[2021] JMSC Civ 41

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2009 HCV 02665

BETWEEN	**ALEXANDRIA FERGUSON** **(Formerly a child but now of full age)**	**CLAIMANT**
AND	**YANIQUE SMITH** **(Formerly a child but now of full age)**	**1ST DEFENDANT**
AND	**BOARD OF MANAGEMENT OF QUEST PREPARATORY SCHOOL**	**2ND DEFENDANT**

IN OPEN COURT

Ms. Cavel Johnston and Mrs. Kacian Kennedy Sherman instructed by Townsend, Whyte & Porter for the Claimant

Ms. Jacqueline Cummings Queen's Counsel and Mr. Jovan Bowes instructed by Cummings Archer and Co for the First Defendant

Mr. Orane Nelson instructed by Althea McBean and Co for the Second Defendant

Heard: November 16, 17, 18 19 and 20, 2020 and February 25, 2021

Negligence - Liability of a child in negligence - Whether child under age twelve years can be liable in negligence - Whether school liable for injury to child - Causation.

PETTIGREW COLLINS J

THE CLAIM

[1] The claimant by her mother and next friend, filed a Claim Form and Particulars of Claim on the 22nd of May 2009. An Amended Claim Form and a Further Amended Particulars of Claim were filed on the 29th of July 2016. By the time of the filing of the Amended Claim, the claimant and the first defendant who were minors at the time of the incident giving rise to this claim, had attained majority. The claimant's mother as well as the Principal and the Director of the second defendant were no longer parties to the claim.

[2] The claimant's claim is for damages as a result of injuries allegedly sustained on the 18th of January 2008 when the first defendant is said to have pulled a chair on which the claimant was about to sit, causing her to fall to the floor. The claim as pursued in the Further Amended Particulars of Claim is one in negligence.

[3] It is not disputed that the claimant and the first defendant were both grade 5 students at the second defendant Quest Preparatory School, a licensed preparatory school. Neither is it disputed that there was an incident involving both students and the moving of a chair by the first defendant resulting in the claimant falling to the floor on her buttocks. The sequence of events and what part or parts of her body the claimant hit when she fell and the resultant injuries, if any, are disputed.

[4] The second defendant was sued because according to the claimant, the incident took place in the absence of any adult supervision and intervention in breach of the school's duty of care to the claimant.

THE DEFENCE

[5] Both defendants assert that the claimant got up from a chair on which she had been sitting at the request of the first defendant, in order to allow the first defendant to pass to the other side of the corridor. The first defendant moved the chair in order to pass and the claimant attempted to sit back down, missed the chair and fell. Negligence

on the part of each defendant was denied. The first defendant also denied that she wilfully removed the chair causing the claimant to fall.

THE ISSUES

[6] Based on my findings of fact the main issue arising in respect of the first defendant is whether an ordinary reasonable 10-year-old school girl in Yanique's situation ought to have appreciated that by deliberately pulling the chair on which she was aware that the claimant was about to sit, her conduct gave rise to a risk of injury. The matter of whether the second defendant was in breach of its duty of care towards the claimant must be explored. There is also the question of whether the first defendant's conduct was the proximate cause of the claimant's injury.

[7] I do not intend to detail all the evidence from each witness but will instead reference the aspects of the evidence necessary to explain my findings. I am extremely grateful to Counsel involved in this matter for providing this court with final submissions on the last day of trial. As with the evidence, I will make reference to the submissions only to the extent that I find it necessary in order to resolve the issues. The claimant and the first defendant will be referred to as designated or by first name as is convenient.

THE LAW

[8] The law of negligence has been well traversed in numerous cases. I do not propose to elucidate the law in all respects. A major focus in this case is the liability of a child. There is also the question of the liability of the second defendant. The spotlight is therefore on the question of foreseeability. Causation is also an issue. It is specifically against that background that I shall examine the law. The claimant must of course, establish that a duty of care was owed to her by the defendants, that is, that the parties were in a sufficiently proximate relationship so that the duty of care existed, and there has been a breach of that duty resulting in injury/damage which was foreseeable, and the damages claimed must not be too remote. The parties do not join issue on the question of whether a duty of care was owed by both the first and second defendants to

the claimant. The question is whether the duty was breached and whether the claimant's injuries were foreseeable.

Causation

[9] There are certain basic considerations as it relates to causation. One is the 'but for' test and another is that one must take his victim as he finds him. In regard to the latter, if a tortfeasor injures an already injured claimant, he is liable for the additional damage that he has caused. The principle is essentially the same whether the existing problem is a result of an actual injury or whether it stemmed from natural causes.

[10] The 'but for test' requires that a defendant's wrong - doing is a necessary condition for the occurrence of the claimant's injury. The case of **McGhee v National Coal Board** [1972] 3 All ER 1008 supports the proposition that a defendant will be liable to a claimant if the defendant's breach of duty has caused or materially contributed to the injury suffered by the claimant, notwithstanding that there are other factors for which the defendant is not responsible, which contributed to the injury. The question of causation must be explored because the medical evidence disclose that the claimant had a pre-existing condition.

Foreseeability

[11] The question of foreseeability was addressed in the seminal English House of Lords case of **Bolton v Stone** [1951] 1 All ER. At page 1080, Lord Porter said:

> *"The question, however, remains: is it enough to make an action negligent to say that its performance may possibly cause injury or must some greater probability exist of that result ensuing in order to make those responsible for its occurrence guilty of negligence? It is not enough that the event should be such as can reasonably be foreseen. The further result that injury is likely to follow must also be such as a reasonable man would contemplate before he can be convicted of actionable negligence. Nor is the remote possibility of injury occurring enough. There must be sufficient probability to lead a reasonable man to anticipate it. The existence of some risk is an ordinary incident of life, even when all due care has been, as it must be, taken."*

[12] **Gough v Thorne** [1966] 3 All ER 398 dealt with contributory negligence of a child. The case also addressed the question of foreseeability to the extent that it dealt with foreseeability of harm to one's self when the individual concerned is a child and the decision demonstrates that although the standard of reasonable care is measured by objective standards, a child's conduct will not necessarily be judged in the same way as the conduct of an adult. The decision explains what standard of care should be reasonably expected of a child.

[13] The case involved a 13 ½ year old claimant who was hit by a motor vehicle when along with her older brother, she was crossing a road after a motorist had stopped and beckoned them to cross. Denning LJ posited that a very young child could not be guilty of contributory negligence but that an older child may be. He was of the view that there was no blameworthiness attributable to the claimant in the circumstance. He said that it might have been reasonably expected of an adult with fully developed sense to lean forward and look to ensure that it was safe before crossing, as the first instance judge felt the claimant should have done. Denning LJ stated however that it was reasonable for a child to act pursuant to the beckoning. Salmon LJ in his judgment said that "the question of whether or not the claimant could be said to be guilty of contributory negligence depended on whether or not an ordinary girl of 13 ½ years old could be expected to have done more than the claimant did." He opined that a child of that age could not be expected to go through the mental processes of weighing up the circumstances and then wondering if in the given circumstances, it was safe to cross.

[14] The English Court of Appeal decision of **Mullin v Richards [1998]** 1 All ER 920, was cited by Ms. Cummings on behalf of the first defendant. The facts are that the first defendant was a 15-year-old schoolgirl who, based on the judge's factual findings, was involved in an act of playful fencing with the claimant, also a 15-year-old classmate. They were both fencing with plastic rulers when one of the rulers snapped and a fragment of plastic entered the claimant's right eye, ultimately causing her to lose sight in the eye. The judge at first instance found the 1st defendant negligent and the claimant contributorily negligent. That decision was overturned on appeal on the basis that there was insufficient evidence to find that the accident was foreseeable. It was said that the

question of foreseeability had to be judged against the background that there was no evidence that fencing with a ruler was discouraged in any way, frowned upon, or prohibited, the fact that the practice was commonplace, and the fact that there was an absence of warning as to any likely danger as well as the absence of evidence of any previous injury resulting from the conduct. Further, there was no evidence of the propensity or otherwise of such rulers to break or any history of that having happened or that the practice was inherently dangerous.

[15] In that case Hutchinson LJ reiterated that the test of foreseeability is an objective one but went on to point out that:

> *"the fact that the first defendant was at the time a 15-year-old school girl is not irrelevant. The question for the judge is not whether the actions of the defendant were such as an ordinary prudent and reasonable adult in the defendant's situation would have realized gave rise to a risk of injury, it is whether an ordinary prudent and reasonable 15-year-old school girl in the defendant's situation would have realized as much."*

[16] The Australian case of **McHale v Watson** (1966) 115 CLR 199 which was referenced in **Mullin** was also cited by the first defendant's Attorney at Law as well as the claimant's Attorney at Law. It was there said by Kitto J that the correct position is that:

> *"the standard of care being objective, it is no answer for him [a child] any more than it is for an adult, to say that the harm he caused was due to his being abnormally slow witted, quick-tempered, absent-minded, or inexperienced. But it does not follow that he cannot rely in his defence upon a limitation upon the capacity for foresight or prudence, nor as being personal to himself, but as being characteristic of humanity at his stage of development and in that sense normal. By doing so he appeals to a standard of ordinariness, to an objective and not a subjective standard."*

[17] In **McHale v Watson**, nine-year-old Susan McHale lost sight in her right eye when 12-year-old Barry Watson threw a welding rod sharpened at one end which hit her in her right eye. She brought an action against Barry for damages for trespass and negligence. At the trial, Susan and another witness called on her behalf, gave evidence

that the welding rod was aimed at Susan. Barry whom the trial judge believed gave evidence that he aimed the object at a corner post with the intention of sticking it in the post. The judge found that he was not negligent. Susan appealed on two grounds, namely, that the trial judge was in error in holding that the liability or degree of responsibility of the defendant or the standard of care to be exercised by him in any way differed from the liability, degree of responsibility or standard of care which would have been proper had he been over the age of twenty-one years; and that the judge should have made a finding of negligence whether he applied the standard of the ordinary reasonable man or the standard (whatever it might be) appropriate to a twelve-year-old boy.

[18] At page 216 of the judgment Kitto J addressed his mind to the question of whether the respondent, in throwing the spike as he did, though aware of the proximity of the appellant, did anything which a reasonable boy would do. He said,

> *"a boy, that is to say, who possessed and exercised such degree of foresight and prudence as is ordinarily to be expected of a boy of twelve, holding in his hand a sharpened spike and seeing the post of a tree-guard before him'' would not have done in the circumstances. He answered it by saying that "on the findings which must be accepted, what the respondent did was the unpremeditated, impulsive act of a boy not yet of an age to have an adult's realization of the danger of edged tools or an adult's wariness in the handling of them. It is, I think, a matter for judicial notice that the ordinary boy of twelve suffers from a feeling that a piece of wood and a sharp instrument have a special affinity. To expect a boy of that age to consider before throwing the spike whether the timber was hard or soft, to weight the chances of being able to make the spike stick in the post, and to foresee that it might glance off and hit the girl, would be, I think, to expect a degree of sense and circumspection which nature ordinarily withholds till life has become less rosy."*

He also agreed that the appeal should be dismissed.

[19] As it relates to the liability of the second defendant, Counsel for the claimant as well as the second defendant directed the court's attention to the cases of **Geyer v Downs** [1977] HCA, an Australian case, and **Nickiesha Powell (by her mother and**

next friend Valerie Wallace v Grace Patricia Tomlinson for and on behalf the Little London Primary School, The Ministry of Education and the Attorney General Suit no. CL 0076/99. Counsel for the first defendant directed the court's attention to the case of **Carmarthenshire County Council v Lewis** [1955] 1 All ER 566

[20] In **Geyer v Downs**, the claimant was an eight-year-old student who was injured on the playground of the school she attended when she was struck with a bat that was swung by another student who was playing with the bat while the claimant was walking past. One issue which arose was whether the school was liable for the injury which occurred at 8:50 am, which was prior to the commencement of school. The second issue was the scope of the duty that was owed. The court determined that the school owed the same duty of care which was owed during the ordinary school hours. The child who swung the bat was one among others playing in a confined area where it was accepted that ball games should only be played under the supervision of a teacher. There were circumstances on the facts of the case which made it patently clear that there was danger involved in allowing students to play unsupervised as occurred at the time of the incident. Much of what was said in the case is worthy of quotation and/or reference, as it will in my view assist in resolving the present fact scenario.

[21] In the course of the judgment, Stephen J observed that:

> *"It is for school masters and for those who employ them, whether government or private institutions, to provide facilities whereby the school masterly duty can adequately be discharged during the period for which it was assumed. A school master's ability or inability to discharge it will determine neither the existence of the duty nor its temporal ambit but only whether or not the duty has been adequately performed. The temporal ambit of the duty will, therefore, depend not at all upon the school master's ability however derived, effectively to perform the duty but rather upon whether the particular circumstances of the occasion in question reveal that the relationship of school master and pupil was or was not then in existence."*

[22] In the joint judgment of Murphy and Aickin JJ, it was observed that the formulation of the duty owed to a pupil by a school master to take care of that pupil as a

careful father would take care of his boys, (Per Lord Esher in **Williams v Eady** (1893) 10 TLR) was" somewhat unreal" in the case of a schoolmaster who was in charge of a school with many students or for a master with a class of thirty or more students. It was posited that a more appropriate formulation of the duty is as stated in **Richards v Victoria** (1969) VR at p.141.

> *"The duty of care owed by [the teacher] required only that he should take such measures as in all the circumstances, were reasonable to prevent physical injury to [the pupil]. 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 risks of injury which ex hypothesis [the teacher] should reasonably have foreseen."*

[23] The case of **Board of Education for the City of Toronto & J C Hunt v Higgs bnf Lowings and Higgs** 1960 SCR 174 (referred to in **Nickeisha Powell**) is authority for the proposition that there is no duty on the part of a school to keep a child under constant supervision throughout the day.

[24] In **Commonwealth v Introvigne** (1982) 150 CLR 258, a case cited by the claimant's Attorney at Law, a student was injured at school a few minutes prior to the commencement of classroom instructions. The injured 15-year-old boy was one of a group of students who were skylarking in the school quadrangle by swinging from an apparatus attached to a flagpole. A device attached to the top of the flagpole became detached and hit the claimant who was at that moment not swinging but was standing beneath. He was severely injured. A claim was brought against among others, the Commonwealth of Australia. One of the bases of the claim was that the Commonwealth owed a duty to take care for the safety of the boy as a student of the school and that the duty was breached. On appeal before the High Court of Australia, issues regarding the liability of the Commonwealth and the question of contributory negligence were addressed. On the issue of the liability of the Commonwealth, Brennan J at paragraph 8 of his judgment observed that:

> *"Though the primary duty, so far as it requires supervision of the pupils, will ordinarily fall to be discharged by the teachers at a*

> *school, a school authority's liability for damage caused by a failure to provide supervision is founded on the school authority's failure to discharge a duty which it assumed when the child was enrolled and which is sustained by the continued acceptance of the child as a pupil"*

He went on to say at paragraph 9 that:

> *"The primary duty of care owed by a school authority extend to the provision of the staff and resources necessary to discharge the duty to the pupil which it undertakes by accepting him."*

[25] There had been a staff meeting at the school and only one teacher was left to supervise the body of students on the school ground. The High Court upheld the Federal Court's decision to overturn the first instance decision. The High Court agreed that it was foreseeable that someone might swing on the contraption and suffer injury because the contraption or the flagpole was not strong enough to withstand the weight of a pupil. This finding was endorsed with the recognition that there was no evidence as to the likelihood of the device at the top (which in fact fell) becoming detached by the weight of the boys swinging on the contraption attached to the pole.

[26] In **Carmarthenshire County Council v Lewis** [1955] 1 All ER 566, Miss Morgan was a teacher at a nursery school conducted by the appellants, Carmarthenshire City Council, the local education authority responsible for the provision and maintenance of schools in the county of Carmarthen. David, a boy aged 3 ¾ years was a pupil at the school. Miss Morgan decided to take David and another little girl on one of her daily walks as a treat. She left both pupils in a classroom with two girls. On her way back to David and the little girl, she saw a little boy who had received an injury from falling. She bandaged him and brought him to a secure place some distance away. During her absence of about ten minutes, David wandered outside the school premises through an unlocked gate into the busy street, causing a lorry driver to swerve causing an accident which resulted in the death of the lorry driver. The Respondent, the spouse of the lorry driver, brought an action against the appellants in whose charge the child was when he got into the street.

[27] The trial judge and the Court of Appeal held Miss Morgan negligent in leaving David and the other child unattended and found that this negligence caused the accident to the respondent's husband. On appeal to the House of Lords, it was determined that there was no negligence on the part of Miss Morgan. Lord Reid took the view that the question of whether or not her omission to attend to David and the other child while she was attending to the injured child amounted to negligence was borderline but choose to focus on the fact that the Council ought to have anticipated and provided for situations such as that which occurred.

[28] The Council was found to be negligent on the basis that the child's presence in the street indicated a lack of reasonable precautions on their part and since it was reasonably foreseeable that such an accident might occur from the child being alone in the street, the Council was negligent.

THE CASE AGAINST THE FIRST DEFENDANT YANIQUE SMITH

[29] The claimant's account is that on the morning in question, students were preparing to line up for devotions. She was on a balcony which is located in front of her classroom. She was about to sit on a chair when the first defendant pulled the chair from beneath her, causing her to fall in a sitting position.

[30] I will point out at the outset that I reject her account that when she fell, she hit her back as well as her head. My simple reason for rejecting that account is that she indicated in cross examination that she was the one who explained to Dr Myers Morgan, Dr Melton Douglas and Dr Dawson what happened on the day of the incident.

[31] It is noteworthy that there were variations in the account as reported by each doctor as the account of the incident given by the claimant. Dr Myers Morgan was the claimant's family doctor and the first doctor who saw her after the incident. There is no indication that the claimant had reported to her that she hit her back when she fell. The report was that she fell on her buttocks and she also complained of pain to the lower back. The claimant was seen by Dr Melton Douglas approximately one week after the incident. Based on her response in cross examination, there was no report made to him

about hitting her back or head. The first reference to hitting her back appeared in Dr Rose's report. Dr Rose first saw the claimant on the 9th of May 2013.

[32] I also reject the claimant's account that she was seen by Dr Myer-Morgan in her office on the day following the incident. Dr Myers Morgan said in her evidence that her records revealed that the claimant first visited her on the 21st of January 2008 in relation to the incident which it is not disputed, occurred on the 18th of January. Dr Myers Morgan attempted to explain in cross examination by Ms Cumming that the claimant's mother had spoken to her the day following the incident but was not allowed to complete her statement which would in any event have been hearsay. I find that the claimant's first visit to a doctor regarding the incident was on the 21st of January 2008.

[33] The claimant's account of how the incident occurred differs from Yanique's account. On a balance of probabilities, I prefer the claimant's account and I therefore reject Yanique's account. This is so notwithstanding the undisputed evidence that on a number of occasions prior to, and subsequent to the incident in question, Yanique received school prizes for most disciplined student. She also received a prize on one occasion for good citizenship. This evidence is of course potentially indicative of the first defendant's lack of propensity for mischievous conduct. Indeed, it is this evidence as to character that the second defendant's Attorney at Law has asked the court to rely on to say that the first defendant did not wilfully pull the chair, knowing that the claimant was about to sit but rather that she pulled it with a view to gaining access to the other side of the corridor and the claimant happened to sit back down at that moment. It was however the claimant's evidence that Yanique was mischievous but would pretend to be otherwise in the presence of teachers. In the face of compelling evidence which propels me to a different view, I decline to rely on what is in essence, character evidence to come to a different conclusion.

[34] My reason for accepting the claimant's account over that of the first defendant is in some measure due to my observations of both the claimant and the first defendant as they gave evidence. There were instances when the first defendant was evasive in responding to questions and she disagreed to suggestions that were patently obvious

and undeniably true, even in instances when she hesitated before responding, presumably giving thought to how she should respond.

[35] Further it was demonstrated in my view through cross examination of the first defendant, that based on her account as to the location of the chair, there was sufficient space for her to pass along the corridor without the need to move the chair from its original position where according to her, the claimant was sitting on the chair. It was her account that the chair was in the middle of the corridor, almost totally blocking access to either side. On a photograph of the general area where it was agreed that the incident took place, the claimant pointed to an area closer to one side of the corridor as being the approximate location of the chair at the time of the incident. On a balance of probability, I accept that the chair was not blocking access from one side of the corridor to the next. The evidence was that it was that time of the morning when children were lining up to go down to devotion.

[36] The first defendant sought in re-examination to explain that even though there was space, there were bags and water bottles on the ground which rendered it necessary for her to ask the claimant to allow her to pass. That explanation in my view was the product of afterthought when she realized that her own account lacked credibility.

[37] I am mindful that Ms McLean and Mrs Smith were not present at the time of the incident and that any account related by either of them, would in the circumstance be what each was told by someone else. It is noteworthy that the first defendant's Attorney at Law did not seek to deny Ms McLean's account that Yanique had told her that she and the claimant were both sitting on the landing before class started and that Yanique got up to pass, and that the claimant leaned forward to allow Yanique to pass and the chair slipped and fell. Their accounts revealed a different version from that which Yanique gave in evidence.

[38] As adverted to before, I am in no way saying that the claimant was an entirely truthful witness, as I am of the view that she was not truthful as to where she hit

when she fell. Notwithstanding, her for the most part stolid and unhurried demeanour when responding to questions contributed to my taking the view that her account is more closely aligned with the truth. This court fully recognizes the difficulties entailed in deciding which individual to believe when the basis for that belief rests primarily on observing demeanour. However, in part due to the different accounts of how the incident transpired as put forward by the defendants, the claimant's account is more believable.

[39] The claimant's account is that she was about to sit when Yanique pulled the chair from beneath her and she fell. In cross examination, she explained that she saw Yanique pull the chair, and she thought that Yanique was about to sit but then she observed that Yanique did not sit. She said however, that that was before the point in time when she fell. The claimant vehemently denied Yanique's account that she was sitting on the chair and that Yanique said "excuse" signalling her intention to pass and that she got up from the chair and Yanique shifted the chair in order to pass onto the other side of the corridor and that she attempted to sit while Yanique was shifting the chair. The claimant also denied the suggestion put by Mr Nelson, counsel for the second defendant that in her presence, Yanique told Ms McLean that she got up to pass and she leaned forward for Yanique to pass and the chair slipped and fell.

[40] It is not inconceivable that the claimant was about to sit at that point when other students were preparing to go downstairs. Her explanation that she was the tallest student and would therefore be at the back is plausible.

[41] There is the question of whether the first defendant in an act of mischief or horseplay, pulled the chair. I have already indicated that I reject the first defendant's account that she was about to pass to the other side of the corridor. On the claimant's account which is accepted, there was no discernible reason for the pulling of the chair and such conduct must be viewed in the circumstances as mischievous behaviour.

[42] This finding leads me at this point to seek to apply the relevant law in relation to the conduct of children. The undisputed evidence is that at the relevant time, the

claimant was eleven years old and that the first defendant was ten years old. From all indications, the first defendant was a bright and intelligent student. That inference may be drawn in part from her evidence which is that she is now a student in the faculty of Medicine at the University of the West Indies.

Application of the law to the facts- the first defendant

[43] It was part of the submission of the first defendant's Attorney at Law that the first defendant, being a child of 10 years of age at the time of the incident, cannot be liable in negligence. She posited that because of her tender age, it would be difficult for the claimant to establish reasonable foreseeability on the part of the first defendant.

[44] Another basis on which she made this submission was that it is conclusive as a matter of law that a child below twelve years of age cannot be criminally responsible for her wrongful conduct. I do not think that the fact of not being criminally responsible for what would otherwise be criminal conduct is a basis on which it can be said that there should be no civil responsibility. For one the standard of proof in criminal case is higher than in civil cases.

[45] There is no doubt as to the existence and soundness of the general principle that a child is not expected to appreciate cause and effect and to be able to assimilate and process the likely consequences of his/her conduct and therefore act with prudence in the way an adult would. In **McHale v Watson** (supra), the court observed that the correctness of the decision depended upon the special circumstances of the case and it did not lay down any general principle that a young boy who cannot be classified as a grown person could not be guilty of negligence in any circumstance.

[46] I reject the submission that because of her tender age at the time, the first defendant could not have foreseen that injury would have been caused to the claimant by her deliberately pulling a chair on which the claimant was about to sit. Surely, a clear distinction may be made between scenarios for example where the child in **McHale v Watson** (supra) aimed the metal rod at the wooden post, but it caught the claimant, or

in **Mullin v Richards** (supra) where the common place act of fencing with rulers in which the claimant was a willing participant resulted in injury to the claimant.

[47] The mischievous pulling of a chair when the claimant was about to sit cannot be viewed in quite the same way. It would have been foreseeable by an ordinary 10 years old child such as Yanique was at the time that when she pulled the chair, Alexandria would have fallen on the floor. It would have been foreseeable that she could sustain injury by falling. The likelihood of the claimant sustaining injury from falling to the ground could not be said in my view to be remote. We are not in the instant case concerned with a complicated chain of events. It was not as I understand the law, necessary that Yanique should have foreseen the exact nature or the extent of the injury which Alexandria sustained. What must have been foreseeable was that the sequence of events (as demonstrated by the case of **Bolton v Stone**), which in the instant case was simply the pulling of the chair, resulting in the claimant falling on her buttocks to the floor, would have led to injuries sustained by the claimant.

[48] **In Mullin v Richards(supra)** Hutchinson LJ said at page 925 that

> *"even if the requirements that I have so far summarized with the consequence that negligence has been proved, the defendant will not be liable if the injury actually sustained is not foreseeable, that is to say is of a different kind from that which the defendant ought to have foreseen as the likely outcome of his want of care".*

[49] He then adverted to the case of **Hughes v Lord advocate** [1963 AC. 837]. It seems that what the judge was referring to in **Mullin** was the manner of the occurrence of the injury rather than the nature of the actual injury per se. Even so, as evidenced by the decision in **Hughes v Lord Advocate**, it is not necessary that the extent of the injury or the precise chain of events leading to the injury is foreseeable as long as the kind of injury and the manner of its occurrence is foreseeable.

[50] I have attempted to explain the above because of the first defendant's Attorney at Law's submission that the claimant has failed to satisfy the court that the it was reasonably foreseeable that the first defendant's actions would cause injury to the

claimant or that it was foreseeable that the claimant falling would result in her sustaining the injuries she allegedly received.

[51] It was said in **Mullin** that the question of foreseeability had to be judged against the background of the facts. The reasoning that there was no evidence of the propensity or otherwise of the rulers to break or any history of that having happened or that the practice of fencing was inherently dangerous cannot be applied to a very different scenario such the pulling of a chair from beneath someone who is about to sit. There would have been no need for there to have been any prior incident of a child pulling away a chair causing another to fall to the ground thereby receiving injuries for it to be known that such conduct was dangerous. The question remains whether a child of 10 years of age should possess that foresight. It may also be said of **Mullin** that the defence of volenti non fit injuria might have availed the first defendant since both children were engaged in playful conduct carrying out the exact same activity.

[52] Unlike the fact scenarios in the cases cited, the actual conduct in the case at bar which led to the injury was a deliberate and mischievous act, albeit the consequences were not intended. In **McHale** for example, as mentioned before, the trial judge found that the rod that struck the claimant in the eye was not aimed at the claimant, but at a corner post with a view to sticking the rod in the post.

[53] To my mind, it must have been evident to a child such as Yanique was in the circumstances that pulling away a chair from beneath another child who was about to sit could have caused injury.

THE CASE AGAINST THE SECOND DEFENDANT QUEST PREPARATORY

[54] The evidence regarding the second defendant came from all the witnesses. The claimant's evidence was that her form teacher Ms Gordon was not present in the classroom or anywhere in the vicinity at the time of the incident. She said that in fact, she does not recall the teacher attending school that day at all. I accept Ms McLean's evidence that Ms Gordon had signed the register that day. A copy of a document which I accept to be the school's attendance register for the day in question was admitted in

evidence. The attendance register bore a signature said to be that of Ms Gordon. The fact of her presence at school that day does not however mean that she was anywhere in the vicinity of where the incident took place.

[55] There is conflicting evidence as to where the class teacher would ordinarily be at that time when children would be lining up to go to devotion. Alexandria gave evidence in cross examination that Ms Gordon would ordinarily go downstairs and wait for the line to come down the stairs then fall in at the back of the line. In paragraph 6 of her amended supplemental witness statement, the claimant said the following:

> *"The class teacher would position herself at the front of the class line. She would remain on the balcony and monitor the students until all the students have passed down the class to the balcony and down the staircase and then she would position herself at the back of the line."*

[56] I note that this aspect of her evidence was contradicted during cross examination as in exhibit 12a, she pointed to an area at the top of the stairs and stated that that is the area where she would stand, she being at the very back of the girl's line. This area was at the end of the balcony. In any event, she maintained her assertion that her class teacher Ms Gordon was not present in the vicinity on the morning in question. I accept that evidence.

[57] It is also Alexandria's evidence which I accept that the prefect assigned to her class was not present. It is noteworthy however that she said that other teachers were present but that they did nothing when she fell. The failure to act after the claimant fell would not in my view assist the claimant's case in the circumstances of this matter. There must be a causal link between the failure to supervise and the occurrence of the incident giving rise to the injury to the claimant. Acts such as that of the first defendant in pulling the chair I accept, ought to have been foreseen by the second defendant or those whom the second defendant put in place to supervise the students.

[58] Even if foreseen by the second defendant, was it such that it could have been prevented with adequate supervision. The evidence discloses that notwithstanding the presence of teachers in the vicinity, the incident took place.

[59] Alexandria's evidence was that each class had approximately 40 students. Ms McLean said it was 25, it could be more, it could be less. On a balance I accept that the number was closer to the 25 than to the 40. It would not have been unreasonable for there to be one teacher responsible for a class of 25 or even 30 students. That teacher could hardly be expected to be monitoring minutely the activities of all the students at once so that she ought to have been able to detect that a student was about to pull a chair when another student was about to sit.

[60] The pulling of the chair was not an activity or conduct that lasted over a matter of minutes even. Alexandria's description of the incident was that it happened so quickly. This kind of activity may be contrasted with conduct such as the boys swing from the device attached to the flagpole in **Commonwealth v Introvigne,** the child straying from the nursery in **Carmarthenshire CC v Lewis,** the boy playing ball game in a confined area of the school compound in **Geyer v Downs** or with the infant claimant in **Nickeisha Powell** wandering off. In each case the conduct which was the result of the failure to supervise lasted at least minutes, compared with what was sudden and evidently unexpected conduct of the first defendant in the case at bar. Notwithstanding those observations, the presence or otherwise of Ms Gordon, the teacher with direct responsibility for the class is a weighty consideration.

[61] It is the evidence that at the relevant time, students were in motion, getting ready to line up, whether on the stairs or down in the quadrangle, whichever it was is not particularly material, although I accept that they would and were about to line up on the stairs and then proceed to the devotion area. Alexandria's evidence that students would hit and fight each other whilst in the walk to devotion was not really compelling. I say so because in her witness statement, she had said that during the walk to devotion, some students generally engage in mischievous behaviour such as pinching and pushing each other. While it is not at all inconceivable that students could get into fights during

such activities, surely, it would have been a pertinent matter to have stated in the same breath that it was being said that they pushed and pinched each other. My distinct view was that the claimant was not aware of any fights that had taken place during the walk to devotions.

[62] Ms McLean accepted that some children in the age group 10 to 12 years old in which most if not all the students in grade 5 fell were energetic and accepted that a few of them would be "high-spirited" She stated that the school gate would be opened by 6 o'clock or 6:30am to allow children onto the compound and that the classrooms would be open to allow the students to enter and that the class teachers would be in the classroom to offer supervision and if the particular class teacher was not present, another teacher would supervise until the class teacher gets there. She also agreed that it is the class teacher who is supposed to supervise the students in order to ensure that they get to devotion, further, that at 7:55 on the ringing of the second bell the students get into line with their class teacher and go down to the quadrangle for devotion. It was Mrs Smith's evidence that each child was required to participate in devotions.

[63] There is no question in my mind that the school was responsible for the safety of the students at the time the incident occurred. The second defendant's duty was to take such measures that in all the circumstances were reasonable to prevent injury to the claimant. The duty was not to insure against injury. Relevant questions as Mr Nelson on behalf of the second defendant identified are what were the circumstances which obtained at the relevant time and what act should be taken in the exercise of reasonable care to prevent the injury.

[64] In answering those questions, it would seem reasonable to say that it was the school's responsibility to ensure that the children in its care were being supervised during the process of moving to devotions in the quadrangle. It is also reasonable to say that a child is far less likely to be doing a mischievous act in close proximity to her class teacher. There is an absence of acceptable evidence that the class teacher Ms Gordon was on time for school and present anywhere in the vicinity of the classroom on the occasion in question.

[65] The presence of other teachers or another teacher for a different class in a different classroom albeit in close proximity, would hardly have had the same effect as the presence of the teacher directly responsible for the class. It is evident from Alexandria's evidence that the teacher or teachers present in the classroom next door did not exercise control over the students of Ms Gordon's grade 5 that morning. A teacher exercising supervision was more likely than not to have intervened when it was observed that a child had fallen to the ground whether the view was taken that an accident had occurred or that mischief was at play.

[66] Thus although it is the accepted legal position that the duty is not to insure against injury, it is my view that the present of a teacher or even a prefect exercising direct supervision over grade 5 Gordon students that morning, could have averted the defendant's act of pulling the chair and consequently, the injury to the claimant.

The medical evidence relative to causation

[67] From a factual perspective, there is also the question of whether the first defendant's conduct was the proximate cause of the claimant's injury. The medical evidence is important in this case not just on the question of the extent of the injury, but on the question of causation. Dr Myers Morgan's evidence and that of Dr Christopher Rose is critical in this regard.

[68] Dr Myers Morgan stated that when she saw the claimant on the 21st of January 2008, the claimant complained of back pains which started four days prior to her visit and at the time when she fell. She said her clinical findings then were related to limitation of flexion and extension of the lower back. She also stated that three days later she referred the claimant to Dr Douglas and when she again saw the claimant on the 15th of April, the claimant reported that she continued to experience back pains and on May 20, the claimant reported that the back pains were now occurring in association with involuntary movements of her right leg. The claimant on later visits in 2008 still complained of back pains.

[69] In his July 2013 report, Dr Rose spoke about the findings based on an MRI scan which was caused to be done on the claimant by Dr Douglas. He noted that the scan of her lumbo-sacral spine revealed multi-level disc bulges with mild central canal stenosis. He noted that based on the complaints of mainly lower back pains with occasional radicular pains into her lower limbs and the absence of neurological findings in the lower extremities, a diagnosis of discogenic lumbar pains was made. He also observed in that report that it was his opinion that the competent medical cause of the claimant's injury was the incident described by her.

[70] In cross examination, Dr Rose explained that the hypertrophy he referred to in his July 2013 report as being evident from the MRI of the claimant, is usually indicative of longstanding degeneration. In response to questions put to him pursuant to rule 32.8 of the CPR. Dr Rose stated that the changes on the MRI scan of the lumbar spine predated her fall in January 2008 but he also observed that while the likelihood of degenerative disc disease of the lumbar spine occurring is elevated in overweight individuals, and that most individuals by age 60 will have some degree of disc generation, not everyone, even at the age of 60 will also experience pain.

[71] Dr Myers Morgan pointed out in cross examination as she did in her report that, she had known the claimant since the claimant was six months old. She stated that she was the claimant's family physician and that the claimant had never complained of back pains prior to January 2008. The scenario may be summed up by Dr Christopher Rose's conclusion that the precipitating factor of the claimant's symptoms (which is understood by me to mean the pain and discomfort) is the fall on January 18, 2008. In other words, even though the claimant in fact had degenerative disc changes prior to the fall, she had not begun to experience any symptoms prior to the incident giving rise to this claim.

[72] As it relates to the claimant's neck, Dr Rose's evidence in cross-examination was that someone can experience neck pain as a result of falling on the buttocks because the force can be transmitted from the coccyx to the cervical spine. He said that in fact such a fall could result in pain to the entire spine. He also went on to explain that such pain could be felt immediately or take hours, even up to the following day before it

manifests. The significance of this evidence is that the claimant said in her witness statement that she experienced neck pain and reportedly told Dr Myers Morgan that sometimes her lower back pains were associated with neck pains and pains across her shoulders resulting in interruption of her sleep patterns.

[73] In cross examination, Dr Myers Morgan said that it was on the 21st of October 2008 that the claimant complained of pain to her neck. She however went on to explain that she was not making a direct connection between the pain to the neck and the claimant's fall but that the neck pain arose because of a secondary issue, namely disruption of sleep resulting from the lower back pains. Thus while not a direct result of the impact of the fall, the claimant's neck pains may be said to be indirectly a result of her fall and in my view not too remote a consequence.

CONTRIBUTORY NEGLIGENCE

[74] The concept need not be explained. Based on my findings of fact, I am of the view that this partial defence is not applicable to the circumstances of this case. It is true that the claimant had said that she had earlier seen the defendant move the chair. The first defendant's Attorney at Law's view that her subsequent attempt to sit constitutes contributory negligence, indicates that she misconstrued the evidence in that regard. The evidence was also that Yanique had pulled the chair and she thought that Yanique was about to sit and that she had checked to see when she had stopped pulling the chair and that she had looked and saw that Yanique was not still holding on to the chair. Clearly, the pulling of the chair resulting in the fall was a separate motion from that which the claimant was talking about when she said that she had seen Yanique pulled the chair.

DAMAGES

SPECIAL DAMAGES

[75] Items 1 to 9 contained in part 4 of the judges' bundle are documents which were agreed. Those documents were filed on behalf of the claimant and are receipts

evidencing payments made to Dr Dawson, to Apex Health Care facility, receipts from a pharmacy and a receipt evidencing payment made by Quest Preparatory School. They were accordingly admitted in evidence as exhibits. My understanding of agreed documents is that issue is not being taken with the contents of the documents and the documents are therefore admissible as proof of the truth of the contents. It is my conclusion that the defendants did not indicate to the claimant that issue was being taken with the sums represented on those receipts. Unless there is some obvious reason why the sums represented in those documents should not be awarded as special damages in the event of a judgment in favour of the claimant, then the claimant should recover those sums. One document in this instance, in relation to which the sums represented therein is obviously not recoverable is exhibit 9, the receipt from Quest Preparatory for $45,000.00. That receipt on the face of it represents sums paid by the second defendant for an MRI on behalf of the claimant. There is no evidence that would in any way indicate that the claimant should recover that sum. The total of the sums represented in exhibits 1 to 8 is $23,075.00. The claimant is entitled to that sum.

[76] The evidence in respect of payment to a private tutor was not challenged but no proof of such payments was provided. A sum of $15,000.00 was claimed as transportation cost. That claim was somewhat vague. It merely said $1,500.00 per trip for 10 trips. This court cannot however ignore the irrefutable evidence that the claimant in this case made several trips to at least 4 different doctors. It would be unrealistic to think that there was no cost directly associated with those trips. It is not always practicable to be able to produce tangible proof of transportation costs. In all the circumstances, it would not be unreasonable to award the sum claimed. The claimant will recover $38,075.00 as special damages.

GENERAL DAMAGES

[77] As was discussed when addressing the issue of causation, this court finds that the claimant fell on the floor hitting her buttocks and not her head or back. In order to assess the claimant’s injuries, this Court looks at her injuries as indicated in Dr. Rose’s reports. I am mindful of the contents of the reports of Dr Myers Morgan as well as that of

Dr Delroy Dawson. The contents of their reports are in essence also reflected in those of Dr Rose, therefore, to outline their contents would result in unnecessary repetition. It was accepted by both sides that Dr Melton Douglas' report would not be relied on by the claimant because of his failure to answer written questions put to him by the first defendant. The May 2013 report indicated that she complained of lower back pain which were described as intermittent in nature. These pains it was said, significantly affected the claimant's quality of life in the following ways:

- She had to lay down everyday at the school's sick bay.
- She is unable to participate in physical education.
- She is limited in all physical activity such as tennis.
- She had to be assisted in negotiating stairs.
- Standing in the school line for meals precipitated severe lower back pains and assistance is required when standing.
- While at school, she had to stand after every 15 minutes and this resulted in distraction to the remainder of the class. She therefore had to stand to the back of the class.
- She was out of school for extended periods.
- At home, she is prevented from performing household chores.
- She has become frustrated and depressed because of the significant limitations in her daily activities caused by the severe back pains when attempting any of the above physical activities.

[78] It was Dr Rose's opinion then, that it was highly unlikely that the claimant would ever become pain free. He opined that the appropriate treatment was pain management. In his May 2016 report, there are complaints of neck pain and pain to the lower back. The neck pains were said to be aggravated by the following factors:

- Sitting in front of a computer during classes at school and when sitting exams. All of those activities involved her neck being held in a flexed position for long duration.

- Radiation of pains along both sides of her neck into both trapezius muscles and both shoulders. She reported occasional radiation of pains into the occiput. For the past year she reported burning pains in the right arm even at rest.

- Household chores aggravated her neck pains.

- Neck pains are worse at rest than when she is active during the days. Neck movements do not increase her neck pains.

[79] It was said that the claimant reported no problems in her hands and that objects did not fall out of her hands and there were no reports of paraesthesia in her hands. Further, she reported no tinnitus, no dizziness and no peri-oral numbness.

[80] In relation to lower back pains, they still existed and were still intermittent in nature. He opined that she suffered from chronic lumbo-sacral strain with no abnormal neurology and no complaints of radicular symptoms. She also suffered from cervical strain. He maintained his opinion held at the time of the 2013 report that there was no indication for cervical intervention and that her intervention lay in the area of pain management. He assessed her permanent partial impairment of the lumbar spine at 2% of the whole person. An impairment rating regarding the cervical spine was also at 2% of the whole person. He assessed her total permanent partial disability at 4% of the whole person.

[81] The effects of the injuries enumerated in Dr. Rose's report was what was expressed by the claimant in her witness statement.

[82] The claimant relies on the cases of **Candy Naggie v The Ritz Carlton Hotel Company of Jamaica** (2004) HCV 00503, **Schaasa Grant v Salva Dalwood and JUTC, 2005 HCV 03081** and **Merdella Grant v Wyndham Hotel Co.** C.L. 1989/G045.

[83] In **Candy Naggie,** the claimant was awarded $1,750,000.00 on the 13th of December 2005. In October 2020, that figure updated to $5,167,817.68. in that case the claimant suffered from protrusion of her L4/5 disc and a reduction in her range of motion to 70%, intermittent lower back pains aggravated by sitting or standing for more than 15 minutes, inability to perform household chores, requiring analgesics to sleep, occasional pains along posterior aspect of the right thigh, impaired sexual activity and inability to resume sporting activities like water sports.

[84] In **Schaasa Grant,** the claimant was awarded $1,750,000.00 on the 16th of June 2008. In October 2020, that sum updated to $3,748,998.00. The claimant in this case suffered serious back pain and swellings, spasms and tenderness to the paravertebral muscles. She was assessed as having right-sided lumbar radiculopathy secondary to prolapsed intervertebral disc and severe mechanical lower back pain and mid back pain. She also had muscular spasms in her right shoulder and neck. She received physiotherapy and pain management was recommended. Her permanent partial disability was assessed at 10% of the whole person.

[85] In **Merdella Grant,** the claimant was awarded $1,400,000.00 in July 1996. In October 2020, that figure updated to $9,655,483.87. She fell backward from a tilted chair. She temporarily became immobile and was taken to the hospital where she remained on bed rest and traction for seven days. She experienced severe pain throughout her body whilst hospitalized. She was unable to walk on discharge and remained at home in bed for three weeks. She was diagnosed as suffering from lumbar strain and problems with the L3/4 disc and herniation at L4/5.

[86] Counsel for the claimant submitted that a reasonable award for pain and suffering and loss of amenities is $5,000,000.00.

[87] Counsel for the first defendant directed the court's attention to the cases of **Pamela Brown v Windell Bryan et al.** Khans Vol.4, pg. 168**, Barbara Brady v Barlig Investment Co. Ltd et al.** Khans Vol. 5 pg. 252 and **Jean McLennon v Stanley Williams et al** Khans Vol. 4 pg. 161.

[88] In **Pamela Brown,** the claimant was awarded $250,000.00 in June 1997. In September 2020, that figure updated to $1,647,515.53. The claimant suffered damage to the neck and cervical spine, damage to L1 and L2, unconsciousness, severe pain, abrasion to the right chin and onset of premature menstrual flow.

[89] In **Barbara Brady,** the claimant was awarded $300,000.00 in November 1998. In September 2020, that figure updated to $1,702,139.04. The claimant suffered lower back pain with marked tenderness along the lumbosacral spine as well as to both sacroiliac joints as well as loss of consciousness.

[90] In **Jean McLennon,** the claimant was awarded $170,000.00 in November 1993. In September 2020, that sum updated to $2,122,000.00. in that case, the claimant suffered whiplash, spasm and tenderness in the cervical vertebrae and was assessed at having a 6% disability of the whole person. The first defendant contends that an award of $1,600,000.00 is a reasonable sum for pain and suffering and loss of amenities.

[91] Counsel for the second defendant cited **Raquel Bailey v Peter Shaw** (Claim No. HCV 3065/2004) and **Marlene Sealy v Harley Williams and The Attorney General of Jamaica** (Claim No. HCV 2008/00183) as being helpful in assisting the court to arrive at a reasonable sum for general damages in the event the court decides the question of liability in the claimant's favour.

[92] In **Marlene Sealy**, the claimant was awarded $3,000,000.00 in February 2010. That sum updates to $5,331,658.00. It was noted that Ms. Sealy had a whole person impairment of 8%-10% which with surgical intervention, could be reduced to 7%-8%. The claimant suffered lumbar sacral strain, degenerative disc disease at L5, central canal stenosis, and bilateral foraminal. She experienced considerable pain in her right and left hip and her hips became less flexible. She also experienced pain in her lower back which increased with bending, walking and standing as well as a burning sensation in her back and hip when she stood for too long. She was unable to do many basic household chores and had to avoid tasks that required standing or sitting for extended periods.

[93] In **Raquel Bailey,** the claimant suffered lumbosacral strain with permanent partial disability of 5%. She was awarded $800,000.00 on the 19th of February 2010. That figure updates to $1,421,775.40.

[94] Counsel opined that a reasonable award for pain and suffering and loss of amenities in the present case would be $1,350,000.00.

[95] In the frequently cited case of **Cornilliac v St. Louis** (1965) 7 WIR 491, it was said that in assessing general damages the court should take the following into account;

1. The nature and extent of the injuries sustained.
2. The nature and gravity of the resulting physical disability.
3. The pain and suffering which had to be endured.
4. The loss of amenities suffered.
5. The extent to which, consequentially, the claimant's pecuniary prospects have been affected.

[96] The incident giving rise to the claimant's injuries occurred some thirteen years ago. She claimed at the time of giving evidence that she continues to suffer from the effect of the injuries. As observed before, the claimant's degenerative disc disease did not come about as a result of the fall. If this court should ask as it is required to do "is the claimant's injury attributable to the defendants' breach of duty, the answer would necessarily be yes because the claimant's symptoms of pain and discomfort began with the fall caused by the negligence of the first defendant, although there is the distinct likelihood that the first defendant's conduct aggravated an existing condition resulting in the onset of the claimant's symptoms.

[97] The evidence reveals that the claimant had not suffered from back pains before. She suffered from a condition which apparently was unknown to her prior to the incident giving rise to this claim. There is the likelihood that she would never have known or would not have known for many years to come that she had the particular condition. In

assessing damages, this court must however take into consideration the fact that the degenerative changes were not a consequence of the first defendant's conduct.

[98] The pain to the claimant's neck, while not arising directly from the fall, came about she said because of disturbed sleep pattern resulting from her back pain.

[99] There is also the question of the depression that the claimant has complained about. A defendant is liable for psychological consequences of an injury as long as there is evidence establishing the causal link between the two.

[100] The claimant's injuries in the present case most nearly equate to that of the claimants in **Yanique Hunter** and in the case of **Jean McLennon**. The case of **Barbara Brady** is also helpful. There is evidence however that the instant claimant has experienced pain and discomfort over an extended period. As pointed out by the claimant's Attorney at Law, there is no evidence of suffering over any prolonged period unlike in the present case. It is observed that the permanent partial disability rating in those cases is higher than that assigned to the claimant in the instant claim.

[101] In all the circumstances, a reasonable award for pain and suffering and loss of amenities is $3,200,000.00.

[102] Based on the foregoing, I make the following orders:

(1) Judgment for the claimant against the first and second defendants jointly and/or severally.

(2) Special damages awarded in the sum of $38,075.00 with interest at the rate of 3% per annum from the 18th of January 2008 to the date of judgment.

(3) General damages awarded in the sum of $3,200,000.00 with interest at the rate of 3% per annum from the 10th of June 2009 to the date of judgment.

(4) Costs are awarded to the claimant against the first and second defendants, to be taxed if not agreed.