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Judgment: approved by the Court for handing down | *Delivered:* **8/6/2016**

(subject to editorial corrections)*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

MEGAN MURRAY

Plaintiff:

-and-

MARK McCULLOUGH as Nominee on Behalf of the Trustees and on Behalf of the Board of Governors of RAINEY ENDOWED SCHOOL

Defendants:

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STEPHENS J

Introduction

[1] The plaintiff, Megan Murray, then 15, now 22, (DOB 29 July 1993) sustained serious dental injuries, together with a cut to her upper lip, on 6 December 2008, when she was struck with a hockey stick whilst playing a first eleven match for her school, Rainey Endowed, against Friends School. The plaintiff was not wearing a mouth guard. The medical evidence, which I accept, is that if the plaintiff had worn a mouth guard, it would have prevented the damage to her teeth, though it would not have prevented the cut to her upper lip which, on the balance of probabilities, would have occurred, but may have been less severe. The plaintiff has brought this action against Mark McCullough representing the trustees of Rainey Endowed ("the defendants"). The plaintiff's case is that:-

(a) The wearing of mouth guards ought to have been mandatory and if it had been that she would have worn one.

(b) That she was not warned sufficiently as to the risks of not wearing a mouth guard, so that her decision not to wear one was not an informed

decision. That, if sufficient warnings had been given to her she would have worn one.

(c) That her parents were not warned sufficiently as to the risks of not wearing a mouth guard, so that they were deprived of the opportunity of persuading the plaintiff to wear a mouth guard. That if the plaintiff's parents had been provided with that opportunity they would have availed of it, so that the plaintiff would have been persuaded by them to wear a mouth guard.

[2] The defendants accept that they owed a duty of care to the plaintiff. It is the defendant's case that they fulfilled the appropriate standard of care. The defendants accept that they did not require mouth guards to be used on a compulsory basis but rather they assert that they recommended to the plaintiff and to her parents the use of mouth guards. The defendants say that they fulfilled their obligation to take reasonable care in all the circumstances by adopting that course of action and by giving sufficient warnings to the plaintiff and to her parents. In support of the proposition that this was sufficient to fulfil their obligations the defendants call in aid the guidelines published by the International Hockey Federation and by the various National Governing Bodies for Hockey, the practice in other schools and the content of a publication entitled "Safe Practice in Physical Education and School Sport."

[3] Mr Dermott Fee QC and Mr Park appeared on behalf of the plaintiff. Mr Ringland QC and Mr Morrissey appeared on behalf of the defendant. I am grateful to counsel for their assistance.

Legal Principles

[4] Mr Fee in opening the case on behalf of the plaintiff contended that the duty of a schoolteacher is *to take such care of his pupils as would a reasonably careful parent of the children of the family*, see Charlesworth & Percy on Negligence, 13th Edition, at Paragraph 9-187, Lord Esher M.R. in *Williams v Eady* (1893) 10 T.L.R. 41, *Jackson v LCC* (1912) 28 T.L.R. 359, *Shepherd v Essex CC* (1913) 29 T.L.R. 303, per Darling J.; *Rawsthorne v Ottley* [1937] 3 All E.R. 902, per Hilbery J. and *Ricketts v Erith C.B.* [1943] 2 All E.R. 629. In *Rich (An Infant) v London CC* [1953] 1 WLR 895 Singleton L.J., giving the judgment of the Court of Appeal, quoted with approval the test set out by Lord Esher in 1893 stating that it had been adopted ever since. However in *Beaumont v Surrey CC* 66 L.G.R. 580, (1968) 112 S.J. 704 Geoffrey Lane J stated that the standard of duty of care of a schoolmaster, which *a reasonably careful and prudent* father would take of *his own children*, was helpful in considering individual instructions to individual children in a school, but when applied to an incident of horseplay in a school of 900 pupils was somewhat unrealistic, if not unhelpful. In the context of that action the schoolmaster's duty, bearing in mind the known propensities of boys or girls between the ages of 11 and 18, was to take all reasonable and proper steps to prevent any of the pupils under his care from suffering injury from inanimate

objects, from the actions of their fellow pupils or from a combination of the two. The standard was high.

[5] I consider that to describe the standard of care by reference to a "parent" or a "prudent father" and "of the family" or "of his own children" is based on a paternalistic approach and potentially diverts attention from the fundamental and simple proposition that the standard is *to take reasonable care in all the circumstances*. The duty of care is owed to the particular child or young person, not out of benevolence or paternalism, but as of right. I consider that to express the standard of care by reference to the standard of the parent diverts attention because there can be a range of reasonable but different parental attitudes and also the cross examination of the school teachers asks them to consider what they would do in relation to their *own children* and if a concession is obtained then that is advanced as determinative, rather than being a particularly solicitous standard of parenting. Furthermore the cross examination of the plaintiff's parents asks them to concede that they were quite happy to leave it to their own daughter to decide what she did with the mouth guard and again what the particular parent would or would not have done detracts from a consideration of the issue as to whether the plaintiff has established that reasonable care was not exercised in all the circumstances. I recognise that the introduction of the relationship of a parent into the standard of the duty of care rightly emphasises that the circumstances includes the requirement of an appreciation by a school teacher of the characteristics, not only of children in general, but of the particular child. However for my own part I would prefer that the standard of the duty of a schoolteacher should not be expressed as taking such care of his pupils as would a reasonably careful *parent* of the children *of the family* but rather taking reasonable care in all the circumstances. 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*.

[6] The relevant circumstances which are to be taken into account in an individual case in determining whether reasonable care has been taken by a school teacher will depend on the evidence in that case. Highly significant circumstances will be the age and maturity of the child or young person.

[7] The reason why the steps to be taken in discharge of the duty of care are high is because ordinarily, amongst other matters, one of the circumstances to be taken into account is the fact, of which judicial notice is taken, that children, particularly young children, and some young persons, do not have the ability to accurately weigh in the balance the long term impact of serious personal injuries against the temporary and short term inconvenience and discomfort of, for instance, wearing a mouth guard. So in this case Mrs Burns, the school teacher who gave evidence on behalf of the defendant, accepted that an 8 year old child could not possibly appropriately weigh those risks to come to an informed and balanced decision. I consider that if the particular child involved cannot balance the risks, then reasonable care requires that the decision is made for the child by the teacher and that this would involve a mandatory requirement to wear a mouth guard.

[8] Other circumstances that ordinarily should be taken into account when considering whether reasonable care has been taken are the tendency for children and young persons to enthusiastically try their best, to disregard risks, to ignore precautions that are devised for their own safety, to forget safety advice, to be impulsive and to succumb to peer pressures. However the circumstances will also include the fostering and the growth of personal autonomy on the part of children and young persons and their understanding of their own growing responsibility for their own decision making process. It is in the interests of a child or young person to respect and promote his or her autonomy to the extent that his or her maturity dictates.

[9] In addition to those circumstances which are particularly relevant to claims by children or young persons are other circumstances of general application such as the magnitude of the risk, the likelihood of injury, the gravity of the consequences and the cost and practicability of reducing or avoiding the risk.

[10] The standard applied in other schools is also a circumstance to be taken into account. In *Kearn-Price v Kent County Council* [2002] EWCA Civ 1539 [2003] P.I.Q.R. P11 Dyson LJ considered the issue of the standard of care to be upheld and stated:

> "30 I accept that evidence of what is standard procedure at schools generally is highly material to a determination of what is reasonably required of a school. But it is no more than that. Sometimes, although probably rarely, a court may conclude that the standard generally applied is not sufficient to discharge the duty of care. In the present case, the evidence of practice elsewhere relied on by Mr Dingemans was of a limited nature. Mr Barnard and the other three teachers who gave evidence said that in the schools where they had worked, there had been no pre-school supervision. They did not purport to vouch for the general position throughout the country. The judge took their evidence into account as a relevant consideration (para.52). In my judgment, he was required to do no more."

In that case a school was found liable for a serious injury to a pupil's eye when he was hit in the face in the schoolyard outside school hours by a full size leather football even though such balls were banned at the school. It was decided at first instance, that the school should have had reasonable spot checks to enforce the ban, even before school started. As can be seen from the passage from the judgment of Dyson LJ the limited evidence of practice elsewhere did not avail the defendant.

[11] The issue as to the practice in other schools or by other bodies is considered in *Clerk & Lindsell on Torts* 21st Edition, at paragraph 18-212 and the issue is illustrated by reference to an unreported case. It is stated that

> "Misuse of gymnasium equipment may lead to liability and common practice may be no defence if risks remain. In *Cassidy v City of Manchester* (1995) (unreported) 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 schools. It was conceded that it was not universal practice, but the LEA 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." Hutchison 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 contributorily negligent saying what she did was "the sort of thing that an enthusiastic child may do in the heat of a game of hockey."

I consider that the fact that a common practice has been established is but one of the circumstances to be taken into account and if risks remain a court may conclude that the standard generally applied is not sufficient to discharge the duty of care.

Factual background

[12] In this part of the judgment I set out my factual findings which findings include a description of the facts which were not in issue together with my determination of any significant issue in relation to which to which there was a conflict of evidence.

[13] The plaintiff took up playing hockey, aged 11, when she transferred from her Primary School to Rainey Endowed School. She played as centre forward and had considerable abilities, being selected for the first eleven team, at the age of 15. She had trials for the Ulster under 16 team, being selected for the under 16 B team. She continued to achieve that high standard, though her chances of playing for Ulster, at a more senior level, were adversely affected by a subsequent and unrelated injury.

[14] Each year that the plaintiff attended Rainey Endowed School the plaintiff and her mother were sent by the defendants a "School Uniform Code". This set out the uniform that the pupils were required to wear together with the equipment and

clothing required for physical education and for hockey. On the second page of that document, which was seen and read by both the plaintiff and her mother, it was stated:-

> "For their own protection, it is recommended that girls wear shin guards/mouth guard during hockey activities as advised by the Hockey Federation."

As can be seen it was expressed that this recommendation was for the "protection" of the girls and came with a degree of emphasis in that reference was made to the advice of the Hockey Federation.

[15] The reference to the Hockey Federation in the School Uniform Code was in fact a reference to the International Hockey Federation ("FIH") which in its publication dated 2009 set out the rules of hockey, including explanations. The 2009 publication is after the date of the plaintiff's injuries but the parties proceeded on the basis that, in so far as the issues in this action are concerned, the earlier edition, which would have been in existence in December 2008, would have been in the same terms. In paragraph 4.2 of the 2009 publication the following is stated:

> "Field players … are recommended to wear shin, ankle and mouth protection."

Accordingly the FIH did not require mandatory wearing of mouth guards and that remained the position at the date of hearing in 2016.

[16] The position in relation to National Governing Bodies for the sport of Hockey was the same in 2008 in that no such body made the wearing of mouth guards mandatory. The National Governing Body for Hockey in England recommended mouth guards and shin/ankle pads at all levels of participation, as did the National Governing Body for Ireland.

[17] In addition to those international and national publications the defendant relied on the 2008 7th Edition of a publication entitled "Safe Practice in Physical Education and School Sport" published by the Association for Physical Education ("the Safe Practice Publication"). This would have been the relevant edition when this accident occurred on 6 December 2008. On page 173 of the Safe Practice Publication it is stated:-

> "Shin pads and mouth guards are highly recommended for match play and competitive practices and mandatory at junior representative level."

There are other relevant passages in the Safe Practice Publication including the following:

"13.2.4 Staff should always seek to effectively **communicate** their policies relating to the wearing of PPE to parents.

Mouth Guards

13.2.5 As with any PPE item, mouth guards work by dissipating direct force relative to both time and impact, thereby offering a measure of protection to teeth and gums. In the case of mouth guards, additional benefits arise in reducing lacerations inside the mouth of the wearer while mitigating injury caused by teeth to an opponent in the event of unforeseen collision. As well as potentially minimising oral/facial injury, there is also some evidence that mouth guards can reduce incidents of concussion, but this is less certain, and only then in situations where a bespoke, personally fitted mouth guard is worn.

13.2.6 At the present time, most NGBs involved in contact sport strongly recommend that players wear mouth guards in games and in practices involving physical contact, while stopping short of making them mandatory (with the exception of the RFU in junior representative games and lacrosse at representative levels).

13.2.7 There is no doubt that a **bespoke mouth guard**, properly fitted by a dentist or dental technician, is the most effective, but cost may be prohibitive. Less effective, but relatively cheap, '**boil and bite**' versions are now available which need to carry a European Conformity (CE) marking. This indicates that the product has been subject to some quality assurance in assessing its fitness for purpose. There is currently no British Standard available.

13.2.8 Staff should ensure that pupils and **parents are kept well informed** about the wearing of mouth guards. A policy strongly recommending the use of mouth guards should be adopted. Should schools decide to adopt a policy of mandatory usage of mouth guards in physical-contact situations, then their duty of care obliges them to ensure that all

> participants always have access to one." (emphasis as contained in the publication)

There was no dispute that the 'Safe Practice Publication' ought to be followed by the defendant when it seeks to establish that it has complied with its duty to take reasonable care in all the circumstances. There was a dispute as to the correct construction of what was contained in the Safe Practice Publication.

[18] Dr Lloyd, the expert retained on behalf of the plaintiff, considered that where, as here, the Safe Practice Publication highly recommended a certain action, that this was in fact mandatory. His contention was that the words "highly recommended" were in fact the equivalent of mandatory. There was no evidence that anyone else understood the publication in that way. The witnesses on behalf of the defendants simply stated that a recommendation is not a mandatory requirement. They also stated that is exactly how the publication was understood, not only by the defendants, but also by nine other schools which were contacted by the defendants' expert witness, Mr Watt. I reject the plaintiff's construction that highly recommended means mandatory. That is not the ordinary use of English language and I do not consider that there is any sufficiently compelling evidence to find that there was some special or different construction to be given to the clear words of the publication.

[19] There was also a dispute as to whether the match, in which the plaintiff was playing, was at a junior representative level. If it had been, then the Safe Practice Publication would have required the mandatory use of mouth guards. Initially Mr Fee, in opening the case, did not consider that it was a match played at junior representative level but then, on reflection, given that the plaintiff was representing her school in a school's cup competition, he considered that she was playing in such a match. The plaintiff's expert also considered that she was competing at a junior representative level. I find that a junior representative level is a level representing a county, a province or a country. If I am incorrect in that finding I make it clear that it would not have been negligent for the defendant to have interpreted the publication in that way.

[20] If the wearing of a mouth guard had been compulsory then I find that the plaintiff would have worn one. However I find that the standard procedure at schools in Northern Ireland, based on national and international standards, was for the use of mouth guards to be highly recommended by the school teachers to the pupils for matches of the type in which the plaintiff was participating, rather than being mandatory. The adoption of that standard procedure meant that risks remained and the question is whether the standard generally applied was sufficient to discharge the duty of care in relation to the plaintiff who was 15 at the time of the incident.

[21] Prior to transferring to Rainey Endowed School the plaintiff and her mother purchased a mouth guard for the plaintiff. This was a boil and bite mouth guard.

The plaintiff asserts that she was not told the reasons why she should use the mouth guard. Mrs Burns, her hockey teacher for the first three years in the school, states that in the first year she would have regularly encouraged the use of mouth guards. That this would have been done prior to each session and also that it would have been done if there was a pause in a session. That the way that she emphasised to the pupils the need to wear a mouth guard was to tell them

> "You have only one set of teeth. Please wear the gum shield."

The plaintiff's expert, Dr Lloyd, accepted in his evidence that this would have been a sufficiently clear and forceful warning to the plaintiff. I am not bound by that concession but I consider that if the warning was given in those terms and was reinforced as Mrs Burns stated on a regular basis, then that it would have been sufficient to bring the dangers to the attention of the pupils and to emphasise to them the reason for wearing the mouth guard being to guard against the permanent loss of teeth.

[22] The plaintiff denies that anything of the sort was said or that the warnings were given with that degree of regularity.

[23] Based on the demeanour of the plaintiff and of Mrs Burns I prefer the evidence of Mrs Burns. I find as a fact that the wearing of a mouth guard was highly recommended to the plaintiff. That the plaintiff was kept well informed about the wearing of mouth guards. That warnings were given to the plaintiff in age appropriate language and in sufficiently clear terms, so that she was aware of and appreciated the need to use a mouth guard and so that she could weigh for herself the short term inconvenience and the long term risks. As a result of what the plaintiff was told she knew that it was important to wear a mouth guard and she knew that it was important because otherwise her teeth could be knocked out. I also find that the warnings were given with considerable regularity throughout her first year at the school. Thereafter they were repeated and reinforced on a sufficient number of occasions in the subsequent years, so that the plaintiff knew from those warnings and from her own powers of observation and deduction, that there was a significant risk of serious injury and that the appropriate protection was to wear the mouth guard and that it was important to wear the mouth guard.

[24] In coming to those factual conclusions I pay particular attention to the age of the plaintiff in the context that children and young persons of the same age have different abilities to understand. I also take into account that children and young persons do not necessarily have the ability to appreciate and to accurately weigh in the balance the long term impact of serious personal injuries when balancing those risks against the inconvenience and discomfort of wearing a mouth guard. It is the ability of the plaintiff at her age to understand and to weigh the risks that is of significance. I have approached with considerable caution the knowledge and understanding of the plaintiff at the age of 15 on the day this accident occurred, in

December 2008. I make it clear that the factual findings I have made take into account all those factors in my assessment of the plaintiff as an individual.

[25] The plaintiff gave evidence that she did wear a mouth guard on occasions. She said that she found it slightly uncomfortable but she got used to it. Also she said that using it made it more difficult to speak but she was able to overcome this by shouting. She did not say that she could only tolerate the mouth guard for short periods of time. She did not say that it caused her to have a choking sensation or that it fitted badly. The plaintiff did not put forward any good reason for not using the mouth guard apart from a lack of appreciation of the risks of failing to do so. As I have indicated I consider that she was aware of the risks and that the teachers had brought those risks to her attention graphically and repetitively. In relation to the plaintiff's evidence as to the comfort of wearing a mouth guard I find as a fact that wearing one was slightly inconvenient to the plaintiff but that the degree of inconvenience was one that she was able to tolerate. I consider that the slight degree of inconvenience was in fact the reason why she chose on occasions not to do so, despite knowing the risks involved.

[26] The plaintiff stated in evidence that the use of shin guards was compulsory. The significance of this evidence is that the National Governing Bodies of Hockey and the Safe Practice Publication both advised that the use of shin guards was recommended or highly recommended. It was suggested that if the school, being aware of the risks of injury in the region of the lower legs, made shin guards compulsory, then a similar standard ought to have been applied to mouth guards. Mrs Burns gave evidence, which I accept, that in fact the wearing of shin guards was not compulsory. Accordingly the factual basis for this allegation against the defendant has not been established.

[27] The plaintiff's mother gave evidence during which she accepted that she had received and read the school uniform code on each occasion that it was sent to her. She also accepted that she had read that part of it which stated "For their own protection, it is recommended that girls wear shin guards/mouth guard during hockey activities as advised by the Hockey Federation." She accompanied the plaintiff in order to purchase a mouth guard and she remembered her daughter boiling and then biting it in order to get it to fit. The plaintiff's mother accepted that she knew that the mouth guard was to protect the plaintiff's mouth whilst she was playing hockey and that this was for the plaintiff's protection given that she knew that hockey involved the use of a hard ball and a hockey stick. She knew that the mouth guard was to protect the plaintiff's mouth in case she was hit in the mouth by either the ball or by a stick. She stated that she was content to leave it to the plaintiff to decide what she did with the mouth guard. I find that the plaintiff's parents were sufficiently warned as to the risks of not wearing a mouth guard and that they were not deprived of the opportunity of persuading the plaintiff to wear the mouth guard. Rather the plaintiff's parents had been provided with such an opportunity and the school had effectively communicated their policies relating to the wearing of mouth guards to the plaintiff's parents.

Conclusion

[28] I do not consider that the plaintiff has established any grounds of negligence against the defendant. I enter judgment for the defendant against the plaintiff.

[29] Ordinarily I would set out my assessment of damages so that if there is an appeal and the Court of Appeal allows the appeal, entering judgment for the plaintiff, then all issues could be resolved at the same time before the Court of Appeal. However, in this case I hesitate to adopt that course, as to my mind it would graphically highlight to the plaintiff the pecuniary compensation which she has failed to secure. If there is an appeal, then at that stage and prior to the appeal being heard, I will give a further judgment in relation to the assessment of damages, so that all issues are before the Court of Appeal.