2014 JMSC Civ 202

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007HCV 02341

BETWEEN	**BEVERLY STEWART**	**CLAIMANT**
AND	**CABLE & WIRELESS JAMAICA**	**1ST DEFENDANT**
AND	**YADAR KINDERGARTEN PREPARATORY SCHOOL**	**2ND DEFENDANT**
AND	**VICTOR CAMPBELL**	**3RD DEFENDANT**
AND	**MICHAEL HAMILTON**	**4TH DEFENDANT**
AND	**SHAWN FALCONER**	**5TH DEFENDANT**

Mrs. Roxann Mars & Mr. Michael Howell instructed by Knight, Junor & Samuels for the claimant

Mrs. Gloria E. Langrin instructed by Mrs. Joan Parris-Woodstock for the second defendant

Heard: October 7, 2013 and December 16, 2014

NEGLIGENCE- OCCUPIER'S LIABILITY-PERSONAL INJURY

SIMMONS, J.

[1] On the 15th April 2003, the claimant was injured whilst participating in the parents' race at the sports day for the Yadar Kindergarten Preparatory

School. Her grandchild was a student at the said school. The event was held at premises which are owned by the 1st defendant (the premises).

[2] The medical report of Dr. Kenneth Vaughn indicates that her right knee joint was dislocated which resulted in injury to the popliteal artery which supplies blood to the leg. This led to multiple ligamentous injuries. The claimant also sustained injury to the common peroneal nerve which supplies the muscles of the leg. She was assessed as having a 32% disability of the whole person and was likely to develop arthritis.

The claim

[3] On the 5th June 2007, the claimant filed an action in which it was alleged that there was a hole on the running track and that she fell into the said hole and was injured. The pleadings state that she was injured as a result of the first and second defendants' negligence and/or breach of statutory duty. The first defendant is alleged to have rented the premises from the third – fifth defendants.

[4] The action was discontinued against the first defendant in September 2012. The other defendants were never served with the pleadings. As such the action is now being pursued against the second defendant.

[5] It is also alleged that the second defendant as an occupier of the premises breached the duty of care owed to the claimant under the ***Occupier's Liability Act*** (***the Act***), by failing to ensure that there were no holes on the premises.

[6] The particulars of negligence are quite extensive and include the following:-

i.) Failing to maintain the premises so as to make it safe for use on the sports day;

ii.) Failing to ensure that the premises were suitable for use and in particular that it was free of holes;

iii.) Failing to take any or adequate precautions to ensure the safety of the users of the premises and in particular the claimant.

The Defence

[7] The second defendant has denied the particulars of negligence and has stated that the claimant as a grandparent was not invited to the sports day. It was also stated that it was unaware of the claimant's presence until she fell.

[8] The Defence also states that the race in which the claimant allegedly participated was one for the mothers of the students. It was denied that either the Principal Mrs. Barbara Reid or the Secretary Mrs. Sherell Charles had invited the claimant to participate in the race. It was also stated that the first defendant's coach Mr. Andrew Taylor had tried to prevent the claimant from running.

[9] The particulars of negligence and/or breach of statutory duty were denied. The second defendant also denied that there was any hole on the premises.

Undisputed facts

[10] There is no dispute that the claimant was on the premises and took part in the parents' race. It is also not disputed that she fell and was injured.

The evidence

[11] Miss Stewart in her evidence stated that on the day in question she was invited to participate in the parents' race at the sports day hosted by the second defendant. Her granddaughter was a student at the school. She says that she was persuaded to run and removed her shoes to run barefooted. There were six persons in the race which was started by the school's coach Mr. Taylor. She said that as soon as the race started her foot fell into a hole in the ground which was covered by grass. She fell and sustained injury to her right knee.

[12] In cross examination, she stated that she had no children who were attending the school but had a granddaughter who was a student at the institution. The claimant also stated that she had not been invited to run in a grandparents' race and that the race in which she had participated was one for parents. She did however indicate that Miss Johnson, a teacher at the institution had asked her to run. The claimant also stated that whilst the school's coach Mr. Taylor did not ask her to run he did not tell her not to do so. This coincides with Mr. Taylor's evidence that he invited the mothers to participate in the race. They are however at variance as to whether he told the claimant that she should not run.

[13] The claimant also indicated that the other parents in the race were behind her. She denied that she tripped and fell.

[14] The claimant's daughter, Donna Stewart also gave evidence that she could not participate in the parent's race because she had her baby with her. Her mother decided to run and she observed that shortly after the race started her mother fell.

[15] Her evidence is that Mr. Taylor assisted her mother and took her to get medical attention.

[16] Miss Joan Samuels who is employed to the second defendant as a janitor gave evidence that there were no volunteers from yellow house for the parents' race. She says that she took Miss Johnson over to where the claimant was sitting and Miss Johnson spoke to the claimant who she said was hesitant to run. The witness stated that the claimant's daughter encouraged her to run as she did not want her granddaughter to feel bad.

[17] She saw the claimant remove her shoes and start the race. Soon after she noticed that she had fallen.

[18] In cross examination she said that she was not authorized by the coach to do anything in respect of the races.

[19] The defendant called three witnesses, Mr. Andrew Taylor, Miss Cassandra Richards and Miss Charmaine Brown.

[20] Mr. Andrew Taylor stated that on the day in question, he spoke to the claimant who indicated that she wanted to participate in the race. He said that he told her that she should not run as the race was for parents and not grandparents. He called for the parents to go to the starting line and then walked to the finish line. Mr. Green, his assistant started the race.

[21] His evidence is that about ten metres into the race he saw someone fall and as a result proceeded to that area where he saw the claimant. His evidence as to the sequence of events was not challenged in cross-examination. He observed that she was injured and took her to seek medical attention. Mr. Taylor indicated that when he walked over to the spot where the claimant had fallen, he did not see any holes.

[22] He also gave evidence that he had walked the grounds prior to the race and had not observed any holes. He also stated that he had marked the field and had inspected it to ensure that it was level and safe for the races. Mr. Taylor also indicated that the race in which the claimant had been participating was the last one for the day and there had been no prior incidents of persons falling. That evidence was not challenged.

[23] Mr. Taylor stated that Miss Samuels who was a member of the ancillary staff had not been authorized to invite anyone to participate in the race.

[24] In cross examination, he said that he was assisted by Mr. Green with the sport's programme. The races were scheduled to be run over a period of two days with those involving the older children on the second day. The incident took place on the second day.

[25] His evidence was that he prepared the field along with Mr. Green. This preparation was done over a period of fourteen days. Mr. Taylor indicated that he examined the field that morning at about 6:30 a.m. as it was used by other persons in the evenings to play football. He marked the field for the one hundred metres race and there were six lanes.

[26] Mr. Taylor also stated that he had met the claimant for the first time when persons were being asked to run in the parents' race. His evidence is that the claimant had indicated that she wanted to participate. He also said that to the best of his knowledge the persons who participated in the race were parents. He indicated that Mr. Green was the starter for the parents' race and it was only after she fell that he realized that the claimant had entered. It was also at that time that he realized who she was.

[27] He went over to where the claimant had fallen and assisted her to get medical attention.

[28] In re-examination he stated that it was when he invited mothers to come forward to participate in the race that he saw the claimant. His evidence is that he told her that it was for mothers and not grandmothers and that she should not run.

[29] Miss Cassandra Richards in her evidence stated that she is a secretary employed to the second defendant. She indicated that as far as she was aware there was no invitation for grandparents to participate in final race which was a Parents' race. She also stated that after the claimant fell she walked around the immediate area and no holes were seen.

[30] She was not cross examined.

[31] Miss Charmaine Brown's evidence is that she did not witness the race but went to the field to find out who had fallen. She also stated that in 2011 she saw the claimant whilst she was at a bus stop and observed that she was not accompanied and did not carry a cane or any other implement to assist her in walking.

[32] She was not cross examined.

Claimant's Submissions

[33] Mr. Howell submitted that the second defendant was in breach of the common duty of care owed to the claimant as a visitor to the premises as set out in **section 3** of the ***Occupier's Liability Act*** (***the Act***). He stated that the said second defendant caused or permitted the claimant to be exposed to the danger posed by a hole on the running track. He also submitted that it had a duty to ensure that the premises were safe and that the existence of the hole was evidence of its negligence.

[34] He argued that it was reasonably foreseeable that where there is a hole on the running track someone could fall into the said hole and be seriously injured. He asked the court to find that Mr. Taylor, the school's coach, allowed the claimant to participate in the parents' race on the day in question. He also directed the court's attention to Mr. Taylor's evidence that he was assisted by Mr. Green in the preparation of the field and that Mr. Green also acted as the starter for the parents' race. He highlighted the fact that although Mr. Green was not employed by the second defendant he played an active role at its sports day. This he said was evidence from which it could be inferred that the second defendant permitted the claimant to run in the parents' race.

[35] Counsel also raised the issue of whether Mr. Taylor's evidence that the claimant was a grandmother could be accepted in light of his testimony that he did not know her prior to the commencement of the race. In this regard he referred to Mr. Taylor's evidence in cross examination that it was after the claimant fell that he realized who she was.

[36] Where Mr. Taylor's evidence pertaining to the existence of the hole is concerned, his evidence that he saw no hole should be rejected. He argued that when the claimant fell, Mr. Taylor was at the finish line and would not have been in a position to identify the exact spot. In addition, he gave evidence that a crowd had gathered at the spot. He therefore asked the court to disregard that evidence.

Second Defendant's Submissions

[37] Mrs. Langrin submitted that the burden of proof was on the claimant to prove that the second defendant owed a duty of care to her, that it breached that duty and that she was injured and sustained loss as a consequence of that breach.

[38] She asked the court to accept Mr. Taylor's evidence that he and his assistant Mr. Green inspected the field at about 6:30 a.m. on the day in question and that there were no holes. She also emphasized the point that the parents' race was the sixth and last race of the day and there had been no complaints from any of the other participants in the preceding races.

[39] Mrs. Langrin argued that this proved on a balance of probabilities that the field was safe for the use of all persons to whom the second defendant owed a duty of care. The persons in that category were said to be the students and their parents. She argued that the claimant, who was a grandmother, did not fall within that category as she was a visitor or spectator.

[40] It was also submitted that the claimant accepted any risk associated with her participation in the race as she was not invited by the coach to run. Counsel asked the court to find that Mr. Taylor is a witness of truth and accept his evidence that he told the claimant that it was a parents' race and

she should not run. She asked the court to reject the claimant's evidence that she fell into a hole on the running track and injured herself.

[41] Counsel also directed the court's attention to Mr. Taylor's evidence that shortly after the race began he observed someone fall, get up and attempt to resume running only to fall once more. He went to the area and observed that it was the claimant.

[42] It was further submitted that chain of events as described by Mr. Taylor is more indicative of a situation in which the claimant fell as against her stepping into a hole and then falling. She said that the actions of the claimant are "…more demonstrative …of the ….determination of an elderly, untrained female runner, to run despite obvious infirmity of her legs".

Liability

[43] At common law, an occupier of premises owes a duty of care to ensure that all visitors are reasonably safe whilst on his premises. **Section 3** of ***the Act*** states:-

> *"3.-(1) An occupier of premises owes the same duty (in this Act referred to as the "common duty of care") to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor by agreement or otherwise.*
>
> *(2) The common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.*

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

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

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

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

(5) Where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe."

[44] In ***Marie Anatra v. Ciboney Hotel Limited and Ciboney Ocho Rios Limited,*** Suit no. C.L. 1997/A 196 (delivered on the 31st January, 2001) Reckord, J. stated:-

"The plaintiff has based her claim under the Occupiers Liability Act and in negligence.

Under the Act, the common duty of care imposed by section 3(2), 'is the duty to take such care as in all the

circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted to be there'

This section has placed a burden of proof on the defendant.

Long before the statutory provisions came into effect McBride J in ***MacLean v. Segar*** *(1917) 2 K.B. 325 said at page 329:*

'The occupier of premises to which he has invited the guest is bound, as a matter of common law duty, to take reasonable care to prevent damage to the guest for unusual danger which the occupier knows or ought to know of.'

Once the duty of care is imposed, the question whether the defendants failed in that duty becomes a question of fact in all the circumstances."

[45] In this matter no issue has been raised as to whether the second defendant was an occupier of the premises. There is also no dispute that the claimant was legitimately on the premises. The parties are however at variance as to whether she was permitted and/or invited to participate in the parents' race. The issue of whether the field was properly prepared and inspected is also a live one.

[46] Where the issue of negligence is concerned, it must be established on a balance of probabilities that:

i. The first defendant had a duty of care towards the claimant;

ii. It breached that duty by its negligent preparation of the field and/or its failure to properly inspect the field on the day of the race;

iii. The claimant fell into a hole and sustained injury as a result of that breach.

It must however be noted that in order for the claimant to succeed such injury should have been reasonably foreseeable.

[47] The above principle was expressed by Lord Atkin in ***Donoghue v. Stevenson*** [1932] A.C. 562, in the following terms:-

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

[48] The determination of liability in this matter is a question of fact and rests on the court's assessment of the credibility of the evidence of the witnesses. The main facts in dispute are: (i) whether the claimant was permitted to participate in the parents' race; (ii) whether the second defendant took sufficient steps to ensure the safety of the claimant; (iii) whether there was a hole on the running track.

Was the claimant permitted to participate in the parents' race?

[49] Having assessed the evidence and in particular, that of the claimant and Mr. Taylor I am of the view that claimant was permitted to participate in

the race. I have especially noted Mr. Taylor's evidence that his invitation was directed to the mothers. He said that the claimant indicated to him that she wanted to participate and he told her that she should not as she was a grandmother. However, he also said that said it was after the incident that he realized who she was and that she had participated in the race. Even if he told her not to run, was this communicated to Mr. Green who was the starter? He was the one in charge. I am not convinced that he told the claimant that she was not to participate in the race and/or that he took any or sufficient steps to ensure that she complied with his directions.

Did the second defendant take reasonable steps to ensure the safety of the claimant?

[50] Having found that the claimant was permitted or allowed to participate in the race it follows that the second defendant owed a duty of care to her. The claimant has asserted that she fell into a hole whilst running on the track. She has ascribed its presence to the second defendant's negligence.

[51] Mr. Taylor gave evidence pertaining to the preparation of the track. He said that he spent fourteen days preparing the track and had inspected it at about 6:30 a.m. on the day of the incident. This was done because other persons used the field in the evenings to play football. He also stated that it was he who had marked the field for the one hundred metres race. No evidence was been presented by the claimant to show that those measures were inadequate.

[52] Having assessed Mr. Taylor's evidence and observed his demeanor I find his evidence to be credible in respect of this issue. I therefore accept his evidence and find that the claimant has failed to prove that the second

defendant was negligent in its preparation or maintenance of the track. I am satisfied that the second defendant took reasonable steps to ensure the claimant's safety.

Has the claimant proved that there was a hole on the running track?

[53] He who avers must prove. Where the evidence concerning the existence of a hole on the track is concerned, the parties are poles apart. Simply put, the claimant said that there was a hole and that she fell and injured herself after stepping into it. At the time it appears that she was leading the field as her evidence is that the other parents were behind her. The second defendant through Mr. Taylor has said that there was no hole and that the grounds were adequately prepared prior to the staging of the sports day. He also indicated that other persons used the field in the evenings and that he went over to the spot where the claimant fell and did not see any hole. Miss Cassandra Richards' evidence that she examined the area and did not see any holes was not challenged.

[54] I have also borne in mind that the event in which the claimant was participating was the last race for the day and that the same running track had been used the day before by the younger children, without incident. On a balance of probabilities I find that the claimant has failed to prove that there was on hole on the track.

Conclusion

[55] The onus is on the claimant to must prove the case against the second defendant. In order to establish liability under ***the Act*** and in negligence. It must be proved that the claimant was invited to be on the premises and that she was invited or permitted to participate in the parents'

race. There is no dispute that she was invited to be on the premises and having found that she was permitted to participate in the said race it is my view that the second defendant had a duty to ensure that she was reasonably safe whilst doing so.

[56] I do not agree that the second defendant breached the duty of care which it owed to the claimant. Its evidence in relation to the preparation of the field and its inspection has been largely unchallenged. Where the evidence of the existence of this hole is concerned, Mr. Taylor has stated that he inspected the field and did not see any holes. I have also noted that the claimant was injured in the sixth and last race of the second day of the event.

[57] In the circumstances, judgment is therefore awarded to the second defendant with costs to be taxed if not agreed.