Neutral Citation Number: [2006] IEHC 416

THE HIGH COURT
DUBLIN

2004 NO 10790 P

BETWEEN

MS. AOIFE CAROLAN

Plaintiff

And
THE BOARD OF MANAGEMENT OF
ST. CIARAN'S NATIONAL SCHOOL

DEFENDANTS

Judgment delivered by Mr. Justice Feeney on Thursday, 6 July 2006.

1. Mr. Justice Feeney: This is a claim brought by the plaintiff for damages for personal injury arising from an accident that occurred to the plaintiff at the defendant's school on 13 May 1997. The plaintiff was on that date some five weeks short of her 13thbirthday and was in sixth class. She had started in that school at the beginning of fifth class and was nearing the end of her second full year as a student of that school.

2. During both her years in the school, the plaintiff's teacher was Mr. John Walsh. Mr. Walsh was an experienced teacher, having graduated from St. Patrick's in Drumcondra in 1974, and by the time of the accident had been continuously working as a primary school teacher for over 20 years, and by the time he came to give evidence for some 32 years.

3. The system as St. Ciaran's was that one teacher taught all subjects to a particular class. Mr. Walsh was Aoife Carrollan's teacher and he covered everything in the curriculum including physical education. At the time of the accident Mr. Walsh was taking a PE class which was due to last for about one hour starting at 1:30 p.m. and ending shortly before the end of the school day at 2:40 p.m. The accident occurred during a game of "dodgeball" which was part of the PE class. The form of "dodgeball" being used was a particular variation used in the school. During the course of the game, which had been going on for some time, the plaintiff had to run or traverse the width of the room and had to avoid being hit by any of three sponge balls being thrown by three classmates.

4. They, the classmates, were standing to the side as the plaintiff crossed the floor and the plaintiff had to avoid being hit by dodging, weaving, stopping and running. The object of the game was to avoid being hit and to cross the room. If a pupil was hit that pupil was out, and went to sit on a bench. The plaintiff was the last successful pupil, that is un-hit, whilst crossing the room, and had to make one more successful crossing to finish the game. The plaintiff had made some three or four crossings without being hit to be the last pupil in the game.

5. In making the final crossing the plaintiff avoided the first ball and in trying to avoid either the second or the third, the plaintiff is uncertain in her evidence as to which, she was ducking or weaving and came to a stop and in moving off again to try and reach the far side, she stumbled or tripped over her own legs and fell to the ground on her left arm. That fall caused a severe injury to the left arm and she had a fracture of both her ulna and radius. The injury was so severe as to require open reduction and internal fixation and thereafter a further operation to remove the metal plate.

6. The plaintiff has been left with two extensive scars on either side of her forearm, one of approximately eight inches in the length and the other of approximately six inches.

7. The above factual description of the accident is not disputed and is accepted as an accurate description of how the accident occurred. There are a small number of factual matters in dispute; there is no issue as at suitability of the premises or in particular as to the suitability of the floor surface and this was expressly acknowledged in the opening of the plaintiff's case. It was also acknowledged that there was no issue in relation to supervision.

8. The facts that are in issue are whether the plaintiff had ever previously been involved in a game of "dodgeball" and secondly, whether the game was being used as a warm up at the start of the class period rather than towards the end of the period following an independent warm up. The evidence concerning whether or not the plaintiff had taken part in the this "dodgeball" game on a previous occasion or not is somewhat uncertain. The plaintiff believes it was her first experience of the game. The teacher, Mr. Walsh, indicated that had the game was a regular feature of a PE class and that the plaintiff, in all probability, would have participated on a number of occasions during her time with him in fifth and sixth classes.

9. The plaintiff had certain absences during fifth class due to ill health but had been a regular attender during sixth class. On balance I would favour the evidence which suggests that the plaintiff would have participated in this type of game on other occasions. It is unlikely that she would have missed all the occasions during fifth and sixth class when it was played. However, this finding is not of particular significance as it is apparent that the variation of "dodgeball" used in the school had simple and straightforward rules of a basic kind and by the time of the accident the plaintiff would have been aware of the format of the game or activity.

10. Also there is no case made to suggest that a lack of understanding of the format caused the accident. It is the format itself rather than a knowledge of same which is criticised by the plaintiff. The issue of the use of the game or activity as a warm up is by and large academic. It is extensively questioned as a suitable warm up exercise in the report of the plaintiff's Physical Education expert, Ms. Judith Wooton. However, the balance of evidence tends to support the view that there was an independent warm up of the type approved by Ms. Wooton. The plaintiff and her classmate do not recall one on that day, but the evidence of Mr. Walsh indicates that there was an independent warm up. The Court prefers that evidence and the lack of recall on the part of the plaintiff and her classmate can be explained by the passage of time.

11. The Court accepts that it is likely that the accident happened towards the end of the PE class as suggested by Mr. Walsh, rather than early on as contended for by the plaintiff. The teacher's evidence that the Head Master was sent for after the accident and that when he arrived, the class time was nearly over. And that evidence is strongly supportive of the accident happening near 2:30 p.m. after the majority of the class time had passed. The Court favors the evidence that there was an independent warm up. Even if there was not, the activity involved in the class up to the time of the accident or even the limited activity involved in the particular "dodgeball" game would have been sufficient for a warm up. Also the type of injury and accident do not relate to the existence or non-existence of a warm up.

12. The real criticism put forward on behalf of the plaintiff was that the variation of "dodgeball" used in the school or its particular format was unsafe and should have been identified as such. And it was unsafe because the throwers threw from a right angle position

or sideways-on to the direction that the plaintiff was required to run. It is suggested that by having the three throwers sideways-on to the direction the plaintiff was travelling, that this caused a so called conflict in the focus of attention. By having a conflict of attention between the travelling forward and the looking sideways to see the balls approaching, together with the added likelihood of the participant moving or jerking her or his head together with the pressure to succeed, resulted in a situation where there was a clear risk of a participant losing balance and tripping or falling. This contention was support bid the evidence of Ms. Wooton. The Court does not have regard to the engineer's view on the appropriateness of the activity as it considers his expertise to be of marginal, if any, relevance to such matters.

13. The defendant's case is that this was a simple straight forward game or activity, suitable for 12 year old's with no significant risk of injury over and above the risk inherent in physical activity, where a trip or fall can occur. And that the format was safe and shown to be safe by 20 years of use and there being only one accident, that is the accident the subject matter of this case. This view was supported by the evidence of Dr. Joseph Lennon.

14. The Court has considered both experts' evidence and the evidence as to fact, and is of the clear view that the more rational and credible evidence of expert opinion is that of the defendants. The experts evidence called by the defendant is in the Court's view compelling in support of an absence of negligence on the part of the defendant. This is not a case of defective premises or equipment or lack of supervision, but rather a claim that a particular activity or game was unsuitable, likely to cause injury or as stated by the plaintiff's counsel, inherently dangerous and ill-considered as being suitable for 12 year-olds. The Court is of the view that this contention is based upon a contrived examination and analysis of the game or activity.

15. The criticism from the plaintiff's expert lacks reality and disregards many activities and games requiring a conflict of focus; it disregards the simple and straight forward nature of the activity or game compared to other more complicated games suitable for and played by 12 years old, such as football or basketball, and it also disregards 20 years of safe use of the game.

16. The Court is satisfied that the facts of this case show that the plaintiff dodged and weaved to avoid a ball she saw approaching and came to a stop. That appears to be common case, and when taking off again she tripped herself. That unfortunate event is a type of risk or event inherent in physical activity and it is the Court's view that the school did not impose an unsuitable or unsafe activity but rather insured that an activity suitably and reasonably safe was being followed. The Court is of the view that such activity properly formed part of a PE class.

17. The Court found Dr. Lennon's evidence and opinion credible, practical, and based on true experience. It accepts the evidence from him that this was a simple, safe game suitable for the premises and pupils. As he said, "the game of the simplest and safest form". The Court is satisfied that the theory of risk emanating from dual focus is unreal and contrived. What happened here was an accident which can arise during any physical activity. All physical activity carries some risk; the Court is satisfied that the chosen activity did not unreasonably or unsafely create a risk and that the game was properly chosen for use and appropriately considered by the teachers, both as to use and format. There is, as Dr. Lennon says, a risk of falling in any moving game. The risk is incidental, not inherent. And the Court is the of the view that it certainly cannot be categorised as this game being inherently dangerous. Physical activity is both an appropriate and vital part of the school curriculum and the activity chosen here was a simple and straight forward game that could be safely played. The Court is fully satisfied that there was no negligence or lack of care on the part of the defendant and therefore dismisses the plaintiff's claim.

18. The judgment was then concluded.