[2017] JMSC Civ.60

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV 07706

BETWEEN	**ROXANNE PEART** **(By her mother and next friend VENICE PEART)**	**CLAIMANT**
AND	**SHAMEER THOMAS** **(By his mother and next friend ANGELLA THOMAS)**	**1ST DEFENDANT**
AND	**BRENDA O'CONNOR** **(For and on behalf of the SNOWDEN ALL- AGE SCHOOL)**	**2ND DEFENDANT**
AND	**ANGELLA THOMAS (For and on behalf of the SNOWDEN ALL- AGE SCHOOL)**	**3RD DEFENDANT**
AND	**THE BOARD OF MANAGEMENT OF THE SNOWDEN ALL- AGE SCHOOL**	**4TH DEFENDANT**
AND	**THE MINISTRY OF EDUCATION**	**5TH DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**6TH DEFENDANT**

Negligence – Claimant stabbed in eye with pencil – Loss of vision in left eye – Cause of action pleaded in Negligence – Whether statement of case discloses negligence or assault against one Defendant – Section 48 of the Judicature (Supreme Court Act) – Rule 8 of the Civil Procedure Rules

Damages – Post Traumatic Stress Disorder – Quantum of damages

Mr. Mikhail Williams instructed by Taylor, Deacon & James for the Claimant

Mr. Wilwood Adams instructed by Robertson, Smith, Ledgister & Company for the 1st Defendant

Mr. Dale Austin instructed by the Director of State Proceedings for the 2nd, 3rd, 4th, 5th and 6th Defendants

IN OPEN COURT

HEARD: 14th & 15th November 2016, 17th March and 28th April, 2017

COR: V. HARRIS, J

Introduction

[1] The claimant, Ms Roxanne Peart, was a minor at the time the claim was filed but who now has attained the age of majority, claims damages for negligence against the defendants jointly and severally as a result of an injury she received to her left eye while she was a student at the Snowdon All-Age School. This is the correct spelling for the name of the institution.

[2] The claimant alleges that on February 14, 2006 Mr. Shameer Thomas (the 1st defendant) whilst in the care and control of Mrs. Brenda O'Connor, Mrs. Angella Thomas and The Board of Management of Snowdon All Age School (the 2nd, 3rd and 4th defendants respectively) who were all servants and/or agents of the Ministry of Education (the 5th defendant) acted negligently causing personal injury to her. The 1st defendant at the time of the incident and the filing of the claim was also a minor. However, he too is now an adult.

[3] The particulars of negligence of the 1st defendant as pleaded are that he failed to have due consideration for the safety of his classmates and to give due considerations to the likely injury which his actions could cause to his fellow classmate.

[4] The alleged particulars of negligence of the 2nd defendant are that she:

i) Failed to keep a watchful eye on the students in her care and control;

ii) Failed to exercise reasonable care and awareness given the age of the students in her care and control;

iii) Failed to be aware of what was happening in her classroom;

iv) Failed to react with the urgency which the attack by one student on another required; and

v) Failed to ensure that the Claimant's injuries were attended to with urgency.

[5] The particulars of negligence of the 3rd, 4th and 5th defendants as alleged are that they:

i) Failed to ensure that the Claimant received immediate medical attention given the serious nature of her injuries;

ii) Failed to ensure that staff members were capable of managing and controlling their classes efficiently;

iii) Failed to ensure that the staff in its employ was properly briefed on the need to be aware of the circumstances which existed in their classrooms at all times;

iv) Failed to ensure that staff in its employ was properly briefed on how to respond when children in their care and control were involved in violent encounters; and

v) Failed to put in place systems and procedures to ensure students' safety.

[6] As a result of the negligence of the 1st, 2nd, 3rd and 4th defendants, Ms. Peart contends, she sustained blindness in and traumatic loss of her left eye, as well as, post traumatic stress disorder.

Undisputed evidence

[7] For ease of reference only and no disrespect is intended, I will refer to the claimant and 1st defendant by their first names. The other parties will be referred to by their respective titles and surnames.

[8] Much of the evidence is undisputed. Roxanne and Shameer on the day of the incident were about ten (10) years old. They were both in Grade 4 at Snowdon All Age School. Their class teacher was Mrs. O'Connor. Mrs. Thomas was the principal of the school and Shameer's mother.

[9] It is also not in issue that there was a physical altercation between Roxanne and Shameer while they were in class and under the supervision of Mrs. O'Connor. During the altercation she received an injury to her left eye. Roxanne, after undergoing four surgeries has lost all vision in that eye.

[10] Prior to the incident, Mrs. O'Connor was inside the classroom writing on the chalkboard. The students were seated doing work from their literacy books. While Mrs. O'Connor was at the chalkboard she heard Roxanne screamed. When she intervened, she was told two different accounts of the incident by Roxanne and Shameer. She examined Roxanne's eye and then took both students to the principal, Mrs. Thomas.

[11] After she reported the matter to Mrs. Thomas, Mrs. O'Connor was instructed by her to monitor Roxanne for any signs of distress. Roxanne was eventually taken to an ophthalmologist and later referred to the Mandeville Regional Hospital (MRH) where she underwent two surgeries. She was then transferred from the MRH to the University Hospital of the West Indies (UHWI) where two more surgeries were performed on her left eye. She is now unable to see from her left eye.

The Claimant's evidence

[12] Roxanne told the Court that on the 14th February, 2006 while she was in class Shameer stabbed her in her left eye with his pencil after he was told by another student that she had said he was gay.

[13] She said that prior to being stabbed with the pencil, Shameer had kicked her several times on her foot and she had responded by hitting him on one of his feet. Her pencil fell from her hand and when she bent down to retrieve it, that was the time that Shameer stabbed her with his pencil in her left eye.

[14] Roxanne's evidence was that just before this incident, there had been a loud and disruptive conversation in the class about homosexuals. Mrs. O'Connor, at that time, was writing class work on the chalk board. According to Roxanne, she did not attempt to stop the conversation or bring order to the class.

[15] It was after she screamed out in pain that Mrs. O'Connor intervened. She, as well as, Shameer was then taken to the principal Mrs. Thomas. Once there, Mrs. O'Connor reported that she was not told what had happened. Mrs. Thomas, Roxanne said, did not make any enquiries and they were taken back to class and Shameer was punished and put to sit elsewhere.

[16] At lunchtime her left eye got cloudy and was running. It also felt as if something big was in it. It was hurting her but not as severely as before. While she was playing Mrs. Thomas called her and said that she was going to call her daughter who was a teacher at another school to take her to the hospital. This was more than an hour after the incident had occurred.

[17] Roxanne also gave evidence about the psychological effect the loss of her sight has had on her. She was teased at school and called unkind nicknames. This made her cry a lot. She played less with her siblings. She was profoundly affected by the response of her mother and father to her condition. She became

very angry and depressed, so much so, that she had to see a psychiatrist and receive counselling.

The evidence of the Claimant's mother

[18] Mrs. Venice Peart, Roxanne's mother gave evidence that she was contacted by Mrs. Hibbert, a teacher at her daughter's school and given certain information.

[19] She went to the MRH where she saw her daughter and Mrs. Thomas. Roxanne, she said, was in a lot of pain and crying. She was told about the incident.

[20] Roxanne underwent two surgeries at the MRH, Mrs. Peart said. She was later transferred to the UHWI where two more surgeries were performed on her left eye. Mrs. Thomas assisted with defraying the costs for Roxanne's surgery and treatment at the UHWI.

[21] She spent twenty-two (22) days at UHWI and had to be taken back for frequent check up. Mrs. Peart told the Court that Roxanne was also prescribed glasses. The first pair was paid for by Mrs. Thomas.

[22] She also testified as to the psychological impact the loss of the vision had on her daughter. This affected her to the extent that she had to receive counselling.

First Defendant's evidence

[23] Shameer was not present at the trial and his witness statement was tendered into evidence by agreement. He was not cross-examined and the Court did not get the opportunity to view his demeanour. All of this will be taken into account when I come to decide the weight that is to be placed on his evidence.

[24] He stated that Roxanne was sitting behind him on the day of the incident. He was doing class work when she began teasing him about a girl and poked him several times in his back. He told her to stop and she refused to do so. He was unable to do his work. He said that he turned around and hit at her and his hand caught her in her face.

[25] She screamed out loudly and both Mrs. O'Connor and Mrs. Hibbert (the grade 6 teacher) came to where they were and made enquiries as to what had transpired. Shameer stated that Roxanne told the teachers that he had hit her in her eye.

[26] He was asked what had happened and he told the teachers his version of the incident. He did not know that his hand had hit her in the left eye and that was not his intention. He apologised to Roxanne. They were taken to Mrs. Thomas, who instructed Mrs. O'Connor to punish him.

Second Defendant's evidence

[27] Mrs. O'Connor testified that she was the grade 4 teacher on February 14, 2006. Both Roxanne and Shameer were students in her class. Her class was divided in two groups, Group A and Group B. Group A was comprised of students that were more advanced than those in Group B.

[28] On the day of the incident the students in Group A were occupied doing seated work activity when she went to another section of the classroom to write on the chalk board and to teach the students in Group B.

[29] While she was at the chalkboard, Mrs. O'Connor said, she heard a loud scream and this alerted her that something was wrong. The scream also brought Mrs. Hibbert, the grade 6 teacher, to her classroom.

[30] She observed that Roxanne was crying with one of her hands covering her eye. She enquired what had happened. Roxanne told her, she said, that Shameer had hit her in her eye. She said that Roxanne did not tell her that Shameer had used a pencil to stab her in her eye. Shameer also related his version of the dispute.

[31] Both teachers (Mrs. O'Connor and Mrs. Hibbert) examined Roxanne's eye. They saw no cuts, bruises or any other physical signs of injury. However, Mrs. O'Connor took both students to Mrs. Thomas and reported the matter to her. Mrs. Thomas also inspected Roxanne's eye. Mrs. O'Connor said that she left

Roxanne with Mrs. Thomas and returned to the class with Shameer and punished him.

[32] Shortly after, Mrs. Thomas came to her class with Roxanne and Mrs. O'Connor was instructed to monitor her and report any signs of distress. This she did. Mrs. O'Connor testified that she asked Roxanne how she was feeling and she said that she wasn't feeling badly. She had her lunch and also assisted her with recording the numbers for the day from the other classes.

[33] Mrs. Thomas, Mrs. O'Connor said, ultimately told her that she was going to take Roxanne to the optician because Roxanne had reported to her that Shameer had hit her in her 'bad eye'. Roxanne was taken to the doctor by Mrs. Thomas' daughter and attempts were made to contact her mother. She later learnt that Roxanne had been admitted at the MRH and she visited with her every evening after school until she was transferred to the UHWI.

[34] Mrs. O'Connor's evidence was that one of her duties was to ensure that children under her supervision do not get into physical altercations but that this sometimes happened. She said that she did not hear any discussion about homosexuality taking place in her classroom while she was writing on the chalkboard. She was also not aware that Roxanne and Shameer had been fighting.

[35] She said that when a student was injured at school, the student was taken to the principal and the principal would attend to the matter thereafter. This was the policy at the time.

[36] Mrs. O'Connor denied that she was negligent in her supervision of the students in her charge on the day of the incident. She also maintained that she had adhered to the policy of the school by taking Roxanne to the principal when she learnt that she had been hit in her eye.

The evidence of the third Defendant

[37] Mrs. Thomas indicated that she was appointed principal of Snowdon All-Age School in 2000. The staff consisted of four teachers and she exercised supervisory control of the school.

[38] She testified that Mrs. O'Connor told her of the altercation that had taken place between Roxanne and Shameer. She was informed that Shameer had hit Roxanne in her eye. She said that Roxanne did not appear to be unduly distressed and there were no physical signs of injury to her eye such as bleeding, swelling, scratches or watering.

[39] However, after sometime had passed (about an hour and fifteen minutes after the incident was reported to her) she decided to take Roxanne to the doctor because she was told by Roxanne that Shameer had hit her in her 'bad eye'.

[40] She asked her daughter to assist with this task because she was still mourning the recent passing of her husband and did not have the energy to drive. Roxanne was taken to see an ophthalmologist and she was then referred to the MRH.

[41] Mrs. Thomas went to the MRH and Roxanne's mother was contacted. When Roxanne's mother arrived she told her about the incident. Mrs. Thomas said that she was told Roxanne would require surgery to correct the injury to her eye. She also assisted financially by paying for prescriptions, the surgery at UHWI and a pair of glasses for Roxanne.

[42] She agreed that it was part of her duties to ensure that teachers exercised proper control over the students in their classes.

[43] If a student was injured, Mrs. Thomas testified, he or she would be observed to see if anything was wrong. If the student displayed signs of distress, his or her parent would be contacted. Depending on the nature of the injury, the student would either be taken to the clinic in the community or to the MRH. This was the system/policy in place to deal with students who were injured during school time.

[44] Mrs. Thomas told the Court that Roxanne did not tell her that she had been stabbed in the eye with a pencil. This, she said, would have been viewed by her as a very serious matter. She testified that about half an hour after the complaint was first made to her, Roxanne told her that Shameer had hit her in her 'bad eye'. She said that it was the manner in which she said this to her that prompted her decision to have her taken to the doctor. (I interpreted this to mean that it was Roxanne's tone and demeanour that caused her to make the decision).

[45] She disagreed that the manner in which she handled the matter was inadequate and negligent.

The evidence of Mrs. Margaret Richards-Hibbert

[46] Mrs. Richards-Hibbert was the grade 6 teacher at the time of the incident. Her evidence supported that of Mrs. O'Connor and Mrs. Thomas in relation to:

(a) What was reported by Shameer and Roxanne about the dispute they had and in particular that Roxanne did not tell them that Shameer had used a pencil to stab her in her eye;

(b) The observation of Roxanne's eye and the absence of any physical evidence indicative of injury;

(c) The system/policy in place to address students who were injured during school time.

Issues

[47] These are the issues to be resolved by the Court:

i) Did the 1st defendant stab the claimant with a pencil in her eye?

ii) If the answer to i) is yes, was the act of the 1st defendant an intentional tort (assault) or was it negligence (an unintentional tort)?

iii) If the answer to ii) is that the 1st defendant's act was an assault, how is the claim to be treated by the Court?

iv) Are the 2nd, 3rd, 4th and 5th defendants liable in negligence to the claimant?

v) What is the quantum of damages to be awarded to the claimant if any of the defendants are found liable?

Submissions on behalf of the Claimant

[48] Learned counsel Mr. Mikhail Williams submitted that based on the pleadings, it is not in issue that it was Shameer who had hit Roxanne in her eye. (This is agreed. The issue is whether he intentionally stabbed her in her eye with a pencil or is that he acted negligently by "swinging his hand wildly with a pencil" as was stated in the written submissions).

[49] Mr. Williams also put forward that there is no issue that Mrs. O'Connor was in the classroom just before the incident occurred and the students were under her supervision. (This is agreed).

[50] It was advanced by Mr. Williams that what is to be determined by the Court is the extent of the negligence on the part of the defendants and whether or not Roxanne had been stabbed in her eye with a pencil. He went on further to say that whether or not a pencil was used was immaterial given the injuries that Roxanne suffered.

[51] He submitted that Roxanne has averred in her pleadings that:

a) Shameer acted negligently at the material time by swinging his hand wildly with a pencil with the intention to hit her in her eye or otherwise; and that as a result, she lost the vision in her left eye; (I disagree. Roxanne's pleadings and evidence do not aver this. What is stated is that she was stabbed with a pencil in her eye during a fight. Her evidence made no mention of Shameer swinging his hand wildly with a pencil).

b) the 2nd defendant acted negligently as she failed to discharge her duty of care to Roxanne by not providing proper or adequate supervision of both Shameer and Roxanne during class time, especially in light of their ages.

c) the 3rd defendant was also negligent because she failed to act with the required urgency and caution given the injury to Roxanne's eye. She also failed to have or activate an adequate system to deal with an urgent situation such as this was, including but not limited t having accessible medical and/or paramedical services at the premises and a system of transportation of students in need of medical services;

d) the 4th defendant was negligent because it did not equip the 3rd defendant with medical and/or paramedical access at the premises and/or by failing to provide, and/or ensuring that a proper safe system was in place to deal with incidents of potentially fatal injury and/or harm especially to Roxanne at the material time;

e) the 5th defendant acted negligently by not providing a suitable system of protocol and/or work enabling the 2nd, 3rd and 4th defendants to ensure the safety and care of all students at the school, especially Roxanne at the material time.

[52] Mr. Williams relied on the well known authorities of ***Donoghue v Stevenson*** and ***Caparo Industries PLC v Dickman*** [1990] 2 WLR 358 as to the elements that are required to prove negligence.

[53] As to the duty of care that is owed by a teacher to a student, he cited the decision of H. Harris J (as she then was) in the case of ***Nickeisha Powell v Grace Patricia Tomlinson and Others*** C.L. p076 of 1999 that was delivered on February 26, 2004. He also relied on the cases of ***Beaumont v Surrey County Council*** (1968) 66 LGR 580, ***Kearn-Price v Kent County Council*** [2002] All ER (D) 440 and ***Ward v Hertfordshire County Council*** [1970] 1 All ER 535.

[54] It was contended by Mr. Williams that at the time of the incident Shameer was capable of distinguishing between right and wrong and was clearly able to

determine whether his actions were likely to cause injury or serious bodily harm to Roxanne.

[55] He also posited that given her age, Roxanne could not be found liable for contributory negligence. He relied on ***Gough v Thorne*** [1966] 3 All ER 398 as the authority for this principle. Mr. Williams also invited the Court to consider the **The Law Reform (Contributory Negligence) Act [J]**, as well as, the cases of ***Lane v Holloway*** [1968] 1 QB 379 and ***Pritchard v Co-Operative Group Limited*** [2011] EWCA Civ 320 on the issue of contributory negligence.

Submissions on behalf of the 1st defendant

[56] Learned counsel for Shameer, Mr. Wilwood Adams submitted that Roxanne bears the burden of proof on the balance of the probabilities in this case. He relied on ***Reid v Forest Industries Development Co Ltd*** [1998] 35 JLR 591.

[57] He also relied on **Carparo Industries** (supra) concerning the requisite ingredients that must be proved when a claimant alleges negligence.

[58] Mr. Adams was prepared to concede that students who were attending an institution of learning owed each other a duty of care in their daily interaction. He cited ***McEllistrum v Etches*** [1956] SCR 787 as the authority for his position. However, he further argued that Roxanne's pleadings and evidence were incapable of sustaining the claim because negligence did not arise in the circumstances.

[59] The evidence established the intentional tort of assault, and not the unintentional tort of negligence, Mr. Adams posited, and as a result the Court ought to dismiss the claim against Shameer.

[60] Mr Adams had initially raised the issues of doli incapax (since Shameer was 10 years old at the time of the incident), contributory negligence and the defence of volenti non fit injuria. However, I can state here and now that none of these legal principles, in my opinion, are applicable. Doli incapax is concerned with criminal

liability. The defence of volenti non fit injuria does not arise and I am of the view, having considered the evidence and law, that Roxanne was not contributory negligent.

Submissions on behalf of the remaining defendants

[61] Learned counsel Mr. Dale Austin submitted on behalf of the remaining defendants that the tort of negligence does not arise in this case. He has put forward that given Roxanne's pleadings and evidence she is alleging that the injury was not unintentionally (or negligently) inflicted.

[62] Negligence and assault, Mr. Austin continued, are two discrete torts and a claimant bringing a case has to determine which of the two is being pursued as both torts cannot be simultaneously pleaded and pursued at the same time; and it must be ultimately one or the other. He relied on the authorities of ***Fowler v Lanning*** [1959] All ER 290; ***Letang v Cooper*** (1965) 1 QB 232 and the unreported case of ***Namishy Clarke v The Attorney General*** 2007 HCV 00031, a decision of the Supreme Court of Jamaica which was delivered on December 11, 2009.

[63] Mr. Austin maintained that Roxanne having elected to pursue the cause of action in negligence, she is bound by her pleadings and cannot thereafter seek to claim that the cause of action is an assault and not negligence. (I believe this was in answer to Mr. Williams' oral submissions made on March 17 that the 1st defendant was reckless in causing the claimant to sustain unlawful personal injury and therefore his actions can be properly classified as an assault).

[64] It was also Mr. Austin's assertion that, in any event, the remaining defendants were not negligent. He agreed that it was well established that a duty of care is owed by a school to its students. This duty is take such reasonable care for the safety of its students as an ordinary careful parent would take care of his or her child/children. This also included a duty to provide adequate supervision. He relied on the case of ***Geyer v Downs*** [1975] 2 NSWLR 835.

[65] However, Mr. Austin argued, that while there is a duty to provide adequate supervision what is adequate must be viewed in the context of what is reasonable in the particular circumstances. That duty, he said, "is not a duty of insurance against harm but a duty to take reasonable care to avoid harm" and does not mean that "education authorities are bound to keep children under constant supervision throughout every moment of their attendance at school." He cited the authorities of ***Richards v State of Victoria*** [1969] V.R. 136; ***Ricketts v Erith Borough Council and Another*** [1943 2 All ER 629; ***Carmarthenshire County Council v Lewis*** [1955] AC 549 and ***Clark v Monmouthshire County Council*** (1954) 52 LGR 246 and ***Baker v State of South Australia*** (1978) 19 S.A.S.R 83 in support of this submission.

[66] Mr. Austin stated that neither Mrs. O'Connor nor Mrs. Thomas breached their duty of care to Roxanne. Mrs. O'Connor provided reasonable supervision to all the students in her class (including Roxanne and Shameer) when the incident occurred. She also attended to Roxanne promptly and followed the protocol that was in place to address students who were injured while at school.

[67] Mrs. Thomas acted upon the report she received, Mr. Austin argued. Her observations of Roxanne did not reveal any outward signs of injury and she did not exhibit signs of distress. It was when Roxanne told Mrs. Thomas that Shameer had hit her in her 'bad eye' (approximately half an hour after the incident was first reported to her) that she decided to have her examined by a doctor. She conducted herself as a reasonable parent would, in all the circumstances, Mr. Austin contended.

[68] Mr. Austin also submitted that while much has been made of the delay in taking Roxanne to the doctor, there was no evidence to show that this materially contributed to the extent of the injury that was ultimately suffered by Roxanne.

[69] It was also advanced by Mr. Austin that Roxanne lost her sight following four (4) surgeries that took place at two (2) hospitals. He asked the Court to infer that a

complication developed after the surgeries at the MRH, which was a lower trauma centre, which necessitated her transfer to the UHWI, a higher trauma hospital. He reminded the Court that It was after the surgeries at the UHWI that she lost her sight.

[70] I deduced that Mr. Austin was putting forward that there were a series of intervening events (novus actus interveniens) that would have broken the chain of causation. However, there was no evidence before the Court from which such a conclusion could properly be made. While I am permitted to draw reasonable inferences from any facts I find to be proved, such inferences must be reasonable and I cannot speculate.

The Law

The Pleadings

[71] I wish to thank all the attorneys in this matter for their hard work, industry and assistance to the Court. I want to make it known that I have carefully considered all the submissions and authorities in this matter whether they have been referred to or not.

[72] It is settled law that he who alleges must prove. Therefore, in the circumstances of this case, Roxanne is alleging that the defendants were jointly and severally negligent and she is required to prove her case against each defendant on a balance of the probabilities.

[73] In ***Blythe v Birmingham Water Works Co.*** (1856) 11 Ex. 781, Alderson B at page 784 of the judgment defined negligence as:

> *"...the omission to do something which a reasonable man, guided upon these considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."*

[74] It is not in issue that the claim has proceeded on the footing that the cause of action is in negligence against all the defendants. However, from the Roxanne's

statement of case and evidence, it seems clear to me that she is alleging that Shameer intentionally used a pencil to stab her in her eye. It has been submitted that the proper cause of action against Shameer is the intentional tort of assault and not negligence. Further, having pleaded negligence, she is bound by her pleadings and as a consequence her claim against Shameer ought to be dismissed.

[75] In attempting to address this matter, a useful place to begin, in my view, is with the Judicature (Supreme Court) Act (the Act) and Civil Procedure Rules (CPR).

[76] Section 48 (g) of the Act provides:

> *The Supreme Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant either absolutely or on such reasonable terms and conditions as to it seems just,* ***all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them*** *respectively in such cause or matter; so that as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and multiplicity of proceedings avoided.* (Emphasis added)

[77] It is clear from this section that once the claim is properly brought, the Court is required to grant all such remedies that any of the parties appear to be entitled to. The words “appear to be entitled to” mean just what they say, that is, not necessarily the remedy which the parties have pleaded or believe that they should be granted. The rationale behind bestowing this power on the Court, in my opinion, is not only to save judicial time and expense, but also to ensure that cases that are before the Court are dealt with justly.

[78] Rules 8.7 and 8.9 of the CPR are also instructive. Rule 8.7 (1) states:

> ***What must be included in the claim form***
>
> *8.7 (1) The claimant must in the claim form (other than a fixed date claim form)-*
>
> *(a) include a short description of the nature of the claim;*

> *(b) specify a remedy that the claimant seeks (though this does not limit the power of the court to grant any other remedy to which the claimant may be entitled);*

[79] The Court by virtue of section 48 (g) of the Act and rule 8.7 of the CPR is empowered to grant any remedy which the parties may appear to be entitled to even if that remedy is not pleaded.

[80] Rule 8.9 of the CPR makes it mandatory for a claimant to set out its case. The relevant aspects of this rule for the present discussion are:

> *8.9 (1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies*
>
> *(2) Such statement must be as short as possible*
>
> *(3) ...*
>
> *(4) ...*
>
> *(5) ...*

[81] Rule 8.9A addresses the "Consequences of not setting out case":

> *8.9A The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission.*

[82] A claimant is therefore required to state in the claim form and particulars of claim the facts on which he or she relies. It is apparent to me that there is no mandatory requirement that the cause of action be pleaded.

[83] This naturally begs the question, what if an erroneous cause of action is pleaded and the case proceeds? This question, it is opined, was answered in several decisions of the Court of Appeal.

[84] In ***Medical And Immuniodiagnostic Laboratory Limited v Dorett O'Meally Johnson*** [2010] JMCA Civ 42 Harrison JA at paragraph 4 of the judgment adopted the following definition for 'cause of action':

> *"A cause of action" has been defined as "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court": **Read v Brown** [1888] 22 QBD 128, 131."*

[85] So while it is recognised that the claimant does have a duty to set out its case, that is, to state all the facts on which it relies and there are consequences for failing to do so (see rules 8.9 and 8.9A (supra)), it appears that it was contemplated that there could be situations where the facts do not accord with the description of the nature of the claim or the cause of action.

[86] Phillips JA addressed this very issue at paragraph 53 in **Medical And Immuniodiagnostic Laboratory Limited:**

> *"I also do not think the appellant is precluded from pursuing the claim in negligence because its ancillary claim as pleaded seemed to rely on the Sale of Goods Act only and did not explicitly refer to negligence as an alternative cause of action. **Once the facts establishing the cause of action have been pleaded, it is not fatal that the claimant has not identified the cause of action.** (In **Karsales Ltd v Wallis** [1956] 2 All ER 866, Lord Denning said:*
>
> > *"I have always understood in modern times that it is sufficient for a pleader to plead the material facts. He need not plead the legal consequences which flow from them. Even although he has stated the legal consequences inaccurately or incompletely, that does not shut him out from arguing points of law which arise on the facts pleaded."*
>
> *Indeed, the principle has been endorsed by Lord Wolfe MR in **McPhilemy v Times Newspaper Ltd** [1999] 3 All ER 775, 792 where he set out the functions of statements of case, stating specifically that "the need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged". So, the authors of the leading text Bullen & Leake & Jacob's Precedents of Pleadings 15 edn Vol 1 state:*

> *"…the statement of case defines the ambit of the dispute… must state facts which if correct give rise to a valid legal claim or defence. If it does not do so, it is liable to be struck out."*
>
> *However, the reliance as existed under the old regime on every possible material fact being pleaded is no longer so under the CPR*." (Emphasis supplied)

[87] **Medical and Immuniodiagnostic Laboratory Limited** was approved in ***Capital & Credit Merchant Bank Limited v The Real Estate Board*** [2013] JMCA Civ 29. In that case, the Court of Appeal examined the issue of pleadings. The Court considered whether the doctrine embodied in the phrase trustee de son tort was sufficiently pleaded although it was not mentioned specifically by that term. Although in **Capital & Credit Merchant Bank Limited**, the claim was brought by way of a Fixed Date Claim Form and not by Claim Form, as in the case at bar, I am of the view that the reasoning of the Court would be equally applicable.

[88] Morrison JA (as he then was) at paragraphs 132 – 149 of the judgment discussed a number of authorities and detailed the reasoning of the Court. I found the following paragraphs instructive:

> *"[134] In **Karsales (Harrow) Ltd v Wallis** [1956] 1 WLR 936, 941, a case which involved a claim for breach of contract, Denning LJ (as he then was) said this:*
>
> > *"The only real difficulty that I have felt in the case is whether [the] point is put with sufficient clarity in the pleadings. It is not put as clearly as one could wish. Nevertheless, I have always understood in modern times that it is sufficient for a pleader to plead the material facts. He need not plead the legal consequences which flow from them.* ***Even although he has stated the legal consequences inaccurately or incompletely, that does not shut him out from arguing points of law which arise on the facts pleaded."*** (Emphasis added)
>
> *[135] In similar vein, in **Letang v Cooper** [1964] 3 WLR 573, 580, Diplock LJ (as he then was) observed that "[a] cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person". The learned judge went on to recall that, in the days before the*

> *Judicature Act, 1873, causes of action were divided into categories, depending on the factual situation in a particular case, according to the 'form of action' by which the remedy was obtained. But, he concluded, "that is legal history, not current law".*
>
> *[136] Finally on this point, I would refer to* ***In re Vandervell's Trusts (No 2)*** *[1974] Ch 269, 321, where Lord Denning MR remarked "[i]t is sufficient for the pleader to state the material facts…[h]e need not state the legal result", and* ***Medical and Immuniodiagnostic Laboratory Ltd v Johnson*** *[2010] JMCA Civ 42, para. [53], where Phillips JA, citing* ***Karsales (Harrow) Ltd v Wallis****, stated that, "****[o]nce the facts establishing the cause of action have been pleaded, it is not fatal that the claimant has not identified the cause of action".*** (Emphasis added)

[89] Finally, the Court considered whether there would be any prejudice to the defendant and found that the pleadings should be sufficient for the defendant to meet the case which has been brought against him.

> *"[139] Authoritative guidance on the role of pleadings in the post CPR dispensation was given by Lord Woolf MR in* ***McPhilemy v Times Newspapers Ltd and Others*** *[1999] 3 All ER 775, 792-3:*
>
> > *"The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular, they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules."*
>
> *[140] These observations were expressly approved by the House of Lords in* ***Three Rivers District Council v Bank of England (No 3)*** *[2001] UKHL 16; [2001] 2 All ER 513 (see especially per Lord Hope of Craighead at para. [50]) and by the* ***Eastern Caribbean Court of Appeal in Eastern Caribbean Flour Mills Ltd v Boyea*** *(Civil Appeal No 12 of 2006, judgment delivered 16*

> *July 2007). In the latter case, in a notable judgment written by Barrow JA, the court also approved (at para. [50]) the following submission on the role of a statement of case by one of the respondents' leading counsel (Mr Sydney Bennett QC):*
>
> > ***"The purpose of a statement of case is to present the opposite party with a claim stated in sufficient detail to allow that party to understand the factual basis of the allegations being made against him thereby enabling him to respond to the claim by admitting or denying the specific facts and allegations on which that claim [is] based****. It is also required to clarify for the Court the facts and assertions underpinning the dispute thereby identifying the issues to be decided by the Court."* (Emphasis added)

[90] In ***Harley Corporation Guarantee Investment Company Limited v Estate Rudolph Daley et al*** [2010] JMCA Civ 46, the Court considered, inter alia, whether fraud had to be specifically/expressly pleaded. The Court considered the true test of fraud and examined the pre-CPR and CPR requirements.

[91] Harris JA at paragraphs 53, 57 and 58 had this to say:

> *"[53] In placing reliance on an allegation of fraud, a claimant is required to specifically state, in his particulars of claim, such allegations on which he proposes to rely and prove and must distinctly state facts which disclose a charge or charges of fraud.*
>
> *[57] The Civil Procedure Rules however do not expressly provide that fraud must be expressly pleaded. However, rule 8.9 (1) prescribes that the facts upon which a claimant relies must be particularized. It follows that to raise fraud, the pleading must disclose averments of fraud or the facts or conduct alleged must be consistent with fraud. Not only should the requisite allegations be made but there ought to be adequate evidentiary material to establish that the interest of a defendant which a claimant seeks to defeat was created by actual fraud.*
>
> *[58] It is perfectly true that although fraud has not been expressly pleaded, it may be inferred from the acts or conduct of a defendant - see Eldemire v Honiball (1990) 27 PC 5 of 1990 delivered on 26 November 1991..."*

[92] **Harley Corporation Guarantee Investment Company Limited** emphasises the modern approach that even in cases of fraud, the Court may make findings

where the allegations/facts are adequately set out and there is sufficient evidence upon which to make a finding.

Duty of Care

[93] It has long been established that a duty of care is owed by a school (and its servants) to its students. That duty is take such reasonable care for the safety of its students as an ordinary careful parent would take of his or her children.

[94] In ***Geyer v Downs*** (supra) Glass JA had this to say:

> *"Adequate supervision is needed not only to avoid external dangers which might threaten immature children, but also to prevent them from inflicting injury on each other... What precautions would have been practicable and what precautions would have been reasonable in any particular case must depend on a great variety of circumstances."*

[95] In ***Richards v State of Victoria*** (supra) it was held that although a teacher bears a duty to provide adequate supervision, that duty "is not a duty of insurance against harm but a duty to take reasonable care to avoid harm."

[96] In **Ricketts** (supra), the six year old plaintiff was injured during the mid-day break at school when another student discharged an arrow which hit the plaintiff in her eye. The plaintiff's eye had to be removed. There was no continuous supervision of the students on the playground although from time to time teachers would go to the playfield. The teachers admitted that if they had seen the student with the arrow about to discharge it, they would not have allowed him to continue to play with it. It was stated in that case by Tucker J that:

> *"The duty of the defendant's is that of a reasonable careful parent, and I have come to the conclusion that they were not guilty of any failure to exercise that degree of care which may be expected from a reasonably careful parent. Incidentally, in considering with a very large family... I find it impossible to hold that it was incumbent to have a teacher, even tender as were the years of these children and bearing in mind the locality of the school, continuously present in that yard throughout the whole of this break... small children or any child can get up to mischief if the parent's or teacher's back is turned for a short period of time..."*

[97] In **Carmarthenshire** (supra) it was stated by Lord Oaskey:

> *"The standard of care which the law demands is the standard which an ordinarily prudent man or woman would observe in all the circumstances of the case...holding that education authorities are bound to keep children under constant supervision throughout every moment of their attendance at school... is to demand a higher standard of care than the ordinary prudent schoolmaster or mistress observes."*

[98] Lord Reid, in that same case said:

> *"There is no absolute duty; there is only a duty not to be negligent, and a mother is not negligent unless she fails to do something which a prudent or reasonable mother in her position would have been able to do and would have done.* ***Even a housewife who has young children cannot be in two places at once and no one would suggest that she must neglect her other duties****, or that a young child must always be kept cooped up... What precautions would have been predictable and what precautions would have been reasonable in any particular case must depend on a great variety of circumstances" (Emphasis added)*

[99] Similarly in **Clark** (supra) it was held that, "the duty of a school does not extend to constant supervision of all boys all the time; that is not practicable. Only reasonable supervision is required."

[100] The principles stated above were also enunciated in **Nickeisha Powell** (supra). In that case Harris J (as she then was) stated the following:

> *"It cannot be disputed that, at the material time, the defendants owed a duty of care to the Claimant. That is, a duty comparable to such as is exercised by a careful parent...The fundamental question to be determined is whether the defendants had taken all reasonable steps to ensure the safety of the Claimant..."*

Analysis

The Pleadings/Cause of Action

[101] Roxanne's claim, as set out in the Claim Form, is against all the defendants, jointly and severally, for damages for negligence. However, in paragraph 8 of her amended particulars of claim, which was filed on October 02, 2015, it is averred:

> *"On or about the 14th day of February [sic] 2011, at approximately 11:30 am while the Claimant and the 1st Defendant were in the 2nd Defendant's class and in her care and control the 1st Defendant attacked the Claimant kicking her several times before stabbing her in the left eye with a pencil."*

[102] At paragraphs 5 to 8 of her witness statement that was filed on March 18, 2016 the following is stated:

> *"5. One of the students told Shameer that I was saying that Shameer is gay. When the student was telling Shameer this, I was writing off work that Mrs. O'Connor was putting on the board. I heard when this was said to Shameer, however I did not react. I continued writing off the work on the board.*
>
> *6. Shameer was sitting beside me at this time. Suddenly he started kicking me on my knee. He kicked me three times, but it was not until he kicked me the fourth time that I stated to fight back by hitting him.*
>
> *7. My pencil fell from my hand during the fight. When I bent down to pick up the pencil, Shameer used his pencil to stab me in my left eye. I started screaming out in pain and it was at this time that Mrs. O'Connor came to find out what was happening."*

[103] It is clear to me that it is the tort of assault , and not negligence, that arises on the facts set out in Roxanne's statement of case. These were the facts on which she relied to ground her cause of action. I am of the view that, in light of the authorities discussed in paragraphs 73 to 92 above, it is not fatal to her claim that she pleaded negligence as the cause of action in relation to Shameer, rather than assault.

[104] Once the facts establishing the cause of action have been pleaded, it is not detrimental that Roxanne did not identify the proper cause of action. There is no

prejudice to Shameer because the allegations of assault were clearly set out in her statement of case and he was duly notified of the case that he was required to meet. It is my opinion that Shameer has met the case of assault in his pleadings and evidence.

[105] He denied stabbing Roxanne in her eye with a pencil. His case is that he used his hand to hit at her when she refused to refrain from poking him in his back while he was attempting to do his class work. He also stated that his hand caught her in her face. However, he did not know that it made contact with her eye

[106] Having alleged those facts in her particulars of claim she can rely on them to prove the tort of assault against Shameer. To hold otherwise, given that this matter has proceeded to trial, and in light of the overriding objectives of the CPR to deal with cases justly, would be to place more emphasis on form rather than substance.

[107] In arriving at this decision I am guided by the dicta of Denning LJ in ***Karsales Ltd v Wallis*** (supra) which was cited with approval in **Capital & Credit Merchant Bank Ltd.** The learned judge said::

> *"The only real difficulty that I have felt in the case is whether [the] point is put with sufficient clarity in the pleadings. It is not put as clearly as one could wish.* ***Nevertheless, I have always understood in modern times that it is sufficient for a pleader to plead the material facts. He need not plead the legal consequences which flow from them. Even although he has stated the legal consequences inaccurately or incompletely, that does not shut him out from arguing points of law which arise on the facts pleaded."*** (Emphasis added)

[108] I have also been guided by Morrison and Phillips JJA in **Capital & Credit Merchant Bank Limited** and **Medical and Immuniodiagnostic Laboratory Limited** that:

> *"Once the facts establishing the cause of action have been pleaded, it is not fatal that the claimant has not identified the cause of action..."*

[109] I agree with Messrs Adams and Austin that Roxanne is bound by her pleadings. The point here is that she pleaded facts to establish assault. The wrong cause of action (negligence) was identified. This does not prevent the Court, in light of section 48 (g) of the Act and rule 8.7 of the CPR, to award her damages for assault, if I find that she is entitled to it.

[110] In any event, the tort of assault can be proved by intention or negligence. In ***Julius Roy v Audrey Jolly*** [2012] JMCA Civ 53 Harris JA applying the principles in ***Fowler v Lanning*** [1959] 1 QB 426 at paragraph 26 of the judgment made the following observations:

> *"...there are two distinct requirements in satisfying proof of an assault. At common law, in an action for assault, the success of the claimant is dependent on either proof of intention or negligence. As a consequence, on a claim for assault, there must be, on the one hand, proof, that the assault was a deliberate act of the defendant, or on the other hand, that it was the result of the defendant's negligent act."*

Finding of facts

[111] The issue of liability will now to be addressed. Having seen Roxanne and assessed her demeanour, I am of the view that she spoke the truth concerning the manner in which the injury to her eye was inflicted. I believe her that Shameer used a pencil to stab her in her left eye. This was a deliberate act on his part. As a result, her cornea was lacerated and this ultimately led to the loss of vision in that eye. For her cornea to have been cut, a sharp object, such as the point of a pencil, must have been inserted into her eye.

[112] However, I have accepted the evidence of Mrs. O'Connor and Mrs. Thomas that Roxanne never told them that she had been stabbed in her eye with a pencil. Both Mrs. O'Connor and Mrs. Thomas said that they would have considered this to be very serious indeed and no doubt the matter would have been dealt with differently. I found that they were both forthright in the way that they gave their

evidence and were not shaken in cross-examination. I am therefore satisfied on a balance of the probabilities that they both spoke the truth about this aspect of the evidence.

[113] As a result, applying the legal principles discussed at paragraphs 93 to 100 above, I have concluded that Mrs. O'Connor and Mrs. Thomas did not breach their duty of care to Roxanne.

[114] At the time of the incident, Roxanne and Shameer, as well as, the other students were doing work inside their classroom Mrs. O'Connor had just given work to the students in Group A and was writing on the chalkboard so she could instruct the Group B students. It was at this time that the incident occurred.

[115] It is not the law that a teacher is expected to provide constant supervision at every moment. Mrs. O'Connor's duties also required her to write on the chalkboard and to teach all the students in her class. That was what she was doing prior to and at the time of the incident.

[116] When she became aware of the dispute between Roxanne and Shameer, she immediately intervened, made enquires as to what had happened, examined Roxanne's eye and then took her to Mrs. Thomas. She later monitored her so that she could be taken to the doctor if she displayed any signs of distress. In the context of the report she said that she had received from Roxanne, it is my view, that she did not breach her duty of care to her.

[117] I also believe Mrs. O'Connor that no loud and disruptive discussion about homosexuality took place in her class prior to the incident. I doubt very much that the students, given their ages and the topic, would be loud and disruptive about it. What is more likely than not to have happened was that this was being done very quietly. Therefore she cannot be faulted for failing to take steps to stop a discussion that she did not hear and which possibly could have prevented this unfortunate event.

[118] As Jacob J said in ***Baker v State of Australia*** (supra):

> *"I am unable to find upon the whole of the evidence that a short absence of a teacher from a class room is a breach of duty of care which the school owes to children of this age group... the teacher can do little or nothing to stop a student pushing another off a chair, or pulling a chair out from underneath, unless he or she by chance saw it about to happen."*

[119] Similarly, Mrs. O'Connor could do little or nothing to stop the injury to Roxanne's eye unless she saw it about to happen. I have found, on the evidence, that Mrs. O'Connor's supervision of Roxanne and Shameer, as well as, the rest of her class was reasonable in all the circumstances.

[120] I am also convinced, on a balance of the probabilities, that Mrs. Thomas was also not negligent. I have accepted that the report that was made to her by Mrs. O'Connor, Roxanne and Shameer, was that he had hit Roxanne in her eye (and not stabbed her with a pencil).

[121] Mrs. Thomas examined Roxanne's eye and saw no outward or physical signs of injury and Roxanne was not unduly distressed. These were all factors that led her to conclude, as she stated, that Roxanne did not receive a serious injury to her eye. Later, however, when Roxanne reported to her that Shameer had hit her in her 'bad eye', Mrs. Thomas made the decision to have her taken to the doctor.

[122] I do not find that Mrs. Thomas' response was unreasonable/and or negligent in the circumstances. It is my belief that had a similar report been made to a parent, a reasonable parent would have reacted any differently than she did. It is not my belief that reasonable parents are in the habit of taking their children to the doctor at the drop of a hat. This is usually done when a child is seriously injured or very ill. She concluded, based on the report she received and her inspection of Roxanne's eye, that any injury to her eye was not serious. As it turned out, she was incorrect. However, this, without more, does not mean that she was negligent.

[123] I have also taken into account and accepted Mrs. Thomas' evidence as to the reason she gave for asking her daughter to take Roxanne to the doctor. I have also considered that the school was located in a very rural area and that the number of teachers on staff was relatively small (five (5) including the principal). These are the matters, no doubt, that influenced Mrs. Thomas' decision. I do not find that her approach was unreasonable or indicative of negligence on her part.

[124] In any event, I agree with Mr. Austin that there was no evidence to show that the delay (the evidence revealed that she was taken to the doctor about an hour and fifteen minutes after the incident) materially contributed to the injury or the extent of the injury that was ultimately suffered by Roxanne.

[125] Mrs. Thomas also gave evidence that there was a system in place, or a school policy, that addressed children who were injured during school time. This policy was that if a child was injured, the matter would be reported to her. The child would be observed to see the nature of the injury. If the child was in distress, his or her parents would be contacted. Depending on the nature of the injury, the child would then be taken either to the clinic in the community or to the MRH.

[126] I find that this that this system/policy is adequate. I accept Mrs. Thomas' evidence that the requisite procedure was followed. The 3rd, 4th and 5th defendants are therefore not negligent.

Damages

[127] Having found that Shameer is liable for assault I now turn to the issue of damages. Mr. Adams, who appeared for Shameer, rested his submissions on the principle that since Roxanne's cause of action was negligence, and it was not made out on the pleadings, that was the end of the matter. He made no submissions to the Court on damages although he was invited to do so on March 17, when I heard oral submissions.

[128] However, learned counsel Mr. Austin did and reference is made to his submissions on damages at paragraph 141 below.

The injuries

[129] There are four medical reports before the Court. These are:

i) the medical report of Dr. Doreth M. Garvey dated April 22, 2209;

ii) the medical report of Dr. Gavin Henry dated January 04, 2012;

iii) the medical report of Dr. Robert Edwards dated November 08, 2012; and

iv) the medical report of Dr. Lizette Mowatt dated May 28, 2013.

[130] Dr. Garvey's report indicated that Roxanne suffered post traumatic stress disorder as a result of the blindness to her left eye and traumatic loss of that eye.

[131] The report of Dr. Henry disclosed that Roxanne had no condition in the past that contributed to the blindness in her left eye and there was no prospect for the restoration of the vision in that eye.

[132] Dr. Edward's report stated that up to November 05, 2005 (which was prior to the incident) Roxanne had no visual impairment of her left eye.

[133] Dr. Mowatt's report showed that she was unable to see from her left eye even with visual aids and this was unlikely to improve. She diagnosed her as having 100% visual impairment in her left eye and that this was permanent.

General damages

[134] Counsel Mr. Williams has asked the Court to bear in mind Roxanne's age at the time she received the injury and the effect of the injury on her quality of life and future.

[135] He relied on the cases of ***Hartley v Grays*** found at Khan Volume 4, page 142; ***Thompson v Foster's Trucking Construction Company Jamaica Ltd***, reported at Khan Volume 4 page 143; ***Pat Bellinfanti v National Housing Trust*** **and Others** Khan Volume 5 page 221; ***Owen Small v United States Ltd*** Khan Volume 5 page 219 and ***Protz-Marcocchio v Ernest Smatt*** Khan Volume 4 page 284.

[136] In **Hartley** (supra) a field supervisor sustained injury to his left eye while at work on June 08, 1983. This occurred during reaping time when a puff of wind blew cane leaves across his eye. The age of the claimant was not stated. Ellis J did not find the defendant liable but went on to say that if he had done so he would have awarded general damages in the sum of $250,000.00. This sum would be about $2 million today.

[137] In **Thompson** (supra) a student who was 18 years old and attending university severely injured her left eye in an accident on March 12, 1992. She suffered 80% PPD in the said eye. The Court awarded $250,000 for general damages which updates to approximately $2.2 million today.

[138] In **Pat Bellinfanti** (supra) an award of $1 million was made on February 03, 1997 to the claimant who lost his right eye as a result of a motor vehicle accident. This award updates to about $5.8 million today.

[139] In **Owen Small** (supra) the claimant lost sight in both eyes when he was injured at work. He had not been provided with goggles or respirator and while spraying, the chemical gramoxone was blown into his eyes by the wind. He was awarded $7 million on March 10, 1998. This updates to approximately $36 million today.

[140] In **Protz-Marcocchio** (supra) the 33 year old claimant was awarded $100,000 for post traumatic stress disorder after being attacked by a dog on April 22, 2002. This award updates to about $400,000 today.

[141] Mr. Austin in his submissions on damages directed the Court to ***Chevanese Clayton (An infant suing by Next Friend and Mother Heather Lawrence Clayton) v McIntosh Memorial Primary School, The Ministry of Education, Youth and Culture, Southern Regional Authority Board Mandeville Regional Hospital, the Ministry of Health, Board of Management University of the West Indies and The Attorney General of Jamaica*** 2007 HCV 3753 which was delivered on November 06, 2009.

[142] In that case, the claimant who was seven (7) years old was hit in the left eye with a ball that was thrown by another student during recess time. She lost total sight in her left eye. The Court awarded $2 million for pain and suffering and loss of amenities, $500,000 for handicap on the labour market and $418,365 for future medical expenses. The award today for pain and suffering and loss of amenities amounts to approximately $3.2 million.

[143] Roxanne has completely lost the sight in her right eye and this occurred when she was but 10 years old. She was also diagnosed as having post traumatic stress disorder as a result of the injury. Her injuries have not been challenged.

[144] She gave evidence of the effects of her injury on the members of her family and how they in turn have responded to her. Her brothers no longer play “I Spy” with her. Her mother cries a lot about what has happened. Roxanne said that they are not as close as they once were because she is afraid to speak with her openly about how she feels about her loss of vision. Her father hardly looks at her directly in the eye. He is upset about what has happened to her. This has caused her, Roxanne said, to feel less valued that before. Her self esteem has taken a serious tumble.

[145] Roxanne also told the Court of the teasing she had to endure at school and the cruel nicknames that she was called. This caused her to become extremely angry and she cried a lot. This led to psychiatric intervention and therapy.

[146] I have accepted Roxanne and Dr. Garvey on this aspect of the evidence. I find therefore that she is to be compensated for the post traumatic stress that she has suffered as a result of her injuries.

[147] Having considered all the authorities cited on damages, I find that the appropriate cases to guide the Court are **Chevanese Clayton** and **Protz-Marcocchio.**

[148] I find that the reasonable sum for general damages is $3.5 million. I award the sum of $500,000.00 for post traumatic stress disorder.

Special damages

[149] Roxanne claimed the sum of $79,150.00 as special damages. Special damages must be pleaded and proved (see ***Bonham-Carter v Hyde Park Hotel*** 64 TLR 177). While there are exceptions to this rule (see ***Walters v Mitchell*** [1992] 29 JLR 173) the expenses that were claimed did not fall within the exceptions allowed.

[150] What was proved were the sums paid to MRH for $1000.00 on the 26th July 2012, UHWI for $3100.00 on the 07th November 2012 and Dr. Robert Edwards for $3900.00 on the 20th November, 2012. This amounts to $8000.00.

[151] The sum of $8000.00 is therefore awarded for special damages.

Disposal and Orders

[152] In the circumstances I make the following orders:

1. Judgment for the claimant against the 1st Defendant.

2. Special damages in the sum of $8000.00 with interest at 3% per annum from February 14, 2006 to April 28, 2017.

3. General damages in the sum of $4,000,000.00 with interest at 3% per annum from December 06, 2011 to April 28, 2017.

4. Costs to the Claimant against the 1st Defendant to be agreed or taxed.

5. Judgment for the 2nd, 3rd, 4th, 5th and 6th Defendants against the Claimant.

6. Costs to the 2nd to 6th Defendants to be agreed or taxed.