Neutral Citation [2013] IEHC 73

THE HIGH COURT

[2009 No. 6805 P.]

BETWEEN

JAMIE BYRNE (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, ANTHONY BYRNE)

PLAINTIFF

AND

STEPHEN BELL TRADING AS BUMBLEBEES

DEFENDANT

JUDGMENT of Mr. Justice Kevin Cross delivered the 5th day of February, 2013

1. The plaintiff was born on 26th December, 2005 and was injured when present at the defendant's premises known as Bumblebees, which is a designated children's play area with slides, climbing areas and ball pools, and adjacent to the children's play area is a designated area for toddlers or younger children with ball pools and a less challenging slide. In the toddler's area there are series of what have been described as "walls" which are, in fact, foam bricks covered in plastic of some 14inches high against the ground or 12inches if there is a mat on one side. These walls divide different sub areas of the toddler's area.

2. Access to the defendant's premise is by payment and there are some notices at the door to the effect that children must be supervised by parents or guardians. There are coffee facilities and chairs available for adults in the vicinity of the play area. It is common case that Bumblebees is a play area and not a crèche.

3. On 28th October, 2008, the plaintiff was present in Bumblebees with his grandmother, Mrs. Breslin, in whose care he was at the time. When the plaintiff, Jamie, was going from one part of the toddlers or young children's area into another, he climbed onto one of the "walls" as previously described and jumped down causing an injury to himself consisting in the main of a fracture of his femur.

4. The plaintiff alleges, through his father and next friend, that these injuries were caused by reason of a negligence of the defendants in the layout of the premises and their failure to have any adequate supervision or intervention to prevent danger, or the accident such as occurred.

5. The plaintiff suffered a fracture of his left femur but has made a good recovery and, due to the good sense of the parties both sets of medical reports have been agreed and handed into court. Indeed, the amount of special damages has also been agreed.

6. The real issue, and in fact the only issue in this case is whether Jamie's injuries were caused or contributed to by reason of any negligence or fault of the defendant. Clearly, Jamie himself is in no way to blame for the accident due to his tender years and neither is it alleged, or indeed could it be alleged, that Jamie's very careful grandmother, Mrs. Breslin, was in any way to blame.

7. I have had the benefit of watching the CCTV footage which showed Jamie and his grandmother entering the premises and the accident. In this regard, I note that both had been present in the premises previously. Mrs. Breslin is seen sitting and having a cup of tea or coffee and talking at a table to another parent or guardian and Jamie is seen playing initially in the area to the right of the pictures designated for young infants which has a small ball pool and then he is seen going from time to time over one of the "walls" into the area designated for toddlers which has steps, a slide and another ball pool. He is seen playing with one or two of the few other children who were in the premises at the time and sometimes he is seen playing by himself. He is seen following a slightly larger child from the toddler's area into the area for somewhat older children and does this more than once and Mrs. Breslin is seen intervening to bring back towards the toddler's area. Jamie, from time to time, also approaches his grandmother as she is having coffee and then goes back to the play area.

8. There is no sign in the CCTV footage of either member of the defendant staff who were present on the premises at the time of the accident. I accept, however, that two members of staff were present in the premises at the time.

9. Jamie is seen in the CCTV climbing onto a "wall" which divides the toddler's area into sections and you see from behind him that he appears to jump down away from the camera onto what is a matted area, a distance of some 12inches and it is there that he is injured. His grandmother is seen rushing towards him.

10. Mr. Gavigan, senior counsel on behalf of the plaintiff complains that though Jamie was under the primary care of his grandmother, Mrs. Breslin, that there should have been some supervision to ensure that toddlers would not go from one area to another over the "wall" and also supervision to remove any balls that might have escaped from the ball pools and to prevent the plaintiff going into the area reserved for larger children. Mr. Gavigan also complains that the design of the area was defective in that it should have been possible to go from the front area for very young infants into the toddler area without having to go over or climb over the wall and that the supervision ought to have stopped Jamie going into the toddler's area in the manner that he did.

11. It is important to note what did not happen in this accident. The plaintiff was not injured by being in the older children's area; he was not injured by any of the older children being in the toddler's area; he was not injured by jumping towards – down towards the cameras some 14inches where, inexplicably there was no safety mat, this would have involved a fall onto a relatively hard floor; he was injured jumping away from the camera down some 12inches onto a safety mat. It is suggested that it is possible that the plaintiff may have landed on a loose ball or balls that has escaped from the ball pool but there is no direct evidence of this.

12. Mr. Kidney on behalf of the defendant submitted a number of authorities and Mr. Gavigan has referred me to the Occupiers' Liability Act and *McMahon and Binchy* (3rd Ed.). Mr. Gavigan relies on ss. 3 and 5 of the Act of 1995. Under s. 3, an occupier owes a duty to a visitor to take such care as is reasonable in the circumstances to ensure that a visitor does not suffer injury or damage by reason of any danger existing there on the premises. Under s. 5 an occupier may modify any duty in certain defined circumstances.

13. I hold that the notice at the entrance was reasonably prominent and displayed at the means of access but, in any event, it is not disputed and indeed is common case, that all infants are primarily under the immediate supervision of their guardians and Jamie was at the time under the care and watchful supervision of his grandmother.

14. A series of cases starting with *Lennon v. McCarthy* (13th July, 1966) in the Supreme Court were submitted by Mr. Kidney and he referred also to *McMahon and Binchy* which sustained the principle that "where there are normally…children in a playground, it is not necessary that they should be under constant supervision".

15. This approach was followed in a number of cases but in the case of *Mapp v. Gilhooley* (Unreported, High Court, 7th November, 1989), Barr J. imposing liability on a defendant, stated:-

> "As I accept… the court must take into account all the relevant factors of the case."

16. It should be noted that these cases in the main referred to children being injured in schools which themselves had taken over their responsibility and role of parents who are acting in *loco parentis*. This case is somewhat different. There is no doubt that at least the primary supervision was that of Mrs. Breslin.

17. It still remains, however, to be decided by the court whether the defendant can be faulted for any failure to take reasonable care to ensure that the visitor, in this case Jamie, did not suffer injury by reason of any danger, if such existed. We do not know why the plaintiff fractured his femur. He may have fallen awkwardly or he may have fallen on one or more of the balls which had somehow possibly escaped from the ball pool. There is simply no evidence on this point or as to why he suffered his mishap on this occasion.

18. If someone had been standing by the wall, Mrs. Breslin or an employee, would they have stopped Jamie from jumping? I do not believe that they would. Mrs. Breslin is clearly a very loving grandmother who saw Jamie jumping earlier and did not intervene. Even had a supervisor seen a ball on the ground, were one there, would they have stopped Jamie jumping? I do not believe so. I accept that the balls are soft and would be crushed under any weight and I accept Mrs. Bell saying that the "walls" were so designed as part of the play that the children would indulge in.

19. In effect, I do not see or believe there was any danger in the premises relevant to the accident that occurred. I believe that the premises were well run and generally safe. You cannot ensure against all mishaps or accidents to young children. Accidents, injuries, do happen from time to time and do so without any fault. Play areas such as Bumblebees are an important part of the development of children who are, as in this case, generally far safer there than in some regimes where prudent parents will allow their children to play entirely unsupervised, for example, gardens with trees.

20. The plaintiff suffered a significant injury. It is good that he made a good recovery. He has sat uncomplaining in this Court throughout the evidence. He is no way to be faltered for the accident due to his age. Mrs. Breslin is in no way to be faulted either. The plaintiff's parents are clearly loving and caring parents who have a very good control over Jamie, including a control to a heroic sense in listening to what must have been extremely boring evidence in this Court. The plaintiff's father who was not present at the accident is not to be faulted for taking the proceedings on behalf of his son. Indeed, any prudent parent would have the same.

21. But the issue in this case is whether the plaintiff established any fault for his injuries on the part of the defendant and unfortunately, in my view, he has failed to do so and accordingly, I must with reluctance dismiss the case.