THE HIGH COURT

[2023] IEHC 367

[Record No. 2019 4864 P]

BETWEEN

KELVIN O'BRIEN

PLAINTIFF

AND

MALCOLM BYRNE and WATERFORD AND WEXFORD EDUCATION AND TRAINING BOARD

DEFENDANT

JUDGMENT of Ms Justice Bolger delivered on the 16th day of June 2023

1. The plaintiff is currently 24 years old and is employed as a care assistant. This claim arises from the manner in which he claims his PE class was run on 29 January 2015 when he was a fifteen year old, third year student in the defendant's school in Kilmuckridge, County Wexford.

2. The plaintiff was engaged in a PE class with 23 other students in what was described by the plaintiff and the defendant as a relay race activity. He fell at the wall of the gym hall and sustained a fracture to his left elbow. The plaintiff claims he also suffered a loss of consciousness, but this is not accepted by the defendant. The plaintiff and the defendant both differ fundamentally in their accounts of what the activity involved and how the hall was set up by the PE teacher, Colin Breen. It is clear from the evidence, including the admissible expert evidence, that the plaintiff's recollection of the arrangement Mr. Breen put in place was unsafe, whereas the defendant's recollection of it was safe. Therefore, the court must decide which version it prefers.

The Plaintiff's Version of Events

3. The plaintiff says that the activity involved each student selecting their own opponent and having a sprint race against them along a route with the start and finish point at the end wall of the hall, with a turning point for each person marked by two cones placed at the midpoint of the hall. Each student was required to turn around the cone towards the other student and run as fast as they could towards the wall. The plaintiff was racing against his friend, D, and when he turned at his cone, the plaintiff bumped into D which caused his glasses to fall off, but he caught them in his hands and proceeded to run as fast as he could in an attempt to catch up with D. Approximately 1.5 to 2 feet away from the wall, he tumbled and stumbled. He remembered hitting the wall and then waking up. His teacher, Mr. Breen, came over to him and implemented a concussion protocol. The plaintiff had no symptoms of concussion and no pain at that time. He sat out the remainder of the class, attended his next class and was later collected from school by a member of his family. Later that evening, he began to experience severe pain in his left elbow and was brought to the Emergency Department of Wexford Hospital and, from there, was transferred to Waterford Hospital where he remained as an inpatient for three days and underwent two surgeries for a fracture of his left elbow. He returned to school very shortly afterwards as he was due to sit his mock Junior Certificate. Mr. Breen enquired about his arm being in a sling and the plaintiff, for the first time, told him that he had sustained an injury during the PE class the previous week.

4. The plaintiff's version of the class was corroborated by his former classmate Cameron McCarthy, who had a very clear recollection of how what he also called a relay race activity was organised by Mr Breen and of the plaintiff's accident. He described the plaintiff colliding with D, continuing to run and then tripping and hitting the wall head first. Mr. McCarthy said he believes the plaintiff's elbow hit the floor but that he could not fully see it as the plaintiff's back blocked his view. He said the plaintiff was unconscious for 20 to 30 seconds. Mr McCarthy only became aware of that loss of consciousness when the plaintiff told him of that some weeks later. The first time since then that Mr. McCarthy was asked to recall what happened was in January 2023.

The Defendant's Version of Events

5. Mr. Breen also called the activity a relay race but described a very different type of activity. He divided the class of 24 students into three teams of eight students, following warm-up exercises. He laid out a sprint route out over the middle two-thirds of the hall with a 15-metre run and three cones marking a start/end point and three more cones marking a turn point for each team to allow a total run for each student of 30 metres. Each of the three team members ran to their cone, turned around it away from their opposing team members and ran back to the start/end cone. The start/end cones were placed some metres from the end wall so as to allow a safe distance between the endpoint and the wall. This was, in effect, a single race with each team competing against the other two teams and with one winning team rather than twelve individual winning students. As the running student approached the end point marked by a cone on the floor of the hall, their teammate was ready on one knee to run the next part of the race when they were tagged (also referred to as released).

6. Mr. Breen described the plaintiff sprinting to his cone and losing his balance before the turn point. He disputed that the plaintiff ever collided with another student. The plaintiff stumbled but stayed on his feet for some metres and finally fell at the wall and made contact low down on the wall. Mr. Breen suggested that the plaintiff may have tripped over himself. He described the way the plaintiff fell as vivid and unique and drew an analogy with a sprinter going over the end line in a competitive race. Mr Breen immediately went over to the plaintiff and implemented the concussion protocol but was satisfied that the plaintiff had no complaints of injury or pain. He believes he made a precautionary phone call to the plaintiff's home, but it was not until he saw the plaintiff in a sling some days later that he was made aware of the plaintiff having sustained an injury during the class. At that time Mr. Breen filled out an *"Accident/Incident Record Form"*. He did not request input from the plaintiff or anybody else in completing that form. He was not asked about the incident until some years later when the plaintiff instituted the within proceedings.

7. Mr. Breen disputed the plaintiff's version of how the relay race was arranged and the route he set out and said it would make no sense to have a student sprint to the wall,

because the end point must be a reasonable distance from the wall. Mr. Breen did not recall giving a specific instruction to the students not to run into the wall, but said they would have known that the end point was marked by a cone which he had placed a distance from the wall.

Expert evidence

8. Evidence was given by engineers and PE experts for the plaintiff and the defendant. It quickly became apparent that all of the experts agreed on the safety and appropriateness of the arrangement the defendant says Mr. Breen put in place and the negligence and foreseeable risk in the arrangement the plaintiff recalls. However, the plaintiff was highly critical of the approach taken and evidence given by the defendant's PE expert Dr. Moles and contended, firstly, that her evidence should be excluded or given no weight and secondly that her approach meant Mr. Breen's credibility was to be questioned. Dr. Moles strongly endorsed Mr. Breen's approach as a PE teacher and commended what she referred to as his organisational and efficient management. Whilst she said he had shown her where he had placed the cones for the class on 29 January 2015, she did not record the layout or the distance between the cones and the wall and could not recall it during her evidence. Neither could she recall what Mr. Breen had told her about the plaintiff negotiating his way around the cone. Nevertheless, she was able to conclude definitively that the distance of the cones from the wall was safe and appropriate. Her report does record a distance of approximately 10 feet that the plaintiff staggered over after he tripped, which is considerably shorter than what Mr. Breen described in his evidence. Dr. Moles questioned the plaintiff's claim that he had lost consciousness. She accepted on cross-examination that she had strayed outside her professional competence in making those comments and the defendant's counsel wisely confirmed that he would not support that.

9. Dr. Moles also expressed sentiments in her report and her cover letter to the defendant's solicitor, which can only be viewed as positive support for the defendant's position and a hope that the plaintiff would not succeed in this litigation. Such comments have no place in an expert's report and their presence must question the expert's understanding of their role and their duty to the court, duties that Dr. Moles did not seem

to understand. I found it particularly surprising that she explained the absence of the declaration of independence in her report as something she did not know was required. This is in spite of her having apparently acted as an expert witness in many cases.

10. In *Duffy v. Magee & ors* [2022] IECA 254, Noonan J. for the Court of Appeal was highly critical of steps taken by the expert witness, including giving a medical opinion clearly outside his competence which the court found was *"advanced for no obvious purpose other than attempting, again, improperly to undermine the plaintiff's case"* (at para. 102(vii)). Noonan J. concluded (at para. 103) that any one of the criticisms he had identified, including that cited above, *"would tend to strongly suggest an absence of objectivity and impartiality on the part of"* the expert, whom he described as having *"impermissibly donned the mantle of a partisan advocate in his efforts to discredit the claims of the plaintiff's"*. He held that the expert's evidence had been correctly excluded in its entirety by the trial judge. For similar reasons, I have decided I should not give any weight to Dr. Moles**'** evidence.

11. However, even without that evidence, there is essentially no dispute between the parties as to the safety of the defendant's version of how the exercise was organised and the foreseeable risk in the plaintiff's version.

12. Counsel for plaintiff submitted that as well as excluding Dr. Moles' evidence, I should also find that Mr. Breen's credibility is somehow tainted by Dr. Moles' partial approach. I do not agree. I found Mr. Breen to be a reliable and credible witness who gave evidence of what he recalled having taken place over eight years ago as best he could and in a consistent manner. He conceded matters of which he had no clear recollection, including his conversation with Dr. Moles**.** Unlike Dr. Moles, Mr. Breen would have had no reason to make a note of that conversation and, therefore, had to rely solely on his recollection. To the extent that Dr. Moles' account of the distance she says Mr. Breen told her the plaintiff had stumbled before falling is inconsistent with Mr. Breen's evidence, I find that to be attributable to her unreliable gathering of the facts rather than to an inconsistency or lack of credibility on the part of Mr. Breen.

Discussion

13. The plaintiff first notified the defendant of his claim by letter dated 26 June 2018. He lodged an application to PIAB on 6 September 2018. As the plaintiff was a minor at the time of his injury, his claim was lodged within time. Nevertheless, there was a considerable passage of time before the defendant was made aware of the plaintiff's belief that his injuries were caused by defendant's negligence. It is, therefore, important for the court to pay particular attention to the limited number of documents that were generated close to the time when the accident took place, which contain some description of what is said to have occurred.

14. The first of those documents is the Accident or Incident Record Form completed by Mr. Breen on 2 February 2015, the day on which the plaintiff first informed him that he had sustained an injury during the class some four days previously. This is the only contemporaneous or close to contemporaneous account of the incident authored by a witness to it, that is available to the court. Mr. Breen did not involve the plaintiff or anyone else in completing the form and it is, therefore, solely his account of what took place. He described the accident as having been caused:-

> *"Tripping whilst running and after stumbling to stay on feet made contact with the gym wall."*

He described the exercise as sprint relays and identified a distance of 10 to 15 metres over which he says the plaintiff stumbled before falling and colliding with the gym wall. His account, including the steps he took immediately after the accident, is consistent with the evidence he gave to this Court.

15. There is also a medical record from the plaintiff's attendance at the Accident and Emergency Department on the evening of the accident which gave the following description of what happened:-

> *"He was doing fitness tests and was running and slipped and lost the footing and hit the wall…"*

In relation to the head injury, the note records a loss of consciousness *"for a few seconds"* and also records the presence of a *"small abrasion at left side of the forehead"*. I find that

account corroborates the plaintiff's claim that he suffered a head injury and a loss of consciousness for a few seconds. Such a short period of loss of consequence would not have been evident to Mr. Breen. Mr. McCarthy, who was present in the class and saw the accident occur, remembered the plaintiff telling him some weeks later that he had lost consciousness. By then, the period of time of unconsciousness had gone from the few seconds as recorded to the A&E medical team to a far longer period of 20 to 30 seconds. I do not find Mr McCarthy's evidence about the length of time the plaintiff had lost consciousness, which seems to have been second-hand from the plaintiff, to be reliable. It was also inconsistent with the plaintiff's own account which was that he could only recall hitting the wall and then waking up and he gave no evidence of the period of time he had been unconscious, contrary to what Mr. McCarthy said the plaintiff told him some weeks after the accident.

16. Mr. McCarthy did not suggest that he was aware at the time of the accident that the plaintiff had sustained an injury either to his head or his elbow. He confirmed that the first time he had been asked to provide his recollection of the accident was in January 2023, some eight years later. In spite of that lapse of time with no intervening discussion of what took place, other than the plaintiff's account of the period of time for which he lost consciousness some weeks after the accident, Mr. McCarthy gave a remarkably clear account of what he said had occurred, including the location of the bench he said he was sitting on while waiting for his turn to participate in the individual races that were taking place.

17. One point about what took place during the PE class that was common case between all three witnesses who were present (namely the plaintiff, Mr. McCarthy and Mr. Breen) was their description of the activity as a relay race. However, it was only Mr. Breen's description of the exercise, i.e. three teams competing, with each team member running a designated route until they were released or tagged by their next teammate, that actually describes a relay race. The exercise described by the plaintiff and Mr. McCarthy compromised of twelve separate single races between two students competing only against each other. There is no relay element to that exercise.

18. It was also common case between the plaintiff's PE expert, Dr. Lloyd, and both engineers, that the exercise and layout of the hall described by the plaintiff made no sense both in terms of safety and the optimum use of time and space available to Mr Breen.

19. In summary the plaintiff's version of events includes the following elements:-

(i) The exercise is identified as a relay race but the what the plaintiff and Mr McCarthy described is an entirely different type of race;

(ii) The exercise as described was unsafe and a poor use of time and space by the teacher;

(iii) The only contemporaneous or close to contemporaneous version of the incident recording the plaintiff's account at the time (the A&E record) refers to the plaintiff having *"lost the footing"*;

(iv) The account given by Mr. McCarthy is based on his recollection of an accident that occurred eight years previously. The period of time Mr. McCarthy says the plaintiff was unconscious, based on what the plaintiff told him some weeks later, is inaccurate.

20. The defendant's version includes the following elements:-

(i) The exercise was a relay race that made maximum use of the time and space available to Mr Breen;

(ii) The layout of the hall was safe and made sense;

(iii) The Accident or Incident Record Form was properly filled as soon as Mr. Breen was made aware that the plaintiff had suffered an injury. The form only requires completion where there is an injured party and not simply upon the occurrence of an incident.

Decision

21. There have been a number of decisions involving claims of negligence and breach of duty in the management of a PE class, most of which are fact specific. A prevalent theme is the acknowledgement that injuries do occur when one is participating in a sporting activity (Barr J. in *Dunne v. St Paul's* [2019] IEHC 22 at para. 59) and that risk is inherent in physical activity, even one that is suitably and reasonably safe (Feeney J. at p. 8 in *Carolan v. St. Ciaran's School* [2006] IEHC 416). The question is whether the teacher organised the activity in a safe way so as to ensure the discharge of the duty of care owed to the student. Where an activity is adapted, this must be done so that it can be engaged in safely, including the requirement to set out markers at a safe distance from walls or other obstructions (as per Budd J. in *Kane v. Kennedy* (unreported decision of the High Court, 25 March 1999).

22. If the exercise here was organised as recalled by the plaintiff, then the defendant is liable. If it was organised as recalled by the defendant, it is not.

23. In all the circumstances, I prefer the reliability of the defendant's version and in particular the recollection of Mr. Breen. His explanation for the layout of the hall made sense, not just in terms of reducing or even removing the risk of a person colliding into the wall, but also in the optimum use of the time and space available to a teacher responsible for ensuring that 24 students engaged in physical activity for the time allocated by the timetable. I can think of no reason, bar sheer incompetence, why a PE teacher would set up a running route that involved a real and entirely foreseeable risk of running at speed into a wall, but also a class plan that only involved one-twelfth of the class engaging in twelve separate races at any one time, for which each student chose an opponent, as versus the team activity described by Mr. Breen which involved Mr. Breen assigning three groups of eight students, each engaging in a single class race and then resuming their involvement as soon as their fellow teammates had concluded their turn. Mr. Breen's version is clearly the faster paced and more engaging and entertaining activity for the students, with much less non active time spent by students selected their opponent and waiting for eleven other individual races to take place before they got their turn to compete.

24. Mr. Breen said the plaintiff approached the turn cone, stumbled over a distance in trying to keep his balance, tripped and fell into the wall. Mr. Breen was consistent in that

version of what he recalled and explained how the unique and vivid nature of the incident stayed in his memory. He recorded his recollection four days after the incident took place. That is consistent with the record of the A&E medical team, which must have been based on the plaintiff's account to them on the evening of the accident, of how he had sustained his injuries. By the time the plaintiff discussed the accident with Mr. McCarthy some weeks later, the period of loss of consciousness recalled by the plaintiff had apparently increased to 20 to 30 seconds. By the time he signed his PIAB over three years later on 6 September 2018, his description of the accident contained no reference to losing his footing and identified, for the first time, the presence of two relay teams running very close together.

25. The plaintiff claims that Mr. Breen was in breach of his duty of care in failing to expressly instruct him not to run into the wall. Mr. Breen did not claim to have provided any such specific instruction, but that he did explain where the students were to start their participation in the race, where they were to turn and where to then re-join the line. Mr. Breen was not required to furnish an express instruction to the fifteen year old plaintiff not to run into the wall, which was a distance from the designated start/end cone, in circumstances where I have found the layout of the running route was as described by Mr. Breen. Had the cones been as close to the wall as the plaintiff recalls, it may well have been prudent for Mr. Breen to have told him not to run into the wall but, with or without that instruction, such a layout without a run-off area, would have been unsafe and a foreseeable risk to the plaintiff.

Conclusions

26. I am satisfied that plaintiff has not established negligence or any actionable lack of care by the defendant in the organisation of the PE class on 29 January 2015. I, therefore, dismiss his claim.

Counsel for the plaintiff, Elaine Morgan SC, Philip Sheahan SC, William Fitzgerald BL.

Counsel for the defendant, Michael Counihan SC, Mark Flynn BL.