records prove the first defendant's absences at the material time. This means that JPNS, and by extension the third and fourth defendants were aware or ought to have known about the first defendant's transgressions. This renders them directly liable as tortfeasors as well for failing to take action against the first and second defendants. It is undisputed that the first and second defendant falls under the purview of the third and fourth defendants and the first to fourth defendants are employees or servants or agents of the fifth defendant.

[63] As the court has found that the first and second defendants liable for negligence and breach of statutory duty, the third to fifth defendants are vicariously liable for the acts and omissions of the first and second defendants.

Fifth Agreed Issue

[64] In the light of the findings on the first to fourth agreed issue above, the court does not find that the first to fifth defendants took any reasonable steps to safeguard the rights of the plaintiffs. Hence, the fifth agreed issue is answered in the negative.

Violation Of The Plaintiff's Constitutional Right Under Art. 5 Read Together With Art. 12 Of The Federal Constitution

[65] The plaintiffs submit that the rights to art. 5(1) of the Federal Constitution ("the Constitution") cannot be viewed in isolation and must be read harmoniously with other provisions in the Constitution. In this respect, art. 5(1) must be read together with art. 12 which provides protection to the plaintiffs' inherent right to education.

[66] All individuals have inherent human rights that are inalienable, absolute and inextinguishable. Our Constitution affirms their existence and gives protection to it. In this regard, the preamble to the Education Act sets the theme in that it provides the true spirit and intention of parliament as far as education is concerned:

> AND WHEREAS the purpose of education is to enable the Malaysian society to have a command of knowledge, skills and values necessary in a world that is highly competitive and globalized, arising from the impact of rapid development in science, technology and information:
>
> AND WHEREAS education plays a vital role in achieving the country's vision of attaining the status of a fully developed nation in terms of economic development, social justice, and spiritual, moral and ethical strength, towards creating a society that is united, democratic, liberal and dynamic:
>
> AND WHEREAS it is the mission to develop a world-class quality education system which will realize the full potential of the individual and fullfil the aspiration of the Malaysian nation.

[67] In *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] 5 MLJ 301, the Federal Court dealt with, among other things, the interpretation of arts. 5(1) of the Federal Constitution. The Federal Court in its ruling held that constitutional liberties must be read generously and not literally: A

> [14] When Article 5 (1) is read prismatically in the light of Article 8(1), the concept of "life" and "personal liberty" housed in the former are found to contain in them other rights. Thus, "life" means more than a mere animal existence and includes such rights as livelihood and the quality of life (see Tan Tek Seng's case). And "personal liberty" includes other rights such as the right to travel abroad. See *Loh Wai Kong v. Government of Malaysia & Ors* [1978] 2 MLJ 175, where Gunn Chit Tuan J said that "personal liberty" includes "liberty to a person not only in the sense of not being incarcerated or restricted to live in any portion of the country but also includes the right to cross the frontiers in order to enter or leave the country when one so desires. B C

[68] The Federal Court in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507; [2010] 2 MLJ 333 (FC) had referred to *Lee Kwan Woh* for guidance in its endeavour to interpret art. 5(1): D

> [3] Before discussing the specific areas of challenge there are three preliminary observations that must be made. The first has to do with the methodology of interpretation of the guaranteed rights. In three recent decisions this court has held that the provisions of the Constitution, in particular the fundamental liberties guaranteed under Part II, must be generously interpreted and that a prismatic approach to interpretation must be adopted. These are *Badan Peguam Malaysia v. Kerajaan Malaysia* [2008] 2 MLJ 285; [2008] 1 CLJ 521, *Lee Kwan Woh v. Public Prosecutor* [2009] 5 MLJ 301; [2009] 1 LNS 778 and *Shamim Reza bin Abdul Samad v. Public Prosecutor* [2009] 2 MLJ 506; [2009] 6 CLJ 93. The provisions of Part II of the Constitution contain concepts that house within them several separate rights. The duty of a court interpreting these concepts is to discover whether the particular right claimed as infringed by state action is indeed a right submerged within a given concept. E F

[69] The Federal Court adopted the same approach in *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766 when interpreting art. 5(1): G

> [105] And perhaps it is opportune here to be reminded that 'the courts should keep in tandem with the national ethos when interpreting provisions of a living document like the Federal Constitution, lest they be left behind while the winds of modern and progressive change pass them by. Judges must not be blind to the realities of life. Neither should they wear blinkers when approaching a question of constitutional interpretation. They should, when discharging their duties as interpreters of the supreme law, adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution. Such an objective may only be achieved if the expression 'life' in art. 5(1) is given a broad and liberal meaning'. (See: *Tan Tek Seng* (*supra*)). H I

[70] *Lee Kwan Woh, Sivarasa* and *Bato* sets the stage for the plaintiffs' reliance on an Indian Supreme Court's decision in *Unni Krishnan, J/P v. State Of Andhra Pradesh* [1993] 1 SCC 645 where it was held that though the right to education is not expressly mentioned as a fundamental right, it is implicit and flows from the right to life guaranteed under art. 21. See the link where the said Indian Supreme Court judgement as extracted:

https://lawsisto.com/legalnewsread/OTAxNg==/Case-Analysis UnniKrishnan-vs-State-of-Andhra-Pradesh

[71] It should be noted that art. 5(1) is similar to the art. 21 of the Indian Constitution which reads as follows:

> Protection of life and liberty. No person shall be deprived of his life or personal liberty except in according to procedure established by law.

[72] In *CCH & Anor v. Pendaftar Besar Bagi Kelahiran Dan Kematian, Malaysia* [2022] 1 CLJ 1, the Federal Court held:

> (2) Fundamental rights and provisions must be **construed as broadly as possible** while provisions which limit those rights must be construed as narrowly as possible …

[73] In *Mohd Alif Anas Md Noor & Ors v. Menteri Pendidikan Malaysia & Ors* [2022] 6 CLJ 431; [2022] 12 MLJ 455, the High Court held:

> [14] Secondly, in cases involving fundamental constitutional rights, the relevant provisions in the Federal Constitution should be **generously and liberally interpreted.** The courts have a duty to adopt a prismatic approach when required to interpret such rights (see *Lee Kwan Woh v. PP* [2009] 5 MLJ 301; [2009] 5 CLJ 631).
>
> ...
>
> [103] It is after all well-settled, as referred to earlier, that in cases involving **fundamental constitutional rights such as the right in respect of education which is found in art. 12** and placed under Part II of the Federal Constitution on Fundamental Liberties, the courts will interpret the relevant constitutional provisions generously and liberally. In addition, applying a prismatic approach to the construction of constitutional provisions, I would construe the use of such languages referred to in art. 152(1)(b) in so far as it concerns vernacular schools to encompass the use of Chinese or Tamil as a medium of instruction to teach other subjects. (emphasis added)

[74] The court is guided by the aforesaid authorities which shows that the expression "life" in art. 5(1) should be given a generous and liberal interpretation and includes such rights as livelihood, quality of life and right to education. See *Lee Kwan Wah* and *Unni Krishnan* above.

[75] Based on the principles enunciated by the Federal Court in CCA and the aforesaid authorities and adopting a prismatic approach in construing art. 5(1) read together with art. 12 as broadly as possible, the court finds that

the right to be provided with a teacher who attends classes to teach and to prepare the plaintiffs for the English language examination is an integral part of the plaintiffs' constitutional right of access to education under art. 5(1) read together with art. 12 and the said constitutional right has been breached by the defendants.

Sixth Agreed Issue

[76] The plaintiffs have pleaded for exemplary, general and aggravated damages against the defendants. The plaintiffs submit that a fundamental right guaranteed by the Constitution is a value-added right. Thus, any breach imposes strict liability on the offender and must be redressed by an award of compensation without proof of actual damage.

[77] In support, the plaintiffs refer to *Koperal Zainal Mohd Ali & Ors v. Selvi Narayan (Pentadbir Bersama Estet Dan Tanggungan Chandran Perumal, Si Mati) & Anor* [2021] 6 CLJ 157; [2021] 3 MLJ 365, the Federal Court dealt with the award for exemplary and aggravated damages in respect of a breach of art. 5(1) of the Federal Constitution where the majority held:

> [29] Saying this does not mean that the appellants are allowed to walk away scot free for the wrong that had been done to the deceased. Without resorting to or giving a violent interpretation to the clear provision of s. 8(2) of the CLA, on the facts of this case, punishment can and ought to be meted out under aggravated damages, which the respondents had also specifically prayed for in their statement of claim. I say this because firstly, from its very nature, aggravated damages is to compensate the victim or as in this case, his estate for the unacceptable behaviour of the appellants. As stated by the learned author in [2021] 3 MLJ 365 at 406 *McGregor on Damages* (19th Ed) at p. 1653:
>
> > Aggravated damages come into the picture where the injury to the claimant's feelings is increased by the flagrancy, malevolence and the particularly unacceptable nature of the assaulting defendant's behaviour.
>
> …
>
> [32] Therefore, based on the authorities cited above whilst at the same time giving due deference to the express prohibition in s. 8(2) of the CLA, the respondents in this case should be entitled to be compensated with aggravated damages which amount must reflect the sufferings of the deceased and at the same time the sheer abhorrence of the court against the negligent conduct of the appellants, even though the degree of its seriousness is not on the same [2021] 3 MLJ 365 at 407 footing as other reported cases where the deaths of the detainees were the result of physical abuse by their custodians. Factoring such feeling of the court is permissible as held by Lord Hailsham in *Broome*'s case at p. 1073:

> In awarding 'aggravated' damages the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous rather than a more moderate award to provide an adequate solatium. But that is because the injury to the plaintiff is actually greater and, as the result of the conduct exciting the indignation, demands a more generous solatium.
>
> [33] Thus, I would answer the legal question posed in the affirmative and consequentially reaffirm the decision of this court in *Kugan*'s case. Consequentially, this appeal is allowed and based on the reasons I have elaborated earlier, I would substitute the sum of RM200,000 awarded as exemplary damages to be that under aggravated damages. I would, in furtherance of the same abhorrence mentioned above, make no order as to cost despite the success of the appellants in this appeal.

[78] Following the above, the plaintiffs submit that the instances of the first and second defendants' flagrant disregard and abhorrent attitude towards the plaintiffs' education and by extension their future is reflected perfectly in PW10's recorded private conversation with Cikgu Eddy where he had admitted, *inter alia*, that he knew about the first defendant's absences and, more importantly, that the second defendant was very much aware of it but intentionally neglected to take action. This recording is marked as exh. P8 and the transcript of it marked as exh. P8A. PW10 provides a clearer illustration of this in lines 10226 to 10286 at pp. 363 to 365 of the NOP.

Exemplary Damages

[79] The defendants contend that for exemplary damages, exemplary by its meaning is to deter, warn and caution someone from doing the same ultraviolent act or any wilful acts which were malicious, oppressive, fraudulent, wanton or grossly reckless. It is also often called as punitive damages.

[80] Nevertheless, in order to award exemplary damages, several elements need to be fulfilled as mentioned in the case of *Rookes v. Barnard & Ors* [1964] AC 129 in p. 1226 which limit to two categories only which are as follows:

> The first category is oppressive, arbitrary or unconstitutional action by the servant of the government … "Cases in second category are those in which the defendant's conduct has been calculated by him to make a profit for himself may well exceed the compensation payable to the Plaintiff …

[81] The defendants also invited this court to look at the overall facts of this case and to see that there is no proof of the first defendant's bad intentions, no *mala fide*, no bad faith or ulterior motive or purposes.

[82] To conclude, the defendants referred to the case *Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal* [2017] 1 LNS 500; [2018] 3 MLRA 488; [2018] 1 MLJ 784; [2018] 4 AMR 745 which stated that '… exemplary damages may be awarded where the

defendant has acted with vindictiveness or malice …'. The appellants submit that the there was never any kind of oppression done by the first appellant in resulting to negligence let alone monetary damages towards the respondent.

Aggravated Damages

[83] The defendants submit that the plaintiffs should not be awarded with aggravated damages as there is no solid reason on why this court should award them with. There were no particulars or any special facts to support their claim for aggravated and/or exemplary damages.

[84] In the case of *Shen & Sons Sdn Bhd v. Jutawarna Development Sdn Bhd & Ors* [2015] 8 CLJ 125; [2016] 7 MLJ 183 where the learned judge referred to the following cases for aggravated damages:

> [79] I will first refer to the issue pertaining to aggravated damages which was examined in the *Cheong Fatt Tze*'s case. The discussion on aggravated damages is found in the following passage of the judgment: Aggravated Damages. In the *Law of Tort* (9th Ed, 2009) by Professor John Cooke, the learned author said that aggravated damages 'are awarded where there is outrage to person or property and are best regarded as compensatory. They are to compensate for injury to the claimant's pride or feelings'. In *McGregor on Damages* (15th Ed, 1988) at pp. 409-410, aggravated damage is said to be:
>
> > … extra compensation to the plaintiff for the injury to his feelings and dignity …
>
> In *Ley v. Hamilton* [1935] 153 LT 384 at p 386 (HL), Lord Atkin had afforded a good explanation and example of injury to a claimant's feelings and dignity in a case of damages for defamation in the following words:
>
> > (Aggravated damages) are not arrived at …by determining the 'real' damage, and adding to that sum by way of vindictive or punitive damages. It is precisely because the 'real' damage cannot be ascertained that the damages are at large. It is impossible to track the scandal, to know that the quarters the poison may reach; it is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation.

[85] The defendants submit that aggravated damages should not be awarded to the plaintiffs because there was never type of injury suffered by the plaintiffs in term of physical or emotion as the plaintiffs never made any official complaint to the rest of the defendants, they waited until the end of the year to only made recording of them making complaint in which the defendants never knew the real intention of them making so.

[86] The evidence adduced at the trial shows that the injury or loss sustained by the plaintiffs is not a pure economic loss. It is in the nature of emotional and/or psychological injury and trauma. The evidence of the child psychologist, Dr. Noor Aishah binti Rosli (PW9) on the injury and/or impact to the plaintiffs due to the first defendant's absenteeism is reproduced below:

> Understanding about the absenteeism in this case, from the aspect of psychology, it is called structural violence. Structural violence are social forces that harm certain groups of people, producing and perpetuating inequality in health and wellbeing. In education setting especially for students/Plaintiff from this school – Sekolah Men Keb Taun Gusi, Kota Belud, Sabah – they have been experiencing trauma and injustice because of losing the opportunity to receive better education. It hurts them emotionally and denies their right to get the best education …
>
> Referring to the self-perception written by the Plaintiff individually, all of them express their felling that they feel very sad with what had happened to them. Plaintiff believe that if they were given the equal opportunity to learn English, they will obtain good grade and pass English subject during the SPM examination. They also stated that they feel regret to what had happened to them. Because of the Defendant absentee, they loss the opportunity to obtain good grade in English which was limit their changes to enrol to any higher level of education or university during that time.
>
> The absent of Defendant results in Plaintiff becoming demotivated and subsequently losing interest in school. This situation causes Plaintiff to start developing negative attitudes and perception towards Defendant and the learning area. Plaintiff begin to lose respect for Defendant who were repeatedly absent and this affects their relationship with him. Defendant absenteeism has a negative effect on Plaintiff motivation.
>
> In the same line, Defendant's absenteeism impacted negatively on the Plaintiff's SPM result-which cause they only got low marks/fail in English subject for SPM. This situation formed feeling of anxiety, regret and dissatisfied about their future.
>
> Overall, the absenteeism of the Defendant causes the Plaintiff loss a good opportunity in their life. They might receive better education at the higher level if Defendant play his role as an English teacher and provide good teaching and learning process to them.

See pp. 31 to 32 of exh. P.7 (encl. 53).

[87] The nature of injury suffered by the plaintiffs makes it difficult for the court to assess the damages. However, difficulty in assessing damages does not mean that the court must award nothing to the plaintiffs. In *Guinness Anchor Marketing Sdn Bhd v. Man Seng Trading & Marketing Sdn Bhd* [2022] 2 CLJ 81, the Court of Appeal stated as follows:

[81] In *Tham Cheow Toh v. Associated Metal Smelters Ltd* [1972] 1 LNS 153; [1972] 1 MLJ 171 the Federal Court held that the difficulty in assessing damages quoting *Chaplin v. Hicks* [1911] 2 KB 786 does not mean that the damages should not be awarded. On p. 795 Fletcher Moulton LJ said:

> ... I think that, where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case. There are no doubt well-settled rules as to the measure of damages in certain cases, but such accepted rules are only applicable where the breach is one that frequently occurs. In such cases the Court weights the pros and cons and gives advice, and I may almost say directions, to the jury as regards the measure of damages. This is especially the case in actions relating to the sale of goods of a class for which there is an active and ready market. But in most cases it may be said that there is no recognised measure of damages, and that the jury must give what they think to be an adequate solatium under all the circumstances of the case. Is there any such rule as that, where the result of a contract depends on volition of an independent part the law shuts its eyes to the wrong and says that there are no damages? Such a rule, if it existed, would work great wrong.

[88] It is undisputed that English is a core subject for the Sijil Pelajaran Malaysia (SPM) examination and for enrolment into any higher level of education or university. From the available evidence, the court finds that an award of nominal damages to each of the plaintiffs in the sum of RM30,000 for the loss of opportunity to obtain good grades in English and loss of a good opportunity in their lives to receive better education in the future is appropriate in the circumstances of this case. In *Saj Ranhill Sdn Bhd v. SWM Greentech Sdn Bhd & Anor* [2023] 1 LNS 881; [2023] 4 MLJ 397, the Court of Appeal awarded nominal damages in the sum RM100,000 to the appellant since the respondents were liable in negligence.

[89] In *Koperasi Kastam Diraja Malaysia Bhd v. Yi Go Group Sdn Bhd* [2021] 10 CLJ 31; [2021] 5 MLJ 590, the Court of Appeal held:

> (5) Where loss or damage had been suffered but the party claiming had failed to prove its damages, then only nominal damages could be awarded. Since there was precedent where RM100,000 had been awarded as 'nominal damages' for breach of contract, this court would not disturb the generous sum of RM100,000 the registrar had awarded.

[90] In *Ahmad Radhiq Arbee Ahmad Rejal Arbee & Ors v. Kerajaan Malaysia & Ors* [2020] 1 LNS 702; [2020] MLJU 236, the High Court held:

> [15] In regard to AD, the law is also settled. In *Sambaga Valli a/p K. R. Ponnusamy v. Datuk Bandar Kuala Lumpur dan 2 Yang Lain* the Court of Appeal held at page 16:

A Now aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interest of personality of the Plaintiff's where this injury has been caused or exacerbated by the exceptional conduct of the defendant.

B Aggravated Damages are compensation for the injured feelings of the Plaintiff where his sense of injury from the wrongful physical act is justifiably heightened by the manner in which or motive for which the Defendant did it. (Broome v. Cassel [1972] AC 1027 following *Rookes v. Barnard* [1964] AC 1129 accepted on *Bohjaraj* [2001] 6 MLJ 497 and C *Rosharee* [1966] 3 MLJ 337.

[16] In *Thompson v. Commissioner of Police of the Metropolis* [1997] 2 ALL ER 762, as correctly summarised in the Plaintiff submission, the elements of Aggravated Damages were outlined as follows:

(i) Humiliating circumstances;

D (ii) Conduct of Defendants showing that they behaved in a high handed, malicious or oppressive manner;

(iii) The way the litigation or trial is conducted.

[91] In the present case, the plaintiffs were humiliated by the absenteeism E of the first defendant and the high-handed manner in which the second defendant scolded and humiliated the plaintiffs when they went to meet him on 1 November 2017 to complain about the first defendant's absenteeism and to request for extra English classes.

[92] The court also looks into the way the litigation or trial is conducted. F The defendants disputed the first defendant's absenteeism when the JPNS records produced at the trial clearly shows that the first defendant was partially and/or wholly absent from his English classes from March to October 2017. Further, the second defendant maintained that the plaintiffs or students only informed him about the first defendant's absenteeism in G November 2017 when it is clearly admitted by the defendants in para. 4.4 of the statement of defence and para. 6 of the agreed facts marked AF (encl. 51) that the second defendant was notified of the first defendant's absenteeism sometime in May 2017. During the trial, the plaintiff and other students who gave evidence were subjected to a humiliating line of H questioning for failing some other subjects which appears to be an attempt to shift all blame from the absentee teacher to the students.

[93] In the premises and having regard to the injury to the plaintiffs' emotionally and/or psychological trauma or dignity caused by the hurt and humiliation and the negative impact of absenteeism and the factors set out I in paras. 91-92 above, the court awards aggravated damages in the sum of RM20,000 to each of the defendants.

Conclusion

[94] From the totality of the evidence before the court and after considering the submissions by both parties, the court finds that the plaintiffs have proven their case against the defendants on a balance of probabilities.

[95] Based on the aforesaid reasons, the plaintiffs' claim is allowed and there shall be judgment for the plaintiffs against the defendants as follows:

(i) a declaration that the first, second, third, fourth and fifth defendants are in breach of their statutory duty under the Education Act 1996 by failing to prepare the first, second and third plaintiffs for examinations as prescribed under the Education Act;

(ii) a declaration that the second defendant is in breach of his duties under regs. 3C, 25, 26 of the Public Officers (Conduct and Discipline) Regulations 1993;

(iii) a declaration the first, second, third, fourth and fifth defendants have violated the first, second and third plaintiffs' constitutional right to access to education guaranteed to the plaintiffs under art. 5 read together with art. 12 of the Federal Constitution;

(iv) nominal damages in the sum of RM30,000 to be paid to each of the plaintiffs by the first-fifth defendants jointly and severally;

(v) aggravated damages in the sum of RM20,000 to be paid to each of the plaintiffs by the first-fifth defendants jointly and severally; and

(vi) interest on (iv) and (v) at the rate of 5% per annum from the date of judgment until the date of full and final settlement.

[96] As this case involves the question of fundamental constitutional right to education and matters of public interest, the court makes no order as to costs.