[2020] JMSC Civ 50

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013 HCV 01570

BETWEEN	**JORDAN VASSELL**	**1ST CLAIMANT**
	(Suing by father and next friend Seymour Vassell)	
AND	**SEYMOUR VASSELL**	**2ND CLAIMANT**
AND	**PROPRIETORS STRATA PLAN NUMBER 397**	**DEFENDANT**

Ms. Orene Plummer for the Claimants.

Mr. Garnett Spencer instructed by Robinson Phillips and Whitehorne for the Defendant.

Heard: 7 and 8 January and 3 April 2020

Negligence – Duty of care - Causal connection between damage and breach of duty – Res ipsa loquitur - Occupier's Liability Act.

EVAN BROWN J.

Introduction and background

[1] This is a claim for damages, interest and costs for injuries allegedly sustained by the 1st claimant, in consequence of which the 2nd claimant allegedly incurred loss and expenses while on vacation at Columbus Heights, Ocho Rios, in the parish of St. Ann. The defendant was the corporate body charged with the management of the property. The claimants therefore contend that the injuries and resultant loss and incurred

expenses were caused by the defendant's negligence or breach of the ***Occupier's Liability Act***. I will now provide a background to the claim.

[2] On Monday 25 July 2011, the claimants and other members of their family (the Vassells) arrived at Columbus Heights Apartments, Ocho Rios in the parish of St. Ann. They were on vacation from Canada for two weeks and planned to stay at the property for seven days. Delroy Gunter, a Jamaican resident in the island and Mr. Seymour Vassells' friend, together with his family which included two boys, were also staying with the Vassells. One of the attractions of this property was its swimming pool. The defendant had the responsibility to maintain all common areas of this property, including the swimming pool. The obligation fell on the defendant to ensure that the pool was clean and free from hazards.

[3] The discharge of this responsibility fell to the defendant's employee, Bruce Anderson. He described himself as the gardener whose duties included cleaning and adding chemicals to the pool. Those chemicals were chlorine and PH (acid). After the chemicals are added to the pool, the pool is left for about 15 hours before use. He was provided with a kit to test the swimming pool to determine when it needed these chemicals. Over time olfactory and ocular senses became aids and adjuncts to the kit as the need for chemical treatment would also manifest itself in a foul odour emanating from the pool, as well as the water becoming unclear.

[4] Mr. Anderson's routine was to clean the pool three times per week. Included in this routine was the cleaning of the pool on a Tuesday, as Wednesday was his day off. Therefore, on Tuesday 26 July 2011, sometime in the morning, Mr. Anderson vacuumed the swimming pool to remove sand and other debris from the water and the floor. The chemicals were added at about 5 pm that day. Chemicals had been last added to the pool the previous Friday. After adding the chemicals to the pool, he placed a sign on the pool deck indicating that the pool was closed.

[5] The swimming pool became the centre of activity on the property for the vacationers. The Vassells first used the pool on the date of their arrival, at about 11 am.

The following day the Vassells were back at the pool. It was described as an enjoyable experience. The next day, 27 July, the Vassells did as they were wont, they went back to the pool. They arrived at the pool at about 10.30 or 11 am and remained there until about 2 pm. On their arrival, there was a sign indicating that the pool was closed. Representations at the reception area resulted in the removal of that sign. This takes us to the genesis of the claim.

Case for the claimants

[6] After the pool was opened, Jordan was allowed to enter. While the parents remained on the pool deck, the children entered the pool. The first claimant appears to have been a non-swimmer. Aside from swim trunks, he wore a life vest and remained at the shallow end of the pool. He was then four years of age. Other children, apart from the first claimant, were also in the pool, including the Gunter boys. The first claimant and his wife remained on the pool deck during this time.

[7] While Jordan was in the pool, his father noticed that he appeared to be uncomfortable as he occasionally scratched parts of his body. Jordan complained and his father removed him from the pool. His parents took him back to the apartment. Mr. Vassell noticed what appeared to be heat rashes on Jordan's arms, legs and chest. He was in pain, scratched and cried throughout the evening into the night.

[8] When Mr. Vassell was cross-examined, he said Jordan did not appear to have heat rashes on his skin. His witness statement was shown to him where he had said the skin on Jordan's "arms, legs and chest had the appearance of heat rashes". His response was to reject that part of the statement as, in his words, he "didn't come to any conclusion". While Mr. Vassell agreed that 27 July 2011 was a very hot day, he disagreed that in excess of two hours' exposure to the sun would have been too much for a child four years of age.

[9] At about 6 am the following morning, Jordan was taken to the St. Ann's Bay Hospital where he was admitted. From there he was transferred to the Cornwall Regional Hospital (CRH) and admitted on the paediatric ward for thirty-six hours.

[10] The medical report of Dr Garfield Badal, Consultant Paediatric Surgeon at the CRH, was admitted into evidence. The history given to Dr Badal was that Jordan sustained chemical burns to the body and face after swimming pool exposure. On admission, Jordan was found to be in moderate painful distress and mildly dehydrated. There were extensive superficial burns with blebs (small blisters) in the following areas color "predominantly right cervical region, upper and lower limbs, anterior chest wall and anterior abdominal wall". The doctor also observed what he described as "chemical burns to the eyelids but no other ocular abnormalities".

[11] The defence posed several written questions to Dr Badal based on his report. Four of the questions were permitted. These are they:

> *"Question 1: Is it probable that the 1st [c]laimant could sustain chemical burns to the eye lids due to chemicals in a swimming pool in which he was swimming and not suffer injury to the eye?*
>
> *Answer: Yes*
>
> *Question 9: Could it be that the 1st [c]laimant's skin condition was due to excessive sun exposure and dehydration?*
>
> *Answer: Yes*
>
> *Question 11: what was the specific characteristics of the 1st [c]laimant's eyelids that led to their designation as exhibiting chemical burns?*
>
> *Answer: Superficial burns appear similar clinically. Reliance on the history of exposure (chemical) led to that clinical assessment.*
>
> *Question 12: Is it your conclusion that the 1st [c]laimant suffered chemical burns which are consistent with swimming pool exposure or is this merely the allegation of the [c]laimants?*
>
> *Answer: Generally, chemical exposure may produce uniform burns but previous sun exposure could have impacted the distinct pattern observed at clinical presentation".*

[12] Consistent with the medical report, Mr. Vassell agreed with cross-examining counsel that Jordan had no injuries to his back. While that answer came after a long pause, his denial that that was also true for Jordan's genitals, groin and buttocks was swift. He went on to say he had pictures to prove injury to those areas, in answer to the

suggestion that there were no such injuries. He, however, could not say whether those areas had been treated by Dr Badal.

[13] Continuing along that line of enquiry, learned defence counsel obtained an admission from Mr. Vassell that the genitals, groin and buttocks were covered by Jordan's swim trunks. Mr. Vassell agreed too that when swim trunks are worn in a swimming pool, the trunks traps water. He agreed, therefore, that it was likely that these areas (genitals, groin and buttocks) would be impacted and, gratuitously reasserted, that he had pictures to prove it. Mr. Vassell accepted, however, that these areas were less exposed to ultra violet rays.

[14] After Jordan was discharged from the CRH, he and his mother returned to Toronto, Canada ahead of Mr. Vassell and the rest of the family. Upon his return to Toronto, he was admitted in the Sick Kids Hospital for four days. Mr. Vassell disagreed that that admission was not as a result of the injuries he suffered while in Jamaica. While agreeing that he had not provided any evidence of this hospitalization, Mr. Vassell maintained he had documentary proof. He did not take them with him as he was never asked to do so because of the sufficiency of the medical report from the CRH.

[15] Concerning the chemical levels of the pool, neither he nor anyone on his behalf conducted any such checks. He was unaware whether any sample of water was taken from the pool for analysis. He never saw any chemicals being added to the pool on 27 July 2011. However, his basis for saying Jordan suffered chemical burns in the pool was "based on the injury and the time". Responding to the suggestion that Jordan did not suffer chemical burns in the pool, he insisted there was something in the pool. He was unaware that Jordan's injuries could equally have been caused by sunburn. He was aware, however, that efforts should be made to avoid direct sun exposure between 10 am and 4 pm. He went on to assert that Jordan was not exposed totally on account of being clad in swim trunks and life vest.

[16] Miss Angela McIntosh, the housekeeper employed by the owner of the apartment in which the Vassells stayed, testified for the claimants. Her cross-examination showed

her to be someone whose conscience was bound more to a duty to bolster the case for the claimants than her affirmation to speak the truth. This she went about with the fixity of a heat-seeking missile. Although she proclaimed being a practising Christian for 25 years and creditable depth of involvement in her church, her mendacity undermined her credibility to Pharisaical proportions. Consequently, I will have regard to her evidence only in so far as it finds support in the rest of the case. I will only refer to it as the need arises.

Case for the defendant

[17] Bruce Anderson was the sole witness to fact called by the defence. By agreement, the defendant tendered into evidence the medical report of Dr Geoffrey D. Williams, Consultant Plastic Surgeon. I will first summarise the evidence of Mr. Bruce Anderson.

[18] Mr. Anderson was employed at the premises in the capacity of a gardener and part of his responsibilities was the cleaning of the pool. At the time of the incident he had been engaged in pool cleaning activities for about 15 years. He received no formal training in the cleaning of pools. His knowledge was acquired during his understudy of the previous gardener over a period of approximately 10 years. He did not have any experience in cleaning any other pool.

[19] He described the procedure for cleaning the pool. In addition to what was said in the introduction and background, on each occasion the pool was cleaned, three jugs of chlorine and a half bottle of PH were put in the pool. The chlorine was first placed in a mixer to soak and dissolve. Here I make the first reference to the evidence of Miss McIntosh. She said “chlorine grains were put in the pool”. This evidence I reject emphatically. Quite apart from her vapour thin credibility, she was neither engaged in nor assisted in the cleaning of the pool. So, I accept that the chlorine was dissolve before it was put in the pool. These chemicals entered the pool by way of two skimmers (baskets) which were placed at the shallow end of the pool.

[20] During cross-examination Mr. Anderson was asked if he knew why PH was added to the water. His response was whenever the water in the pool got cloudy it was tested to determine whether it needed PH. Water would be removed from the pool and 5 drops

placed in a particular container. If the water remained clear, it meant it had no PH. If it needed PH, a half bottle would be added into the skimmer. The testing for PH was done in the presence of one Mr. Reynolds, the manager for the apartment complex. The task fell to Mr. Reynolds to test for PH on the Wednesday and make a record of it in a logbook. While Mr. Anderson did not have sight of this book, he was aware that such a record had to be kept for monitoring purposes of the Tourism Product Development Company (TPD Co).

[21] Two days after the incident Mr. Anderson tested the chlorine and PH levels of the pool and found them to be normal. Normal PH level is shown as one on the kit and displayed as three for normal level chlorine. Having testified that he was instructed on the importance of each step in pool cleaning, he was asked what is the importance of adding PH. After some thought, he said because it kills bacteria and germs. He was then flummoxed by the suggestion that the purpose of PH was to regulate the alkaline and acidity levels so that the chlorine could kill the bacteria. His simple response was that he did not know anything about alkaline and acidity levels.

[22] I come now to the medical report from Dr Williams, Consultant Plastic and Reconstructive Surgeon. While Dr Williams did not physically examine the infant claimant, he was aided in coming to his opinion by the witness statement of Angela McIntosh and Dr Badal's medical report. Dr Williams commented on the history of complaint which was made several hours after exposure to the chemical agent. In his opinion:

> *"**The effect of such a chemical agent on the skin would be immediate irritation manifested by any of the following symptoms: burning, itching or a tingling sensation of the skin. This is usually the case even when there are no overt signs of a burn injury".***

[23] The "important points" in Dr Badal's report which invited comment from Dr Williams appear below:

> *"The following statement by Dr Badal is of particular significance: "There were chemical burns to the eye lids but no other ocular abnormalities**". It is virtually impossible to sustain chlorine burns to the face in a swimming pool with absolutely no involvement of the eyes.***

> *"Equally important is Dr Badal's description of the burns as being mainly confined to the right side of neck, anterior surfaces of the chest and abdomen and to the upper and lower limbs.* ***The fact that the burns were confined to the child's torso makes it impossible that these injuries could have occurred due to immersion in a swimming pool as the entire front and back of the torso would be involved, were this the case****". (Dr Badal did not state which areas of the upper and lower limbs were affected; this would have been most helpful information)*
>
> *"In my clinical judgement and experience, the history and physical findings in this case make it impossible that these burn injuries were sustained as a result of the child swimming in a pool with high chlorine content.*
>
> *"A much more likely scenario is that the child was exposed for a prolonged period of time to the sun, perhaps falling asleep on his back with his head tilted to the left, and suffered a severe sunburn which was not promptly and appropriately treated. The likelihood of this scenario can be supported by several points in the history and physical examination:*
>
> 1. *The distribution of burns mainly to the child's anterior surfaces.*
>
> 2. *The absence of any injury to the eyes, despite involvement to the eyelids.*
>
> 3. *An important negative finding in Dr Badal's report is the fact that there were no burns described to the groin area, genitalia or buttocks.*
>
> ***The wearing of a bath trunk (or any other item of clothing) would not prevent against a chemical burn, as is alleged. On the contrary, any clothing being worn would exacerbate the effect of a chemical by trapping it against the skin for a longer period of time. On the other hand, the presence of the bath trunk this child was wearing would, in fact, protect the covered area from sunburn".***

The emphases are as they appear in the report of Dr Geoffrey Williams.

Issues for determination

[24] This claim raises an issue of causation. Therefore, the fundamental issue of fact for resolution is what caused Master Jordan's burns.

Discussion and findings of facts

[25] Perhaps the most optimum place to commence is with the facts that are not in dispute. It was accepted that Master Jordan experienced two prior uneventful days of

exposure to both the sun and swimming pool water. On the eventful day, other children enjoyed themselves in the swimming pool and none of them complained of any adverse effects from that exposure. On that day, Master Jordan was at or in the pool for approximately three hours. His first sign of discomfort was noticed towards the end of those three hours and manifested in occasional itching

[26] The fact of itching provides a convenient segue to the disputed facts concerning the source of the burns. According to Dr Williams, the effect of a chemical agent (such as chlorine) on the skin is immediate irritation symptomized by itching, for example. There is no medical evidence to contradict this opinion. I therefore accept that exposure to a chemical such as chlorine is immediate skin irritation. However, there was no immediacy in the observation of Jordan's itching. The evidence is that he had been for some time at play at the shallow end of the pool for what, it appears, was a considerable time before, approximating hours. Consequently, the evidence that he was itching occasionally does not support an inference that he was burnt by a chemical agent such as chlorine.

[27] I move on to the particulars of injuries listed in the amended particulars of claim. the list of injuries commenced at letter "m" through "s". I will examine first, all the items listed at "m", "o" through to "s" together. I will take the item listed at "n", which deals with the eyelids, last. It was there alleged that Master Jordan had extensive superficial burns to his body and the appearance of blebs itemised. Dr. Badal reported extensive superficial burns with blebs over 15% of Master Jordan's body surface. While the presence of the burns was not disputed, where they presented on the body was the source of much disagreement.

[28] The physical examination revealed burns primarily to the anterior of the body. That is to say, the chest and abdominal walls, as well as the right side of the neck, upper and lower limbs. The Paediatric Surgeon did not specify where on the upper and lower extremities the burns were located. However, if the assumption I made earlier that master Jordan was a non-swimmer, then it would mean that he was only allowed to stand or stoop where the water was shallow. Therefore, his torso, arms, thighs and parts of his legs may not have been immersed for any appreciable time. In so far as those parts of

his body were immersed or came in contact with the water in the pool, then it raises this common sense question, why only his anterior was burnt?

[29] If a child is immersed in a pool or is splashing about at the shallow end, it appears to me reasonable to expect that his entire body would have made contact with the water at some point. If that is so, then an allegation that he sustained burns by reason of the chemical content in the pool, begs for an explanation for the absence of burns on his back. Since the claimant bears the burden of proof, it is he who must proffer an explanation. None was offered. Was it that the skin on his anterior torso was peculiarly sensitive to whatever chemicals were in the pool? Or, was the skin on his back particularly resistant to those chemical agents? The answers to these lie beyond the boundaries of legal education and training. How is this pivotal question to be resolved?

[30] In Dr Williams's opinion, confinement of the burns to the front of the torso "makes it impossible that these injuries could have occurred due to immersion in a swimming pool as the entire front and back of the torso would be involved …". According to Dr Williams, the greater probability was prolonged solar exposure while Jordan was supine, with the head listing to the left. Mr Seymour Vassell did not agree with the suggestion that he and his wife lounged on the pool deck and Master Jordan followed suit, falling asleep in the process.

[31] I, however, did not find the senior Vassell credible on the point. He insisted that he and his wife stood on the pool deck for the duration of their stay at the pool; that was for about two and a half to three hours. In the relaxed setting of a vacation, I find that to be incredible. Against that background, I find his earlier inability to recall whether there were lounge chairs on the pool deck suspect. I put it no higher than suspicion being aware of the need to make allowance for the passage of over eight years between the incident and the date of trial. Mr Vassell was openly amused by the suggestion that Jordan joined he and his wife on the lounge chair. His expression, when he laughed, did not convey incredulity at the suggestion. It was more in the order of, I saw that coming.

[32] Putting aside for the moment the condition of the neck, upper and lower extremities, burns on the anterior torso to the complete exclusion of the posterior torso are more consistent with the opinion of Dr Williams than the tale told by Mr Vassell and his vacillating witness. Not only is it consistent with that medical opinion, it concords with common sense also.

[33] That takes me to the injury to the eyelids, a matter on which the medical men diverged. Master Jordan sustained burns to his face, inclusive of his eyelids but no ocular damage. In Dr Badal's opinion, it was probable to sustain chemical burns to the eyelids without the eyes being similarly impacted. Dr Williams, on the other hand, regarded it as "virtually impossible" for the face to suffer chlorine burns with zero involvement of the eyes in a swimming pool.

[34] I prefer the evidence of Dr Williams. Why? Whereas Dr Badal's specialty is in paediatrics, Dr Williams is an expert in plastic and reconstructive surgery and did a Burn Fellowship. Of the two consultants, Dr Williams is better placed to speak from clinical judgement and experience. I therefore reject that Master Jordan suffered chemical burns to his eyelids without similar ocular damage. This conclusion is fortified by Dr Badal's concession that his assessment of chemical burns to the eyelids had no scientific basis. The good doctor's chemical burns characterisation emanated from the patient's history. To be fair to Dr Badal, his report does say that Master Jordan "allegedly sustained chemical burns to the body and face after swimming pool exposure".

[35] In a further retreat from the classification of the burns as chemical, Dr Badal said, "[g]enerally, chemical exposure may produce uniform burns but previous sun exposure could have impacted the distinct pattern observed at clinical presentation". In other words, the burns observed could have been caused by exposure to the sun. His affirmative answer that Master Jordan's skin condition could have been due to excessive sun exposure and dehydration, renders the supposed chemical nexus to the burns counterfactual.

[36] I will now address what Dr Williams described as an important negative finding in Dr Badal's report. Mr Seymour Vassell was asked whether it was true that Jordan suffered no injury to his genitals, groin and buttocks. His spontaneous reply was, "I think that is incorrect". It was suggested to him that no injuries were sustained in those areas. His response was, "I have pictures to prove that he did". Shockingly, he could not commit to an affirmative or negative answer whether those areas were treated by Dr Badal. Mr Vassell admitted, however, that those areas were covered by Jordan's swim trunks. In agreeing that those areas were likely to be impacted, he reiterated that he had pictures to prove it. As far as he was aware, when swim trunks are worn in a swimming pool, it traps water. He also said it was true that those areas were less exposed to ultraviolet rays.

[37] Mr Vassell's insistence notwithstanding, no photographs were produced to support his baseless assertion of injuries to Jordan's groin area. Dr Badal did not list Jordan's groin, genitals and buttocks mong the arears on which he observed blebs. The inescapable and reasonable inference is that those areas were unaffected. Hence, Dr Williams's characterization, "negative finding". So, I accept that those areas suffered no burns.

[38] Two findings of fact may be made from the absence of blebs in those areas. The first arises from the conjoined admission of Mr Vassell that swim trunks traps water and the opinion of Dr Williams about the resultant exacerbation of chemicals trapped in the trunks. Having trapped the chemicals against the skin, that area would have been exposed for longer to the irritation expected. It would be reasonable to expect the contrary result, that is a concentration of blebs, rather than their complete absence. I find, therefore, that this further undermines the allegation of chemical burns. The second finding of fact is that the absence of injury to this area supports the conclusion that the burns observed on the anterior torso, upper and lower extremities and right cervical area, were the result of sun burns. And I so find.

Legal analysis

[39] The claim, as indicated in the introduction, was grounded in negligence and the ***Occupier's Liability Act***. The claimant listed five particulars of negligence, the last of which was a reliance on the doctrine of *res ipsa loquitur*. The Latin expression *res ipsa loquitur* means, "the thing speaks for itself" (see ***Black's Law Dictionary*** 8th ed). This is a pithy way of saying there are circumstances in which a claimant gives only so much evidence as to call for a rebuttal from the defendant, without having to allege or prove that the defendant committed any specific act or omission (see ***Clerk & Lindsell on Torts*** 19th ed at para 8-151).

[40] This doctrine, or rule of evidence, has its roots in the judgment of Erle CJ in ***Scott v London and St Katherine Docks Co*** [1861-73] All ER Rep 246. In that case the claimant was struck by falling bags of sugar being lowered to the ground from the upper part of the warehouse by a crane or jigger hoist, as he walked between warehouses at the defendants' docks. The evidence was that there was nothing to indicate that the area was dangerous; neither warning nor barriers. No other evidence was led. The trial judge formed the view that there was no evidence of negligence and instructed the jury to find for the defendants. The Court of Exchequer set aside that decision and the defendants appealed.

[41] In affirming the decision of the court below Erle CJ said, at page 248:

> *"There must be reasonable evidence of negligence, but, where the thing is shown to be under the management of the defendant, or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management of the machinery use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care".*

According to the learned authors of ***Clerk & Lindsell***, there is a third requirement for the doctrine to be applicable. That is, "there must be no evidence as to why or how the occurrence took place".

[42] The first limb of the doctrine was not disputed. That is to say, the trial was conducted on the basis that the defendant was charged with the management of the

swimming pool on the property. Learned counsel for the defendant admitted this in his written submissions. This was the starting point for learned counsel for the claimants. She argued that the doctrine should be applied in the instant case, citing Fletcher-Moulton's restatement of the doctrine in ***Wing v London General Omnibus Company*** [1909] 2 KB 652.

[43] The next hurdle for the claimant is to establish that the occurrence was such that it would not have happened without negligence. In order to assail this hurdle, the claimant would have to first show, on a balance of probability, that the burns were caused by exposure to the whatever chemical agent or agents were in the pool. Having done that, then it would be a short step from there to go on to say there was negligence in the cleaning of the pool; especially in light of the evidence that the person charged with that responsibility received no special training.

[44] However, as I endeavoured to show above, the evidence on the point was wholly unconvincing. Learned counsel for the claimant urged me to reject the expert evidence of Dr Geoffrey Williams and prefer the evidence of Dr Garfield Badal; I suppose in an effort to make the causal link between the burns and the swimming pool. That argument was based on the fact that Dr Williams never examined the 1st claimant and her charge that the opinion has no probative value.

[45] It is a fact that Dr Williams never examined the 1st claimant. That is of some significance as this claim is somewhat analogous to a personal injury claim. It has been said that:

> *"In personal injuries cases, unless the defendant is prepared to agree the claimant's expert's report, the defendant's medical experts will need to examine the claimant if they are to be able to give meaningful advice". (*See Stuart Sime ***A Practical Approach to Civil Procedure*** 11th ed at para 31.49*)*

[46] There are two factors, however, which militate against a strict compliance with this general position. Firstly, while the occasion giving rise to the claim arose in 2011, the claim was not filed and served until 2013. Secondly, there was no allegation that any disability, partial or permanent, resulted from the injuries. There was no allegation that

any of the effects of the injuries continued unabated either at the time of the filing of the claim or trial. So that, even if application had been made at the time of service for the claimant to be examined, it would have been a futile and academic exercise.

[47] Beyond those two points, the claimant had ample opportunity to raise objection to the report from Dr Williams being put into evidence at the pre-trial review, held on 17 April 2018. Although the report had not yet been served on the claimants, it could not have been a hidden fact that there was no antecedent request for the 1st claimant to be examined by Dr Williams. Failing a challenge at the pre-trial review, the claimants had the option of posing questions to Dr Williams upon receipt of his report. Alas, that was not embraced. The trial therefore proceeded without any objection being taken to Dr Williams being considered an expert. So it was left to the court to choose between them. For all the reasons articulated above I preferred the evidence of Dr Williams.

[48] It is convenient at this time to make a further point in relation to the experts and the evidence generally. Dr Badal, in essence, retreated from his attribution of the 1st claimant's injuries to chemical burns. That is the fair and reasonable conclusion to be drawn from his admission that the claimant's skin condition could have been due to excessive sun exposure and dehydration. Furthermore, his characterization of chemical burns was not as a result of any laboratory test. That 'assessment' was based on what he was told about the patient. It lacked any scientific foundation.

[49] Therefore, even without the report from Dr Williams, it was more likely than not that excessive sun exposure was the cause of the 1st claimant's injuries. That is the conclusion that is supported by other evidence in the case, namely the hours he spent at the pool on the day of the incident. A secondary observation is that that was his second day of exposure. In addition, the pristine condition of the child's groin area undermines the allegation of chemical burns, in the face of the 2nd claimant's admission that the swim trunks would have trapped the water containing the chemicals in that area. If the injuries were the result of chemicals, one would have expected the groin area to have been more severely burnt than the exposed areas. So that, whatever criticisms can be made of Dr Williams, the claimant would have failed to discharge his burden of proof in any event.

[50] That takes me to the alleged breach of duty of care. A convenient place to start is with a definition of the tort of negligence. A good working definition, along with its constituent elements, is offered by ***Winfield & Jolowicz on Tort*** 18th ed at para 5 – 1:

> *"Negligence as a tort is a breach of a legal duty to take care which results in damage. Thus its ingredients are, (1) a legal duty on the part of D towards C to exercise care in such conduct of D as falls within the scope of the duty; (2) breach of that duty, i.e. a failure to come up to the standard required by law; and (3) consequential damage to C which can be attributed to D's conduct".*

[51] There is clearly an organic relationship between the three elements of the tort. Meaning, for a claim in negligence to succeed, the claimant must establish all three elements. As was earlier said, there is no dispute that the defendant had a legal duty to the 1st claimant to maintain the swimming pool so that he would not be exposed to chemical burns while using it. That would satisfy the first ingredient.

[52] Having established that the defendant had a legal duty to the claimants, the claimants are duty bound to show that the defendant breached that duty by an act or omission. This warranted a frontal attack on the evidence of the defendant concerning the treatment of the water in the pool or its cleaning methodology. In respect of the treatment of the water in the pool, no evidence was elicited about the PH level on the day of the incident. The only evidence in this area came from the defendant. He testified that two days after the incident he found the PH and chlorine levels of the pool to be normal. Although counsel succeeded in laying bare Bruce Anderson's absence of chemical knowledge concerning the purpose of PH, that did not advance the case for the claimants. In my opinion, to show a breach of the duty in this regard, some evidence had to be led to whether and how the failure to regulate the alkaline and acidity levels of the pool rendered it inimical for those placed in the position of the 1st claimant to use it. No such evidence was elicited.

[53] The inescapable conclusion is that there was no breach of duty by the defendant. There can be no breach of a duty of care where there is no causal link between the claimant's injuries and the act or omission of the defendant. Finding as I have, that the 1st claimant's injuries were caused by exposure to the ultraviolet rays of the sun, no tort was

committed. Equally, there was no failure to discharge the common duty of care under the ***Occupier's Liability Act***.

[54] The claimants having failed to prove that the defendant was negligent, I give judgment for the defendant. Costs are awarded to the defendant, to be taxed if not agreed.