Neutral Citation No: [2017] NIQB 47	*Ref:* KEE10292
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 15/05/2017

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between

BRIDGEEN GOULDING

Plaintiff

and

REVEREND MICHAEL DOHERTY PP
(AS NOMINEE ON BEHALF OF THE BOARD OF GOVERNORS AND TRUSTEES OF HOLY CROSS COLLEGE)

Defendant

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KEEGAN J

Introduction

[1] The plaintiff was born on 29 April 1994 and so she is now 23 years of age. At the time of the incident she was 15 years of age and a school girl at Holy Cross College, Strabane.

[2] This case relates to an injury the plaintiff sustained during a physical education class ("PE class") at that school on 5 May 2009.

[3] The plaintiff's claim is for damages for personal injuries, loss and damage, sustained by reason of the negligence, nuisance and breach of statutory duty of the defendant, its servants and agents in or about the occupation of the premises and further in or about the maintenance, management, inspection, supervision, care, control and use of gym equipment and provision of supervision thereon during PE class at Holy Cross College, Strabane, on 5 May 2009.

[4] On that date the plaintiff fell and suffered severe injuries to her right leg. The injury is described as a split depression fracture of the right lateral tibial plateau.

There was some depression of the joint surface. The plaintiff required surgery to elevate the fracture into its normal position. This was secured using two metal screws. The plaintiff was released from hospital after 5 days and her right leg was put into a hinged brace which was kept on for 12 weeks. The plaintiff was left with scaring to her right leg. The scarring remains visible, will be permanent and represents a cosmetic deformity. The plaintiff's case is that she suffered pain, discomfort and weakness and that she continues to experience some discomfort in her knee. Happily, the possibility of long term degenerative problems appears to be remote in this case although can never be ruled out entirely. The plaintiff's claim was limited to one of general damages.

[5] The medical evidence in this case was agreed. On behalf of the plaintiff reports were filed from Mr N Simpson, Consultant Orthopaedic Surgeon. A report was also filed from Dr Maria O'Kane, Consultant Psychiatrist, on behalf of the plaintiff. A report was filed from Mr Derek J Gordon, Consultant Plastic Surgeon. A report was filed on behalf of the plaintiff by Dr Michael Reilly, Consultant Radiologist. On behalf of the defendant a report was filed by Mr Niall W A Eames, Consultant Orthopaedic and Spine Surgeon.

[6] Mr Kieran Mallon QC appeared on behalf of the plaintiff with Mr Loughrey BL. Ms Simpson QC appeared on behalf of the defendant. I am grateful to all counsel for the efficient way in which they conducted this case.

Legal Context

[7] The case relates to negligence. It was accepted that the defendant has a duty towards the plaintiff. The real issue was whether there had been a breach of the duty of care. The nature of the duty in this type of case where the plaintiff was a minor at the date of the incident and at school has been described by Stephens J in Murray v McCullough [2016] NIQB 52. In that judgment Stephens J states that:

> "The yardstick is reasonable care; it is not some notional standard as to what a reasonably careful and prudent parent of the family would or would not do in relation to his own children."

[8] Clerk & Lindsell on Torts 21st Edition at paragraph 8-212 refers to issues of sports supervision in the following way:

> "Misuse of gymnasium equipment may lead to liability Fowles v Bedfordshire CC [1995] PIQR P380 and common practice may be no defence if risks remain. In Cassidy v City of Manchester (Unreported) July 12 1995 a 13 year old playing goalkeeper in an indoor hockey game was injured when she tripped on the leg of a bench being used as the goal. The teacher's evidence was that the

> positioning of the bench had been adopted in his teacher training college and by other local schools. It was conceded that it was not universal practice, but the education authority argued by analogy with medical cases, that it had followed a respected body of opinion in the gymnastic field which recognised the propriety of such practice.
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> Hutchinson LJ upheld the finding of liability by the trial judge, commenting that the picture would have been different if the practice had been universal. He also rejected the claim that the girl had been contributory negligent, saying what she did was the sort of thing that an enthusiastic child might do in the heat of a game of hockey. Failure to adequately supervise contact sports such as rugby may also give rise to liability. The same is true of potentially dangerous activities such as swimming. However, there are limits to what can be expected of a school.
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> In Chittock v Woodbridge School [2002] EWCA Civ 195 it was held that issuing a reprimand to a school student who had skied off piste contrary to instructions was within the reasonable range of responses for the teacher to have adopted. Failure to prevent the student skiing or requiring him to ski subject to supervision did not amount to negligence. The school was not liable for a subsequent injury to the student caused by his careless skiing. In any case, supervision would not have prevented the second accident. The Court of Appeal has held that a school's responsibility to its pupils does not extend to taking out insurance on their behalf against sporting injuries, nor to advising their parents to take out such insurance. Van Oppen v Trustees of the Bedford Charity [1991] WLR 235 where facilities or activities are offered to adults, a school may expect foresight of risk to be shown Comer v St Patrick's RC School (Unreported) 1997."

[9] I was also referred to the case of Glennie v University Court of the University of Aberdeen [2013] CSOH 71 where the plaintiff slipped on an astroturf tennis court which he claimed had excessive moss. In that case the plaintiff did not recover from the defendant and in particular the court noted:

> "The mere fact that the pursuer slipped does not indicate that there was anything untoward about the surface of

> the court. Nor does it indicate that there must have been moss on the court where he fell. In order to prove his case he would have to establish that he slipped on a patch of moss which was of a size and density such as to cause it to pose a danger. He has not established that there was moss in the area where he fell, still less that he slipped on it.
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> …
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> Accidents do happen without fault on the part of the occupiers of a tennis court. However, if they came to believe that there must have something about the court which made the pursuer slip and break his ankle and if they then observed moss around the edges of the court, they may well have come to believe that it was moss of the extent and density which caused the fall."

[10] It is of course important to note the particular factual circumstances surrounding all of these cases. This case involves an activity of relay racing which was conducted during a PE lesson. The relay racing involved the use of what are generically called reversa boards. These are boards placed at either end of a gym hall which allow a pupil to turn as part of the race. It was common case that there were 5 boards placed at each end of the hall to facilitate the teams racing. The teams comprised 6 girls each and covered the 30 pupils who were undertaking the PE lesson that day.

[11] The evidence in relation to the reversa boards was largely uncontroversial. These boards have been used in schools and athletic clubs as a means of allowing such relay races to take place. There was no issue raised about the manufacture or inherent safety of the board. The board was described as weighing approximately 13 kilograms. It is placed at an angle against the wall and floor. It follows that both surfaces should be stable. There is some rubber type material which allows the board to prop against the wall and the floor effectively forming a wedge. The pupil then approaches the board and uses the board to turn effectively by placing one foot on the board. This allows a relay race to occur.

[12] The question in this case is not one of occupier's liability because there was no issue as to the condition of the gym itself. There was also as I have said no issue as to the inherent safety or manufacture of the board. This is a question of whether or not negligence is established against the defendant. I should say there was no case made about the adequacy of warning or demonstration in relation to how to use the board. So it is clear that there was a very net point in relation to the positioning of the board. In that context I heard from the plaintiff and a witness on her behalf. I also heard from two teachers and I heard engineering evidence from both parties. I now turn to the evidence.

The Evidence

[13] The plaintiff explained that she is the eldest in a family of four. She said she was in fourth year at Holy Cross Strabane when this incident happened. She said that she was undertaking her GCSEs. The plaintiff said that there were about 30 girls in the class. They had come to the gym to undertake PE and as part of that they were involved in the relay race. She said that this involved running from one side of the gym to another and passing a baton. She said there were 5-6 in a team. The plaintiff said that she went to get the equipment which comprised the reversa board with some other girls. These were placed on each side of the gym so there were 10 or 12 boards.

[14] The plaintiff said in evidence that she had never used reversa boards before. She had been told to separate them out and lay them up against the wall. The plaintiff explained that there were two teachers with the class a Miss Farrell (now Mrs Patterson) and a Mr McCrory. The plaintiff said the teachers did not check the positioning of the boards. The plaintiff said that Mr McCrory gave a demonstration on site prior to the pupils undertaking the relay races. The plaintiff explained that Mr McCrory demonstrated the correct procedure by walking up and placing his foot on the board. The plaintiff said there had been no trial run. She said that they went straight into the races and she was second or third on the team. The plaintiff said that she had conducted the first round without incident as did her team mates. However, she said that after her approach to the board a second time she fell. She described the incident as follows.

[15] The plaintiff said she approached the board at the bottom of the wall and when she placed her foot on the board it moved to the right and then she fell. The plaintiff explained that a friend who had gone before her came to help her and notified the teachers. She said that the teachers were both up at the top corner of the hall near the doors. The plaintiff had described that she was not able to get up and then the teachers came and an ambulance was called for her. The plaintiff described in detail how she was terrified by what had happened to her and that she was in great pain. The plaintiff described her injuries and the distress this incident had caused her.

[16] Under cross-examination the plaintiff agreed that this was a new school. Ms Simpson made use of a diagram to explain the relay racing. The plaintiff agreed with that. It was put to the plaintiff that there was a warm up period prior to the relay which she did not particularly disagree with. It was also put to the plaintiff that the teachers checked the boards. The plaintiff did not accept the proposition put through Ms Simpson that the teachers did check the boards while the warm-up was taking place. The plaintiff accepted the demonstration had happened and that this was the second usage of the board when she fell. The plaintiff accepted that the board had not slipped with her when she first approached the board and she

accepted that no other board had moved or slipped. The plaintiff accepted that the board simply slipped to the right but it did not tumble over. There were certain matters of inconsistency in the medical evidence that were put to the plaintiff in particular that she had said that the board tumbled and fell to Dr O'Kane. It was also put to the plaintiff that she did not say that the board had moved initially after the accident occurred however the plaintiff said that she was distressed at that time. There was also some cross-examination which implied that the plaintiff's injury had perhaps not been as severe as she stated to professionals.

[17] A witness, Miss Lauren Hoynes, also gave evidence on behalf of the plaintiff. Miss Hoynes explained that she was part of the same year group. She was present at the PE class on the day in question. Miss Hoynes also confirmed that this was the first time the reversa board had been used by this class. She said she was nervous about it. This witness said that Mr McCrory had given a demonstration. She explained that she had had a go before the plaintiff fell. This witness said that the teachers were together at the back of the hall when all of this happened. This witness said both teachers were chatting and that she had to distract them to come and help the plaintiff.

[18] Dr Mars, Consulting Engineer, then gave evidence on behalf of the plaintiff. He explained that he had attended a joint inspection on 16 May 2014. He described the reversa board as weighing 13 kilograms. He said that there was rubber material which allowed it to connect with the wall and floor. He said there was no case being made about the suitability of the board or repairs to the board. He said quite clearly that positioning is the only case being made. Dr Mars said the important thing was that the board should be aligned tightly against the wall and floor. He made the case that there should be a demonstration. He accepted that pupils often would position the board themselves to assist teachers in PE class. When I asked about an instruction manual he said that that was not available. Dr Mars said that the board would slip if it is not at the correct angle edged between the wall and the floor. He said it could slip towards the wall or along the wall. Dr Mars said that if the boards had not been checked there could be scope for the board to move if it was not at the correct angle.

[19] It was put to this witness in cross-examination that it would be very obvious by a visual inspection if one of the boards was out of line. Dr Mars appeared to disagree with this. It was also put to this witness that the board where the accident occurred was the one that Mr McCrory had used for the demonstration. The witness was asked whether he had been able to displace the board and the witness accepted that the board was not displaced when placed correctly. In summary Dr Mars opined that this was a piece of equipment that would not be easily displaced. In conclusion in cross-examination this witness accepted that if the teachers did not check the positioning of the board there could be a fault in positioning which would lead to this happening. If the teachers did check the positioning the board there could be no fault on behalf of the defendant.

[20] The defendant then called evidence from Mrs Patterson. She said she had been at the school since September 2008. She stated that she taught a number of subjects including geography, RE and PE. She explained that indoor athletics were part of the PE curriculum and that there were set blocks of exercises. She said she had taught indoor athletics before and that she had used the reversa board in other schools. This witness said that the pupils helped take out the board from the store. She said that there would be a warm-up prior to races which involved stretches in the hall. This witness said that the boards all would have been checked, that this most likely occurred during the warm-up. She explained that she would put her foot on the board to make sure it was flush. This witness explained there were also mats put in the centre of the hall which allowed the race to progress. The witness stated that a demonstration by Mr McCrory took place. This witness suggested that there were basic drills that took place first using the boards prior to the actual relay race. The witness confirmed that the plaintiff had fallen at the board where Mr McCrory had conducted his demonstration.

[21] This witness said that she was in the centre of the room at the mats and that Mr McCrory was near the door at the far end of the room when all of this happened. She effectively said they were each looking at a half of the room. This witness disputed that she was standing chatting at the far end when the incident occurred. The witness said that she saw this plaintiff falling. She said she did not hear the board moving. She went over and gave some attention to the plaintiff and saw that she had sustained a bad knee injury. Under cross-examination the plaintiff accepted that it was standard practice to check the boards. She candidly conceded that this was some time ago and she could not clearly remember the details as it would occur as a matter of course.

[22] Mr McCrory then gave evidence and he frankly at the outset said that he had a very vague recollection of this day. He said the main memory was looking around to see the girl lying on the ground. Mr McCrory explained that he did demonstrate how to use the reversa board to the class who were sitting watching him. He said he had put his foot on the board as part of the demonstration which in itself checked the position of the board. Mr McCrory said that he did not hear the fall but that he was aware of a commotion and that he had been undertaking PE as part of his teaching in the school and that he also had undertaken many sports in his own life.

[23] Mr Wright, Consulting Engineer, gave evidence on behalf of the defendant. He referred to the reversa board as a springboard. He said that it allows you to stop. He said that this type of equipment came in to being to prevent children breaking their wrists against a wall when undertaking relay races. He explained that this board provided a resistance to the body to stop to change direction. The witness explained that an adult could carry the board or it would take two children because it is a robust piece of equipment. The witness explained that it was not difficult to position the board. He explained that it sat vertically against the wall with an angle of approximately 47 degrees. This witness said that it was very easy to see if the board was not in position. He said a little out of position would not be a worry. The

witness then referred to the various forces at issue with this equipment. He said that the board had no resistance to side movement. He said that all forces were against the wall. He said that any force would not push the board to the right or dislodge it unless it was applied sideways to the board. The witness confirmed that there was no criticism of the actual reversa board as it is commonly used in schools and athletic clubs and is a recognised piece of equipment. This witness was quite clear in saying that the accident could not have occurred in the way the plaintiff said by the board slipping to the right if the force was applied by the foot to the face of the board. He said there would have to be a sideways force to cause that.

Consideration

[24] I am deciding this case on the balance of probabilities. The defendant has a duty of care to the plaintiff. The question in this case is whether there has been any breach of duty and whether the defendant's actions have caused the injury. I bear in mind that the plaintiff was a minor at the date of the incident and that she suffered a serious injury to her knee. I pay particular regard to the age of the plaintiff. I give the plaintiff every possible allowance for this. In particular I reject the credibility arguments made by Ms Simpson in cross-examination against the plaintiff that she provided an inaccurate account to Dr O'Kane. I reject the cross-examination regarding the plaintiff's evidence of the symptoms of her injury and the effect of her injury. I also reject the argument made that the plaintiff did not complain at the time about the positioning of the board. This was a nasty injury and the plaintiff would clearly have been in shock and she was a teenager at the time.

[25] I found the plaintiff and her witness to be straightforward, open and honest. They gave evidence to the best of their recollection. However, that could never be entirely complete. It is important to remember that this incident occurred in a busy gym where 30 school girls were undertaking relay races. There would be a buzz of noise and activity. It is reasonable to assume that the girls would be talking to each other. The context of this is important. It seems to me therefore that the evidence of these two girls is not definitive regarding the checking of the boards by the school teachers. I accept the evidence that there was a warm-up. It seems to me that the plaintiff and her witness could not on any reading have been looking at the boards and at the teachers at every stage to see what they were doing.

[26] The defendant's teachers also gave evidence in a forthright manner in particular Mr McCrory who said that he had a very vague recollection of events. Mrs Patterson also was saying that she would have checked and this implies that she could not be 100% sure. However, on balance I accept that some checks were made. It is most significant to me that the accident happened at the board where the demonstration occurred. This evidence was undisputed. Mr McCrory said that he demonstrated how to use the reversa board by placing his foot on the board and there was no issue with it. In other words it was not unstable and he did not notice it out of line with the other boards. It seems to me therefore that the issue of

checking of the board lies in favour of the defendant on the basis of the evidence I heard.

[27] I am also convinced by the engineering evidence of Mr Wright that this particular injury could not have been sustained by reason of the wrongful positioning of the board. I was much more persuaded by the evidence of Mr Wright in relation to this core issue. Essentially he said that for the board to slip to the right a force would have to be applied to the side of the board rather than the face of the board. Having observed the photographs of this board, the diagrams in relation to how it would be used and having heard the evidence I am convinced that Mr Wright is correct in this approach and whilst the plaintiff may have thought that the board moved to the right in fact the board could not have moved in that way given the forces needed to move it.

[28] I have considered the medical evidence in this case and in particular Mr Simpson's up-to-date report where he refers to this being a "bumper" type fracture. It is slightly at odds to describe this as a twisting injury albeit it happened whenever the plaintiff turned back from the board to run to the middle of the room. This type of fracture occurred to the proximal lateral tibia. The phrase "bumper fracture" has been used to describe fractures sustained by reason of a car bumper hitting the lateral aspect of the knee. However, it seems clear that a direct blow to the lower limb resulting in a strain of the knee causes this type of fracture. That seems to me to be entirely consistent with a person turning around overbalancing and falling. The force of the fall whereby the person hits the floor seems to me properly to have caused this fracture.

[29] There was no evidence that this board was defective. There was no evidence that it was badly repaired. There was no evidence that the class had not been reasonably supervised. There was no evidence that there was inadequate warning. It was accepted that a demonstration had been given. The only issue was the positioning of the board and on the basis of the evidence, particularly the engineering evidence I cannot find that there is any liability attaching to the defendant in relation to that.

Conclusion

[30] This was clearly an unfortunate accident. However, I cannot attribute liability to the defendant for the reasons I have given. I therefore dismiss the case.