[2019] JMSC. Civ. 207

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 02425

BETWEEN	**KAYDEN WILSON-LAWERENCE (A child by his next friend, KAYON WILSON)**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**DEFENDANT**

IN OPEN COURT

Mr Phillip Bernard and Mr Christopher Gomes instructed by Bernard & Company for the Claimant

Miss Kristen K Fletcher instructed by the Director of State Proceedings for the Defendant

HEARD: 24th and 25th of July & 18th October 2019.

Negligence - Personal Injury - Whether student was injured at school - Foreseeability - Liability of Crown servants - Res Ispa Loquitur - Occupiers Liability Act 1969.

WOLFE – REECE, J.

INTRODUCTION AND BACKGROUND

[1] The Claimant, a minor who sues by his mother and next friend, initiated a claim against the Greater Portmore Primary School (hereinafter referred to as "the school") and The Attorney General of Jamaica seeking damages for Negligence

and breach of the Occupiers Liability Act arising out of injuries he suffered to his nose while he was a student at the school in the parish of Saint Catherine.

[2] The Claimant alleges that on December 16, 2014 while he was under the care and control of the school, he sustained serious personal injury, after being pushed down a flight of stairs by another student. He states that his injury was consequential to the failure and refusal of the school to provide proper and adequate supervision to students under their care and control.

[3] On the 20th February, 2019 the Court made an order that the claim was to be discontinued against the school, the Attorney General of Jamaica who was made a party to this suit by virtue of the Crown Proceedings Act remained the sole Defendant.

[4] The Claimant asserts that the school was negligent and breached their statutory duty in that they:

i. Failed to exercise any or any adequate supervision resulting in the Claimant being pushed down a flight of stairs;

ii. Failed to take any or any adequate steps to ensure that the Claimant and his fellow classmates were supervised at all material times;

iii. Permitted the Claimant and his fellow students to descend the staircase unsupervised knowing and having reasonable grounds for knowing the dangers intrinsic to a group of children descending a staircase;

iv. Failed to warn students sufficiently or vigorously enough of the dangers of descending the staircase;

v. Failed to operate any or any adequate system of safety monitoring of the school premises, including the staircase;

vi. Failed to notice that the Claimant was injured and to take him to the hospital or to provide facilities or place where sick or injured students would be placed under supervision;

vii. Failed to ensure that a cover or guard was placed over the metal gate, knowing or having reasonable grounds for knowing that its position relative to the staircase posed a foreseeable risk of injury to students;

viii. Caused or permitted a metal gate to be placed at the foot of the stair case or having reasonable grounds for knowing that its position relative to the staircase posed a foreseeable risk of injury to students did not remove same or mitigate the said risk;

ix. Exposed the Claimant to a danger or a foreseeable risk of injury;

x. Failed in all circumstances to take any or any adequate care for the safety of the Claimant;

xi. Failed to discharge the common duty of care contrary to the Occupiers Liability Act 1969*;*

xii. The Claimant intends to rely on the doctrine of Res Ispa Loquitur.

[5] Flowing from this, the Claimant claims:

a) Damages

b) Interest thereon for such rate and for such period as this Honourable Court deems just pursuant to the Law Reform (Miscellaneous Provisions) Act.

c) Costs

d) Such further and /or other relief as this Honourable Court deems just.

CLAIMANT'S CASE

Evidence of the Claimant

[6] On the morning of December 16, 2014, the Claimant was picked up from home by his driver and taken to school. When he got to school, he went with his friends to play upstairs. After playing for a while, the Claimant says he began to make his way down the stairs and that was when he felt a push which caused him to fall face first down the stairs hitting his face on the grill at the bottom of the steps.

[7] At the time of the incident, his class teacher was not around and he could not find an adult to assist him. Shortly afterwards however, he saw an adult, told her what had happened and that was when the adult put him to sit outside the classroom by the door. His evidence is that he had never seen the adult before that day and does not think the adult was a teacher.

[8] The Claimant advances that he was not taken to the nurse's office nor did anyone come to check to make sure that he was okay. He adds that he sat in pain until his driver came to pick him up from school in the afternoon.

[9] When he got home, he was still in pain and so went to his room to lie down. Later that evening, when his mother got home from work and saw that his face was swollen, she asked what happened and he explained to her. The following morning, on December 17, 2014, she took him to the doctor where they were informed that his nose was broken. An X-Ray was ordered and he was given medication for the pain.

[10] The Claimant states further, that his mother took him to another doctor on December 23, 2014 where they were told that he needed surgery to fix his nose. This surgery was done on January 7, 2015. The Claimant also states that he felt pain from the moment he injured his face until sometime after the surgery.

[11] The Claimant was cross examined. He admitted the fair was being held at the centre of the school. He said on his arrival at school the fair had not started yet.

He went to his classroom however it was locked so he placed his bag at the grill, then saw some of his friends up in the garden, and he went to play with them.

[12] He further indicated that he did recall identifying the person who he said pushed him and the adult who he said assisted him to the guidance counsellor. However, that he later learned that the persons he had identified was not at school on the day in question.

[13] In response to seeing Exhibit 21, which is a photograph of the area encompassing the step and the grill. He admitted that there was a corridor between the step and the grill.

Evidence of the Claimant's Mother

[14] Kayon Wilson is the Claimant's mother, she gave evidence that in 2014 he son Kayden Wilson-Lawrence was six (6) years old and attended the Greater Portmore Primary School. She stated that on the morning of December 16, 2014 at approximately 6:30 am, her son was picked up from home by his driver. She contends that when he left home, he was healthy and free from injury. Shortly after her son left home for school, she left for work and did not return until in the evening. On returning home, she checked with her son who was in his room and noticed that his face was swollen and he was in a lot of pain.

[15] Miss Wilson avows that when she asked him what happened, he told her that he was at school playing with his friends when someone pushed him and caused him to trip and fall down a flight of stairs where he fell 'face first' into a metal gate which was located at the foot of the stairs.

[16] She contends that when she asked her son about his teacher, he told her no adult or teacher was present at the time he was injured. He says however that he later found a woman who put him to sit outside a classroom and then left. He was left unattended and in pain for the rest of the day as there was no nurse or person of authority present at school to help him.

[17] Miss Wilson stated that she took her son to see Dr. William Brown the following morning. Dr Brown examined him, diagnosed him with a fractured nose, and recommended that an X-Ray be done. When the X-Ray report was returned to Dr Brown, he confirmed that his nose was broken and recommended surgery. Dr. Brown also prescribed medication to help with pain and breathing.

[18] Her further evidence is that having been to the doctor, she informed the school of what happened and was told to bring the medical report and receipts in the new year as the school offices were closed for the holidays.

[19] In December, she says she took her son to the University Hospital of the West Indies where Dr. Thompson examined the claimant and advised that he had a bone displacement and a deviation to his nose and recommended surgery. The surgery was done on January 7, 2015.

[20] Miss Wilson avers that in January when school reopened, she took the receipts and medical report to the school's principal who told her to speak with the Guidance Counselor. The Guidance Counselor went with them to look at the location of the fall.

[21] On visiting the locus, she sates that she noticed the stairs were poorly constructed and there appeared to be a little lip or ledge on the stairs and an iron gate, which was in dangerous proximity to the foot of the stairs. She maintains that the Guidance Counselor was not able to tell who was supervising the students on that day. She adds that the school showed a blatant disregard for the safety of her son.

[22] In cross examination, Miss Wilson indicated that she returned home about 10 pm that evening. She gave evidence that Kayden school concludes at 2.30 and he would normally arrive home between 5pm and 6pm. She was unable to say what time the driver picked up Kayden from school however she indicated that there was someone to receive him at home upon his arrival.

[23] Miss Wilson admitted that prior to arriving at home nor upon her arrival was she alerted by anyone that Kayden had suffered an injury. She also gave evidence that she had stated in her witness statement that after the injury Kayden sat there for hours, but she couldn't say what time the incident happened and how long he sat for unattended.

[24] Counsel Miss Fletcher sought to illicit evidence about the lay out of the school from Miss Wilson. She admitted that there was a corridor between the steps in question and the wall of the classroom to which the metal gate was attached. However, her evidence was that the metal gate was at the foot of the steps.

Evidence of Dr. William Brown

[25] Dr. William Brown was called by the Claimant to give evidence based on an anomaly which existed on the face of his two reports. He gave evidence that he saw Kayden Wilson Lawrence on December 17, 2014. It was his opinion that there was damage to the facial bones especially the nasal bridge. He referred the mother to have an x-ray done to confirm same.

DEFENDANTS CASE

Evidence of Ms. Audia Robinson

[26] The Defendants through the witness Miss Audia Robinson gave evidence of the layout of the school. She stated that on entering the school compound, one faces a multipurpose court which is the center of the school campus. This court is a central point between the upper and lower schools blocks whereby, grades 1 to 3 are on the lower school blocks, and grades 4 to 6 are on the upper school blocks.

[27] Miss Robinson added that the lower school blocks are to the left of the compound while the upper school blocks are to the right. The classrooms are built in blocks, which are all one storey buildings. Each grade is situated on a single block. The lower school blocks are situated to form a "U". At the center of the "U", is a mound, which is an elevated garden area with three steps leading up to it.

[28] On the lower block, the blocks for grade 2 and 3 face each other while the grade 1 class forms the middle of the "U". On the upper block, the blocks for grade 5 and 6 face each other while the grade 4 class forms the middle of the "U". Between the steps at the mound and the vertical wall of the grade 1 classroom, there is a corridor. At various points along the walls, including the vicinity of the steps, there are classroom doors. The doors she says are grilled to secure the contents of the classrooms outside of regular school hours. There is no grill directly in front of the steps or at the foot of the steps.

[29] She also stated that in the academic year 2014/2015, there was a fair scheduled to be held at the school on the last day of the first term being December 16, 2014. In preparation for the fair, staff meetings were held to organize the activities that were slated to take place on the multipurpose court. It was decided that classroom blocks would be off-limits for students unless provisions were made by teachers to undertake supervised activity on the classroom blocks.

[30] According to Miss Robinson, each teacher was assigned responsibility over different rides and activities. These responsibilities included among other things managing the bounce-about and overseeing entry at the school gate. She adds that the teachers were strategically assigned to handle activities taking place at various points on the multipurpose court so that they could provide adequate monitoring and supervision over student activities.

[31] On the morning of the fair, at about 8:00am, students were at their classrooms and the register was taken before the fair began. In circumstances where a teacher was absent on the day of the fair, someone else was assigned to monitor his or her class before the beginning of the fair. When it was time for the fair to begin, students were instructed to exit their classrooms and head to the multipurpose court. The students were also advised that classrooms were out of bounds, as all organized activities would be taking place on the multipurpose court. After the students left their classrooms, the classroom doors were locked and the fair proceeded as scheduled.

[32] She stated that from the school's records, on December 17, 2014, the Claimants mother, Kayon Wilson, reported that the Claimant had been injured at school on December 16, 2014 which was the day of the fair.

[33] On January 5, 2015, the Claimant's mother attended the school with the Claimant and they were referred to her by the principal, who instructed her to investigate the incident that allegedly occurred on December 16, 2014. Miss Wilson reported that another child pushed her son from some steps. The Claimant was asked to identify the child who pushed him off the steps. However, the child he identified as the one responsible for pushing him was absent from school on the day of the fair. Miss Robinson states that she consulted with the Claimant's class teacher to produce her attendance record on the day of your fair, which indicates that the child was not present.

[34] She contends that the Claimant also reported that a teacher had picked him up when he was laying on the ground after being pushed. When asked to identify the teacher, he pointed out one Mrs. Shauna-Kay Bennett-Myers. The teacher's attendance records however confirmed that Mrs. Myers was also absent on the day of the fair.

[35] Miss Robinson says she offered to take the Claimant to see whether he could identify the correct child however, the Claimant expressed that he was feeling tired and the investigation process was aborted.

[36] In addition to this, Miss Robinson says that the Claimant was registered as a beneficiary on the Sagicor Schoolmate policy by virtue of which students who are injured at the school could claim reimbursement for medical expenses. She explained to the Claimant's mother that she could submit a claim form for reimbursement. As a result, the insurance claim form was completed by the claimant's mother and a photocopy of the medical documents were taken along with a letter dated February 5, 2015 from Bernard & Co. Attorney-at-law.

[37] The principal later signed the claim form. The school records indicate however that the Claimant's mother who was asked to submit originals of the medical records in order for the claim to be honored did not submit same.

CLAIMANT'S SUBMISIONS

[38] Counsel for the Claimant, Mr. Philip Bernard and Mr. Christopher Gomes, submitted that the Defendant is liable under the Occupiers Liability of 1969. They relied of Section 3 of the Act, and sought to highlight the foundation for the duty of care owed to the Claimant as a lawful visitor of the Greater Portmore Primary School. Pursuant to section 3(2), the duty it was submitted is to 'take such care as in all circumstances of the case, is reasonable to see that the visitor will be safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.' The duty they advanced was referred to in the Act as the 'common duty of care.'

[39] Reliance was also placed on section 3(4) of the Act, which provides that in a determination as to whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all this circumstances. Under section 3 (3) of the said act, it was said that:

> *"This circumstances relevant to the present purposes include the degree of care and of want of care which would originally be looked for in such a visitor and so, in proper cases, and without prejudice to the generality of the foregoing:*
>
> *a) An occupier must be prepared for children to be less careful than adults."*

[40] The argument was that from the evidence of Miss Audia Robinson, the school had children as young as age 6 years old and as old as age 11 years old. The age and maturity of the students at the material time is an important factor and must be in the contemplation of the occupier. It is therefore expected that the Defendant would understand and accept that they had a duty of care to the Claimant and as such, they 'must be prepared for the children to be less careful than adults.'

[41] The referred the Court to case of **Marie Anatra v. Ciboney Hotel Limited** Suit no. C.L. 1997/A 196 (delivered on 31 January 2001), where the court said:

> *"Long before the statutory provisions came into effect McBride J in MacLean v Segar (1917) 2 K.B. 325 said at page 329:* ***"The occupier of premises to which he has invited a guest is bound, as a matter of common law duty, to take reasonable care to prevent damages to the guest for unusual danger which the occupier knows or ought to have known of."***

[42] In the case of **Pamela Minor v. Sandals Resort International Ltd. (Trading as Beaches Negril Resort and Spa), Real Resorts Ltd and Beaches Management Ltd.** [2015] JMSC Civ. 256, the Claimant suffered a fracture to her right ankle while she was a guest at the Beaches Negril Resort and Spa. She allegedly fell on the wet cracked stairway, while she was descending it. She further alleged that the crack in the stairway, was unnoticed by her and that the stairway was narrow and made with concrete. The Court found that on “a balance of probabilities, the claimant fell down the stairway at the hotel resort, solely because of her own carelessness and having failed to use the provided and easily accessible handrail for the stairway."

[43] Counsel also relied on the case of **Renay Bryan v. Sugar and Spice Limited** [2016] JMSC Civ 110, in which the Claimant fell down stairs at the Defendant's premises during the course of her duties. The Court found that the Claimant had “assumed a risk in descending stairs in admittedly slippery shoes and without utilizing the handrail to her deterrent."

[44] Both cases were used to outline that a critical component of deciding whether the Defendant had discharged the duty of care was the availability of a railing along the steps at the premises were both Claimants fell. In both instances, the Claimant failed to use the railing during their fall. Counsel contends that the evidence of Miss Robinson is that there is not railing along the steps confirms that the lack of a railing to hold on to when falling was a failure by the Greater Portmore Primary School to take reasonable care to prevent damage to the guest for an unusual danger which the occupier knows or ought to have known.

[45] With regard to negligence, Counsel relied on the case of **Blythe v. Birmingham Water Works Co**. (1856) 11 Ex. 781, where Anderson J states that:

> *"….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 is prudent and reasonable man would not do."*

[46] It was submitted that in order for a claim to succeed such injury should have been reasonably foreseeable. Lord Atkin in **Donoghue v Stevenson** [1932] A.C. 562 says:

> *"You must take reasonable care to avoid acts or omissions **which you can reasonably foresee would be likely to injure your neighbour**. Who then in law is my neighbor? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in my contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question."*

[47] Counsel asserts that it was foreseeable that on the day of a fair, students would be involved in increase amount of play and the risk of injury would have increased. The argument was that the school is highly negligent in not having a nurse present and in having the nurse's station closed and inaccessible to administer medical treatment to students and lawful visitors who may be injured in attending the school fair.

[48] In the case of **Geyer v. Downs** [1975] 2 NSWLR 835, the Learned Judge posited that *"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 good variety of circumstances."*

[49] In **Clark v. Monmouthshire County Council** (1954) 52 LGR 246, it was seen that "the duty of a school does not extend to constant supervision of all boys all the time; this is not practicable. Only reasonable supervision is required." This principle

was enunciated in **Nickeisha Powell v. Grace Patricia Tomlinson and Others** C.L. p 076 of 1999 where Harris J stated that:

> *"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 exercise by a careful parent.... The fundamental question to be determined is whether to defendants had taken all reasonable steps to ensure the safety of the claimant…"*

[50] The submission is that the school did not provide reasonable supervision for the students on the day the Claimant was injured. The duty it was submitted, was in no way altered or reduced by the argument that the students were advised that the blocks were out of bounds on the day of the fair. It was submitted that the fact that given the age of the students, it is prudent and necessary for the school to operate with a higher degree of caution to ensure that there was proper monitoring of the restricted areas and the students in order to prevent the accident and injury. They contend that the school failed as a result to act as a 'careful parent' providing reasonable supervision for a young child attending the school fair.

[51] Under the doctrine of 'Res Ipsa Loquitor', Counsel for the Claimant contends three conditions must be satisfied in order for a successful claim to be raised. In the case of **Katherine Docks Co.** [186] 3 H& C. 596, at 601, the conditions were listed as:

i. the occurrence is such that it would not have been happened without negligence; and

ii. the thing that inflicted the damage was under the soul management and control of the defendant, or of someone for whom he is responsible, or whom he has a right to control;

iii. there must be no evidence as to or away the occurrence too place.

[52] It was submitted that there are no intervening events that would have broken the chain of causation. They contend the causal link to the injury was the fall down the poorly constructed stairs and the blow sustained when the Claimant fell face first into the grill gates which was placed in dangerous proximity to the stairs.

[53] Counsel contends that the facts support the claim of common law negligence and/or breach of section 3(2) of the Occupies Liability Act (1969). In the alternative, it was submitted that the Claimant has satisfied the Court of the necessary conditions required to rely on the doctrine of 'res ipsa loquitur'. Had the school exercise reasonable caution and take the necessary and proper steps to ensure the safety of young students and visitors to the school premises, the incident would not have occurred.

[54] Counsel for the Claimant advanced the medical receipts of the Claimant and claimed Special Damages for the sum of $118,302.66.

[55] For General Damages on the other hand, reliance was place on the case of **Donna Perry v. Napthis Thompson and Others** Suit No. C.L. 1992 P 156 at Volume 4 of the Khans where the adult Claimant suffered an abrasion over her nose, swollen inner aspect of lower lip and swollen and a fracture nasal bone. She was awarded $150,000.00 at 3% in October 1993 (CPI 21.41). Using the CPI for July 2019 (261.2) the award updates to $1,829,985.98.

[56] Reliance was also placed on the case of **Viviene Creary v. Executive Styles Furnishing Ltd. And Milton Swaby** Suit No. C.L. 1983 C 297 at Volume 2 of the Khans where a 22-year-old female injured in a motor vehicle accident. Claimant suffered fracture of nasal bones, and lacerations to the nose. She was awarded $15,000.00 at 6% in October 1984 (CPI 1.4). Using the CPI as at July 2019 (261.2) the award updates to $2,798,571.43.

DEFENDANTS SUBMISSIONS

[57] In regards to negligence, Counsel for the Defendants, Miss Fletcher submitted that the duty owed by school officials to students was laid down in **Williams v. Eady** (1863) 10 TLR 42 in which it was held that "the schoolmaster was bound to take such care of his boys as a careful father would take of his boys, and there could be a better definition of the duty of a schoolmaster."

[58] In **Rich and another v London City Council** [1953] 2 All ER 376, the Plaintiff, a pupil, was struck in the eye by a piece of coke thrown by another student. The Court at first instance found that there was adequate supervision but held that the school breached the duty owed to the Plaintiff in that it had permitted a heap of coke to remain on the premises unfenced, thereby enabling students to use the coke as missiles. On appeal, the decision of the trial judge was overturned on the basis that having found that supervision was adequate, there was no basis for finding that the Defendants was liable to the plaintiff.

[59] Counsel submitted that it is accepted that officials within a school have a duty to supervise the students over which they have charge. The main question she contends is whether there was reasonable supervision in these types of cases. Counsel relied on the case of **Camkin v. Bishop and Another** [1941] 2 All ER 713, where it was said that:

> *"….. **no headmaster is obliged to arrange for constant and perpetual watching out of school hours**. For one boy to throw something at another **is an ordinary event of school life**, but the fact that there was in this particular case a disastrous and wholly unexpected result is no reason for throwing responsibility on the master."*

[60] It was argued that there is no evidence in this case to say that the incident occurred within school hours. The argument was that it is clear from **Camkin** (supra) that the timing of the incident has a significant bearing on whether liability can be ascribed to the school. Counsel added that it is the Claimant's duty to prove his case, and in this case, he must be able to show by evidence, firstly, that he sustained injury at school and, if so, that the incident occurred within school hours.

[61] Counsel added that from **Camkin** (supra), the clear evidence is that the boys were engaged in activity outside of school hours. In the instant case, it cannot be clearly determined when, if at all, this incident occurred. No one was able to corroborate the Claimant's story and his friends with whom he was playing had mysteriously disappeared at the time of the fall. The inadequacies as to the layout, coupled with the gaps in the Claimant's evidence as to the circumstances of the incident, as well

as his misidentification of persons who were present, it was submitted makes his case highly incredible.

[62] Ms. Fletcher added however, that in the event the Claimant is believed to have been pushed, one student pushing another, though it may lead to unfortunate results, is an "ordinary event of school life." The "disastrous and wholly unexpected result" purportedly suffered by the Claimant should not therefore form the basis on which to ascribe liability to the 2nd Defendant.

[63] In the case of **Ward v. Hartfordshire County Council** [1970] 1All ER 535, the Plaintiff was aged 8 when he tripped and struck his head against a jagged wall when he was running unsupervised in the playground at school just five minutes before classes began. It was held that, the accident having occurred in the ordinary course of play, it was irrelevant that there was no supervision in the playground, it being in any event "**impossible so to supervise the children that they never fell down and hurt themselves**." It was added that while "the staff where inside preparing for their day's work [t]hey cannot be expected to be in the playground too." The argument that there was lack of supervision by the local authority was rejected.

[64] Counsel compared **Ward** to the current case and advanced that the Claimant was in an area that was unsupervised. It was submitted that from the gaps in the Claimant's case, it could have been at the time school had not yet started, when preparations were being made for the fair or when the fair was already underway. The evidence that the incident occurred when the Claimant was playing with his friends was used to submit that the alleged incident, it occurred, would have occurred in the "ordinary course of play."

[65] It was also submitted that supervised activities were taking place on the multipurpose court and it was decided that the classrooms were out of bounds to all students. As a result, the Claimant's case is that he was injured on one of the classroom blocks and was therefore not within the designated area of supervised

activities. It was contended also that it would have been "impossible" for the schools official so to supervise the Claimant and other children that they never fall down and hurt themselves.

[66] In the case of **Kenneth Murphy v. County Wexford V.E.C.,** [2004] 4 IR 202, the Plaintiff was struck in the eye by a chocolate bar thrown during horseplay involving pupils at the school. The students were known to have a propensity to be rowdy and a roster was established for supervision. At the material time however, there was no supervision of the students while they were in the resource area. The Court held that the extent of such supervision depended on the number of factors such as the age of the pupils, the location of the places where the pupils congregated, the number of people who would be present at any one time and the general propensity of the pupils at the particular school to act dangerously.

[67] Ms. Fletcher urged upon the Court that the school should not be faulted simply because an injury occurred at the time when the area was not being supervised. In accordance with the factors outlined in **Murphy** (supra), it was also submitted that the Court should look at the number of students who were present or who are expected to be present in the particular area at a time. There was no evidence as to the propensity of students at this school to act dangerously, therefore, in all circumstances, that the school discharged its duty of care and was not in breach as adequate supervision was provided for students on the day of the fair.

[68] In **Maher (a minor suing by his mother and next friend) v. Board of Management of Presentation Junior School, Mullingar** [2004] IEHC 337, the plaintiff was a six-year-old people in a normal class of six-year-old children, when he was injured by a classmate who used a rubber band as a catapult, and propel his pencil in the direction of the plaintiff, hitting him in the right eye. This happened while the teacher was talking for a short time to another teacher. The plaintiff claimed that the school was negligent. In dismissing the claim, the learned judge found, that there is a duty to be vigilant to an extent, that is within the bounds of

reasonableness. That involves a measure of supervision appropriate to the needs of any particular same situation.

[69] It was submitted that it would not fall within the bounds of reasonableness for teachers who were smaller in number than students, to be tasked with supervising or overseeing an area like the mound. The fact that the classroom doors were locked as confirmed by the Claimant's evidence, it would suggest that students were not supposed to be on the classroom blocks. The measure of supervision was submitted to be appropriate.

[70] For the requirements of foreseeability to be satisfied, in this case, it would have to be shown that the school officials had anticipated that as soon as students wandered to a prohibited area during the fair, it would have been probable or likely that some behavior would occur which would cause injury to one or more of the pupils in their charge. The evidence in the instant case, does not support the submission that the school officials would have foreseen that the Claimant and other children would have suffered injuries in the areas that were out of bounds and unsupervised.

[71] Counsel commended to the Court the case of **Roxanne Peart v. Shameer Thomas and Brenda O'Connor et al** (Unreported) [2017] JMSC Civ 60 delivered 28 April 2017, to submit that where kids are at play, there was little or nothing any school official could have done to prevent the Claimant's fall. Even if a teacher had been present and the students had been supervised, the accidents could still occur. There was nothing in the evidence that suggested that this would have caused anyone to foresee that the Claimant would have been pushed.

[72] On the issue of the Occupiers Liability Act, Counsel submitted that in **Revill v. Newbery** [1996] QB 567, where the Plaintiff was shot and injured when he had attempted to break into the shed, attempting to steal from it. The Plaintiff after admitting attempted burglary in criminal proceedings, brought a claim against the Defendant for negligence and breach of the Occupier's liability Act. In considering

the words of section 1 of the Act, in respect of danger to things done or omitted to be done on the premises, the Court stated that the fact that he was the occupier was irrelevant.

[73] It was submitted that the Occupier's Liability act has no relevance to the case at bar. It was added that the fall of the Claimant had nothing to do with the construction of the stairs as there was no evidence to suggest that had he not been pushed; he would have fallen. It was submitted that unless it can be shown that the fall was caused by faulty or defective construction, the Claimant has no case under the Act.

[74] On the issue of Damages, it was submitted that if liability were to be determined in favour of the Claimant, the Court may award special damages as far as proven by the receipts and other evidence deemed satisfactory.

[75] Where Special Damages were concerned, Counsel for the Defendant submits that, in the case of **Nevive Carr v Roderick Christie et al** Suit No. C.L. 1984 C 242 at Volume 3 of the Khans the plaintiff who was 18-years-old suffered a fracture of nasal bone with displacement, lost the tip of her nose, suffered a laceration of her upper lip and bruising of her nose bridge in a motor vehicle accident. The tip of her nose was repaired with a skin graft but the cosmetic effect of the tip of her nose was not satisfactory. The plaintiff was awarded $30,000.00 for the general damages for pain and suffering in October 1989 (CPI 5.1). Using the CPI as at July 2019 (261.2) the award updates to $1,536,471.59.

[76] In **Saddler v Miller and the Attorney General** Suit No. C.L. 1991/SO56 delivered on 6 April 1994 in Harrison, the Claimant suffered fracture to the base of the nasal bone, swelling and tender nose, and a ¼ laceration to the nose bridge, and was awarded $50,000.00 for pain and suffering and loss of amenities in April 1994 (CPI 25). Using the CPI as at July 2019 (261.2) the award updates to $522,400.00.

ISSUES

[77] The main issues for the Courts contemplation are:

a) Whether there was a duty of care owed by the Defendants to the Claimant?

b) If the answer to a) is yes, did the Defendants breach the duty? In deciding this issue, the court will also look at the sub issue:

i. Whether the incident as alleged by the Claimant occurred on the premises of the Greater Portmore Primary School?

c) If the answer to sub issue is in the affirmative, then is the Defendant liable to the Claimant in negligence?

d) Whether the Defendant is liable to the Claimant for breach of the common duty under the Occupiers Liability Act?

e) Whether the doctrine of Res Ipsa Loquitur is applicable?

f) What if any, is the quantum of damages recoverable by the Claimant?

LAW AND ANALYSIS

[78] On the authority of Harris JA in **Glenford Anderson v. George Welch** [2012] JMCA Civ.43 at paragraph 26, in order to satisfy a claim in negligence,

> *"……there must be evidence to show that a duty of care is owed to the Claimant by the Defendant, that the Defendant acted in breach of that duty and that the damage sustained by the Claimant was caused by the breach of that duty ..."*

[79] It is trite law that he who asserts must prove. The onus is on the Claimant therefore to persuade the Court on a balance of probabilities that the school acted negligently in the circumstances of the case. As stated by Harris JA in **Glenford** (supra):

> *"It is also well settled that where a Claimant alleges that he or she has suffered damages resulting from an object or thing under the Defendant's care or control, a burden of proof is cast on him or her to prove his case on the balance of probabilities"*

[80] In cases where students are concerned, the law imposes a duty on schools to take reasonable care for the wellbeing and safety of its students. It equates the duty to that which a reasonably prudent parent would take of his/her own child. According to Lord Esher in the case of **Williams v Eady** (1863) 10 TLR 42:

> *"As to the law on this subject, there could be no doubt; and it was correctly laid down by the learned Judge, that the school master was bound to take such care of his boys as a careful father would take of his boys, and there could not be a better definition of the duty of a school master."*

[81] This duty was further explained in the Australian case of **Richard v The State of Victoria** [1969] VR136, where Winneke CJ stated that:

> *"This duty not being one to insure against injury, but to take reasonable care to prevent it, required no more than the taking of reasonable steps to protect the plaintiff against the risk of injury…."*

[82] Similarly, in the case of **Clark v Monmouthshire County Council** (1954) 52 LGR 246, it was held "*the duty of a schoolmaster did not extend to the constant supervision of all the boys in his care all the time; only reasonable supervision was required*."

[83] It is clear from the authorities that at the time the Claimant was enrolled as a student of the Greater Portmore Primary School and a duty was imposed upon them to take reasonable care for safety and wellbeing of the claimant and all the students enrolled in the institution.

[84] Having established that the duty is owed, the next step in my deliberations must be a determination as to whether this duty was breached. In attempting to address this issue, the pertinent question becomes whether the Claimant was injured on the premises of the Greater Portmore Primary School.

[85] The parties advance divergent accounts as it relates to the circumstances surrounding the Claimant's fall. The issue therefore becomes one of credibility. Having had a chance to listen to the witnesses and to observe their demeanour, I accept the Defendants account to be the more reliable of the two. I laud the Claimant's attempt at recollection given that he was just six years old when the incident occurred but find that he was irreconcilable inconsistencies and gaps in his evidence which affect the foundation on which his case is built.

[86] On the Claimant's account, he was pushed at school while descending the staircase. When he fell, he hit his face in a metal grill located at the foot of the stairway, which resulted in his injuries. The Defendants of the other hand disputed this layout as was described by the Claimant and advanced that there is no grill directly in front of the steps or at the foot of the steps. By way of pictures admitted into evidence I have been able to view the steps in question. I do not accept that the metal grill gate is at the foot of the steps. The photographic representation shows a clear corridor between the foot the step and the grill gate. Even though there is no evidence as to the width of this corridor, having seen it I conclude that the metal grill gate is not at the foot of the steps.

[87] Another issue for consideration of the Court is the evidence of the Claimant as to the identification of who pushed him and who helped him after he was pushed. The evidence is that when the Claimant and his mother attended the school in January 2015 the Claimant had indicated to Ms. Robinson that he was pushed by a fellow classmate. who the Defendant contends from their records, was absent from school at the time of the incident. The Defendant added also that when she offered to take the Claimant to see whether he could identify the correct child however, the Claimant expressed that he was feeling tired and the investigation process was aborted.

[88] Under cross-examination, the Claimant states that he did not see who pushed him. His further evidence is that he does not recall the name of his friends but it was about two or three of them. He asserts that was not able to say where his

friends were at the time he fell down. When asked by Counsel if he saw his friends go away, he replied 'no'. In addition to this, he states that he did not ask who had pushed him.

[89] Furthermore, in his witness statement, the Claimant states that he had not seen the person who assisted him after he fell before the day in question and does not think the person was a teacher. Under cross-examination, when asked more details about the incident by Counsel for the Defendant, the Claimant says that he had in fact identified an adult at school as the one who assisted him after he was injured. He admitted that the person was a female but he could not recall the name at the time.

[90] The evidence on both the Claimants and the Defendants case reveal that in the presence of his mother and Miss Robinson the Claimant had identified the adult who he says assisted him. It was determined that that person was a teacher by the name of Mrs. Bennett - Myers but their records show that Mrs. Bennett - Myers was absent from school on the day of the fair. Under cross-examination the Claimant agreed with Counsel that it came to his attention that on the day of the incident, the teacher he had identified as helping him was absent from school.

[91] From the evidence of the Claimant, stated that on the day in question, persons were setting up for the fair but on his recollection he did not see any teachers. He also stated, when asked if he returned to the open area after his fall, He said yes but that he was not sure if any teachers were there. On the contrary, the evidence of the Defendant is that at the time of the fair, teachers were assigned tasks such as overseeing rides and activities taking place on various areas of the multi-purpose court or at the classroom block where provisions were made by that teacher to undertake supervised activities.

[92] There was also an issue raised by Counsel for the Defendant as to the time of the incident. The evidence of the Claimant’s mother is that on the day of the fair, she sent her son to school at 6:30 am and did not return home until later that evening

at about 10:00 pm and that was when she saw that the Claimant had been injured. She adds that the Claimant usually got home from school at 5:00pm or 6:00 pm. Both the Claimant and his mother stated that when the Claimant got home from school, he was received by his aunt until his mother got home. The Claimant has contended however that when he got home, he had dinner but did he tell anyone what had happened.

[93] The mothers evidence was she received no report of Kayden Being injured. Neither from the driver who picked him up from school or from anyone at home. It is somewhat curious that this six- year old child whose evidence was that he was in pain and no one neither at school or home noticed or sought to do anything about it.

[94] In light of the foregoing, I find that the Claimant's case was questionable. The onus is on the Claimant to prove his case against the Defendant. Whilst I accept he was injured I am of the view that he has failed to prove on a balance of probabilities that this injury was sustained on the premises of the Greater Portmore Primary School.

[95] Given this fact, the issues as to negligence becomes moot as the Claimant could not establish that the incident occurred on the premises of the school. I therefore also find that there is no evidence the school breached the duty of care which it owed to the Claimant, and therefore cannot be held liable for negligence

<u>Occupiers Liability</u>

[96] Under the Occupiers Liability Act:

3) *"(1) An occupier of premises owes the same duty (in this Act referred to as the "common duty of care") to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor by agreement or otherwise.*

(2) The common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

(3) The circumstances relevant for the present purpose include the degree of care and of want of care, which would ordinarily be looked for in such a visitor and so, in proper cases, and without prejudice to the generality of the foregoing-

(a) an occupier must be prepared for children to be less careful than adults;

(b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.

(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances."

[97] It is obvious given the definition under section 3 that the Defendant owed a duty of care to the Claimant as a visitor to the school. In light of the previous discussion and the Claimants inability to established that he was injured while at school, I find that the Defendants would not have been liable for a breach of the duty of care under the Occupiers Liability Act.

Res Ipsa Loquitor

[98] In **Shtern v Villa Mora Cottages Ltd and Another** [2012] JMCA Civ 20, Morrison JA, addressed the doctrine of res ipsa loquitur and stated as follows:

"[57] Res ipsa loquitur therefore applies where (i) the occurrence is such that it would not normally have happened without negligence (the editors of

Clerk & Lindsell, [19 Ed], para. 8-152 provide an illustrative short-list from the decided cases: 'bales of sugar do not usually fall from hoists, barrels do not fall from warehouse windows, cranes do not collapse, trains do not collide and stones are not found in buns'); (ii) the thing that inflicted the damage was under the sole management and control of the defendant; and (iii) there must be no evidence as to why or how the accident took place. As regards this last criterion, the editors of Clerk & Lindsell (op. cit. para. 8-154) make the important point, based on Henderson v Jenkins & Sons [1970] RTR 70, 81 – 82], that 'Where the defendant does give evidence relating to the possible cause of the damage and level of precaution taken, the court may still conclude that the evidence provides an insufficient explanation to displace the doctrine'." (Emphasis supplied)

[99] From this definition, the Claimant would have to satisfied the requirements under all three heads to succeed on a claim for Res Ipsa Loquitor. However, having regard to my findings that the Claimant has failed to establish and prove on a balance of probabilities (i) where he sustained the injury and (ii) that there was negligence on the part of the school. The Claimant cannot succeed under the doctrine of Res Ipsa Loquitor.

DISPOSITION

[100] Having found that the Defendant is not liable by way of Negligence nor under a breach of the Occupiers Liability Act, in the circumstances, I make the following orders:

1. Judgment for the Defendant against the Claimant

2. Cost to the Defendant to be taxed if not agreed.