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THE DISTRICT COURT
OF NEW SOUTH WALES
CIVIL JURISDICTION

JUDGE GARLING

THURSDAY 5 JULY 2007

8406/00 - VANESSA MILES BY TUTOR RAYANNE MILES v JAN PATRICIA BUCKLEY

JUDGMENT

HIS HONOUR: The plaintiff sues the defendant for damages for personal injuries. The defendant denies liability and alleges contributory negligence.

These matters are not in dispute or are not significantly in dispute and I find: The defendant was the mother of Christopher Buckley. On 20 November 1998 at about 5pm the plaintiff, who was aged ten years, went to the defendant's premises. The defendant was her aunt. She frequently visited her aunt's premises and was there before going to Little Athletics. Her aunt had provided her with something to eat and drink.

There were also present at the time Christopher, a cousin, Liza and Christine. They went to an area on the side of the house which is depicted in photographs tendered in evidence. The area depicted was a little shorter than that shown as a trailer was parked in the area. Christopher had invited the plaintiff and, indeed, I think, the other girls outside. Christopher then proceeded to hit or attempt to hit a tennis ball with a golf club. He swung the club in a manner similar to swinging a baseball bat. The plaintiff was standing three to four feet away from him, Christopher swung the ball and, on his follow through with the club, struck the

plaintiff on the face near the left eye. She sustained serious injury. Christopher at the time was ten years of age.

The plaintiff said in evidence: "Christopher asked us to go to the backyard to watch how he could play with the ball and we followed him out". The evidence was also that once they got outside he suggested that the girls stand somewhere in the vicinity of the wall, as I understand it, to collect the ball and send it back to him, but the plaintiff declined to do that, but stood to the side of him, as I said, three to four feet away.

The defendant called no evidence, asked no questions on liability and did not challenge the veracity or accuracy of the plaintiff's version.

There was a submission, I don't know to what extent it went, but certainly a submission that the defendant had not gone into evidence and the court could take note of that. I am not sure, as a matter of law, that I can really do that. The defendant was content to argue this case on the plaintiff's version. What I can do and do do is accept the plaintiff's version at its highest point.

The defendant was not in the backyard at the time the injury occurred. After being hit the plaintiff ran into the house. She ran into the kitchen. The defendant was in the house at the time. I do not believe the evidence allows me to find in what part of the house she was, although there is a suggestion that she came into the kitchen as the plaintiff ran into the kitchen. What was apparent from the photographs was that there were windows

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from, I believe, the kitchen and another room facing onto the yard area where the children were playing.

The plaintiff's claim is that the defendant was the owner/occupier of the premises and the plaintiff was in the care and control of the defendant. I do not believe that those matters are seriously in dispute and, certainly, the important matter being that the plaintiff was in the care and control of the defendant and I accept that.

The plaintiff pleads her case in this way: That the defendant was guilty of negligence, that she failed to take any or any adequate precautions for the safety of the plaintiff, she exposed the plaintiff to a risk of injury which could have been avoided by reasonable care on her part. The defendant failed to prevent the children in her care from playing a dangerous game with a high risk of injury, failed to prevent the children in her care from exposing themselves to a risk of injury, failed to properly or at all supervise the children in her care, failed to observe that the plaintiff was in a position of peril in the circumstances. In effect, the plaintiff argued that the defendant, in the position of a person who had the care and control of the children, allowed the children into a relatively small area, her son swung a golf club in a relatively small area that was dangerous and it was a foreseeable danger. The plaintiff says the defendant should have been aware of what was happening and should have stopped it. She could have looked out the windows to see what was happening and should not have

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allowed a ten year old to have the golf club.

The defendant argues there was nothing the defendant could have done. There was no evidence as to where the defendant was in the house at the time. The evidence was that this was the first time that Christopher had used the golf club in this manner. That, I should say, is the evidence of the plaintiff. It was the first time she had seen him use it. There is no evidence that the defendant knew that Christopher was using the golf club or intended to use the golf club and there is no evidence that the defendant knew what was happening outside.

The defendant relies upon a decision of the Court of Appeal of **Doubleday & Anor v Kelly**, 2005 NSWCA 151. That was a decision where the facts were significantly different to these, but where a number of these principles were discussed. That is a decision which is based on the **Civil Liability Act 2002**, in this case the common law applies, not the **Civil Liability Act**. That decision related to a fall from a trampoline. The plaintiff, as I understand it, had on a pair of roller skates, got onto a trampoline and fell off and sustained injury. The mother who had the care and control of the children was asleep at the time. As I understand it, she had warned the children not to go on the trampoline unsupervised but the next morning whilst she was asleep the children had not only gone on it, but one of them had put on roller skates, fallen off and was injured. The trial judge found in favour of the plaintiff and the Court of Appeal did not overturn that decision. As I understand it, the decision

was based on the fact that it was foreseeable that the children could have got onto the trampoline, not necessarily on roller skates, and could have fallen off and been injured and there was a simple action that could have been taken to prevent it, that is, to turn the trampoline either on its side or upside down or to do something to prevent the children going on it. So it is different from this case. However, there are some principles which come out of the judgment of his Honour Bryson JA, which included these, commencing I think at paragraph 14, where his Honour said:

> "There is no highly developed body of doctrine about the application of the laws of negligence where children suffer an injury whilst in the care of parents or of persons who, for longer or shorter periods, are exercising the responsibility of parents."

It refers to a discussion in the Law of Torts by the late Professor John G Fleming 9th edition and also a case dealing with negligent liability of schools.

He went on to say at para 16;

> "In determining the existence and scope of duty of care both as articulated in Wyong Shire Council v Shirt 1980 146CLR40 at p 47 (Mason J) and as restated in the Civil Liability Act, it is necessary to come to a decision about the response of a reasonable person in the position of the appellants to the foreseeability of risk of injury; even though there is a foreseeable risk of injury it may be a reasonable response to take no precaution against it. In a domestic situation, the response of a householder occupant to a foreseeable risk of injury to a child for whom the occupant is exercising parental responsibility" (even for a brief period) "necessarily involves acceptance of many foreseeable risks of injury to the child. A house has much furniture and other effects which can cause injury, according to the way children use them; children could climb

> on tables and fall off, and they could tip furniture over. A household could be full of things which children might foreseeably break so as to cut themselves, drop on their feet, swallow or otherwise cause injury."

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And there are of course many other examples.

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He went on to discuss the trampoline and the characteristics of it and then at para 19 said;

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> "Examples drawn from other parts of the law of negligence, relating to liability of occupiers and employers, are of little use and could well be misleading if one endeavoured to proceed directly from them to the conclusions about reasonable response to foreseeable risk of injury in a domestic and parental situation. Stringent parental control and paralysis of everyday activities are not what the law of negligence requires."

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He went on in paragraph 20 to discuss the principle that to arrive at the conclusion of negligence there must be an affirmative concept of what should have been done.

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As this clearly is a case at common law one simply goes back, as I understand it, to those principles which are set out in **Wyong Shire Council v Shirt** where Mason J at p 47 said, discussing the Australian support for aversion of foreseeability;

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> "In essence its correctness depends upon a recognition of the general proposition that foreseeability of the risk of injury and the likelihood of that risk occurring are two different things. I am of course referring to foreseeability in the context of breach of duty, the concept of foreseeability in connection with the existence of the duty of care involving a more generalised inquiry. … … In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The

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> perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position."

He went on to say;

> "The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors."

Let me just deal with the law in this way:

Firstly, I am satisfied that the defendant owed the plaintiff a duty of care. The plaintiff was in her care and control and she owed such a duty.

Secondly, in my view, if you have a ten year old boy, who has in his hand a golf club and he is using it to hit a tennis ball and there are other young children in the area it is foreseeable that that ten year old boy may inadvertently hit one of the children in the face with the golf club.

I do not think there is anything remarkable in those propositions. The question is, as I understand it, what this defendant was required to do in response to that risk. As I see it, this case really comes down to this very narrow issue, that is, there is no evidence before me

that the defendant knew that her son had outside a golf club or that he was using it to hit or attempt to hit a ball with it. She was aware that children of about the age of ten years and a little lower had gone outside to play in an enclosed yard which, of itself, was not unsafe.

As I understand it, the question I have to answer is this under those circumstances was the defendant's response to the children going out to play in the yard a reasonable one or should she have gone out into the yard with the children to observe what they were doing? Or, should she have looked through the windows facing the yard to see what the children were doing? If she had and had have seen him swinging the golf club, of course, one would expect that she would have taken immediate action to stop it. But the matter I have to decide, as I understand it, is whether that is the obligation which is placed upon the defendant.

I should just add one other thing. I am not sure that it was argued, but it is a matter which I must say crossed my mind, that is, will it be available to the court to draw an inference that the defendant knew that her son was outside playing with a golf club or that she must have seen him doing that on another occasion and, therefore, should have been aware that there was a danger in the yard which she had to keep a lookout for? I do not think I can draw that inference. It is certainly a possible inference, but there have to be other equally competing inferences, that is, that, indeed, she did not know; that the lad had not used the golf stick in this way before;

had, perhaps, recently obtained it or found it and decided to test it out in this way and, as I have absolutely no evidence in relation to that, I do not believe it leaves me, at law, in the position where I could draw such an inference even if I thought it an appropriate inference.

So then I return, having considered those matters, to look at the responsibility of the defendant for the control of the children. I return also to what was said in **Doubleday v Kelly**, that is:-

"Stringent control and paralysis of everyday activities are not what the law of negligence requires."

What would one expect of a mother who had her child visiting children about ten years or so of age? Would you expect that she would go out to watch them play or to keep an eye on them from inside the house? Is that the standard we require of the defendant? I have had to come to the conclusion it is not and, having come to that conclusion, I have to decide that there is no negligence on her part. Had I found there was, I would have found there is no contributory negligence. It was not subsequently argued before me, but I do not believe that this plaintiff did anything which contributed to this accident. This is, of course, a difficult decision and is one the parties may very well wish to have tested and I now intend to assess damages in case my decision is incorrect.

The plaintiff, at the time, was ten years of age. She is soon to be nineteen years of age. She sustained injury to her face and to her eye. Importantly, the injury to

the eye has resulted in total loss of sight in her left eye. The plaintiff was a straightforward witness whose evidence I can accept. She was not really challenged nor should she have been. The evidence of her treatment and her complaints are set out and I do not need to go into it at this stage. The plaintiff also confirmed that those matters set out in the statement of particulars filed on 25 January 2007 covered how this accident has affected her. She has a very significant injury for a young girl. The plaintiff did have a problem with her left eye before the accident. Her left eye did not have the sight that her right eye did and that matter was looked at by some of the specialists. I should add that the medical evidence supports the plaintiff. Indeed, the plaintiff tendered in evidence a report from one of the defendant's doctors.

The evidence comes essentially from Dr Benga, who reported in November 2006 that:

"The findings, from the time of her initial presentation until present, have been entirely consistent with her history of sustaining a severe blow to the left eyeball cavity. There is complete loss of vision. She is self-conscious of the abnormal appearance of her left eye which has resulted from her being injured. She has fear of surgery. There is emotional pain, physical pain and she has had problems with the wearing of a cosmetic shell."

Professor McClusky provided a number of reports. He said there was 100 per cent visual loss, there is some facial asymmetry as a result of poor development, it is likely the left eye will require an implant at some stage, although that was beyond his area of competence. He said she has 100 per cent loss of sight. He then discusses the prior problem she had, which was actually a problem in

both eyes, of low grade inflammation. He said she has that in the right eye and that has fluctuated significantly.

"At this time I do not feel it represents an acute threat to her vision. I am reluctant to perform surgery while there is inflammation." He said, "It is difficult to give an accurate prognosis for the future as Vanessa has a potentially vision-threatening form of inflammation in her remaining eye. It can be quite severe, it can result in significant visual loss. The odds of this happening are relatively low. However, as she only has one eye, clearly management is potentially more difficult and may need to be far more aggressive than if she had two seeing eyes. She will need many years of follow up and there is no doubt her long term visual future is significantly more uncertain as a result of the loss of her left eye."

I do not believe that the fact that she had a lower degree of sight in her left and her right eye affects this assessment in any way other than as to the future.

Dr Duke, who was qualified on behalf of the defendant, whose report the plaintiff tendered, felt that there was a remote risk of problems with the right eye and he felt that with the problems she had before, if she had not had this injury, there would have been a gradual reduction in inflammation, both in terms of frequency of occurrence and severity. There was no real dispute between the doctors.

In addition to that, there were also two reports from Dr Westmore on the plaintiff's psychological problems. He concluded that she would have suffered acute distress of a physical and emotional type no doubt for several months after the original injury and in his next report in November 2006 he thought she was developing at a social

and psychological level in a way which could be described as generally consistent with her age. Her mother does have some concerns about her level of confidence and he agrees that that may be affected by the cosmetic appearance of her left eye.

> "She has no psychiatric history of any recent history of counselling. I do not believe she needs assistance at this time. I think her prognosis from a psychiatric perspective is good, but obviously a lot will depend on the final cosmetic appearance of the eye. Unless, of course, the other problem I have referred to earlier, of any problem she may have with her right eye.

There is a report also tendered from Dr Roberts, psychologist. I have read that report. It does not assist me any further in this case. I do not rely on it if it differs from the opinion of Dr Westmore, who I accept.

There is also a report from an occupational therapist which I will return to in a minute.

This young girl has lost the sight of an eye. She has a small chance, but a chance, that she could lose the sight of her other eye, or, I suppose, more importantly, that that sight could deteriorate. She is very young. She has a long life ahead of her. I assess pain and suffering, taking into consideration all she has gone through, in the sum of $120,000. Out of pocket expenses are agreed at $912. There are various other claims which are made. A lot of those are based on the report of an occupational therapist, Ms Reviganni, and are difficult at times to follow. However, there is evidence from

Dr Westmore that the plaintiff needs some ten sessions of psychotherapy at $170 a session and I would have allowed $1,700 for that. She has not worked, she has never had a job. She obviously has a loss of earning capacity, that is, she has lost the sight of an eye. She may have a greater loss of earning capacity in the future. She will at some stage go to work. Hopefully, she will work without trouble in the future but there is a real risk that she may suffer a loss of earning capacity. She is a young girl. She has a long working life ahead of her. I assessed that loss of earning capacity on a cushion basis in the sum of $75,000.

The remaining matters are these:

Vocational assessment. I do not accept that there is evidence which will allow me to make that award. The plaintiff will return to work. Once she obtains a job I have no doubt she will work. I do not see the necessity for vocational assessment.

There is evidence she will need sunglasses from time to time. There is evidence she will need medical treatment from time to time. She will have to see doctors. She will have to have a lot of checks on that side and it is reasonable that those two matters be assessed together with other necessary medical treatment from time to time. It is always difficult to assess these, but I did it on the basis of a cushion, but based on $10 a week on the multiplier of 976 for 50 years and allowed $10,000.

I am unable to find that she should be awarded a sum

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to cover lenses, solution or domestic assistance. I have absolutely no evidence as to why she would require domestic assistance. However, in the past her mother did provide her with domestic assistance and I award the sum of $1,650.

Future operative treatment is a difficult area because she herself has said she does not want any future operative treatment and I understand that, she is obviously scared of it. She obviously does not want it. She still has her eye but it maybe in the future she will need such treatment.

There was a schedule provided but that is on the basis that there were, as I understand it, immediate procedures and then procedures every four years after that and I do not have any evidence that that is going to occur. All I can do with this would be to treat it as something which she may very well require in the future and deal with it by way of a cushion and, dealing with it as best I can, I allow the sum of $15,000 to cover that possibility in the future.

I believe I have covered all those areas which were argued before me, which may have been of assistance if I am incorrect in my verdict, which will be a verdict for the defendant.

Is there any reason the order for costs should not apply?

MCNALLY: No, your Honour, and I do have some offers of compromise that--

HIS HONOUR: That's why they may not apply. Did you wish me to deal with that?

MCNALLY: Yes I do, your Honour.

HIS HONOUR: Well I am going to have to do my call over first and I will come back to that in a moment, unless you can get some agreement on the matter.

Have you had a discussion about the costs?

ROWE: Not really about the costs, your Honour, but I will have an application under s 128.

HIS HONOUR: What's s 128?

ROWE: That's the stay.

HIS HONOUR: Why do you need a stay? A stay in payment of the costs? Yes, well that's fine.

MCNALLY: Your Honour, I did mention to Mr Rowe before your Honour came onto the bench that if we were successful we would be relying on offers of compromise that had been filed in the matter.

HIS HONOUR: You tender those. No objection to that?

MCNALLY: I do.

ROWE: No, your Honour.

MCNALLY: There are two offers of compromise, both in the same amount, one dated 18 December 2000 another one dated 20 October 2006, your Honour.

HIS HONOUR: So what do you seek?

MCNALLY: An order that the plaintiff pay the defendant's costs on a party/party basis up until 18 December 2000 and thereafter on an indemnity basis.

ROWE: Your Honour has heard the matter and it's clear from the matter that there - put it this way, your Honour, liability is a line ball. That the offer of compromise in those circumstances is not an offer that necessarily the defendant can rely upon as it is obviously not a figure that would be a reasonable compromise in any circumstance.

HIS HONOUR: Can you give me any law? Any case that--

ROWE: No, your Honour, all I can say is--

HIS HONOUR: --supports that proposition, because I'm not aware of any. In fact I thought to the contrary.

ROWE: What I'm submitting to your Honour is that in the circumstances, your Honour having heard the case, that the assessment of the damages is such that even on a compromised basis that would not be a figure that the

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plaintiff would be - I'll put it another way. It's not unreasonable that the plaintiff should reject that as a figure of a reasonable compromise.

HIS HONOUR: I don't agree with that argument I've got to say. As I understand it the law is quite clear, that if an offer of compromise is made, and at this time it was probably pursuant to part 19A, and the offer is not accepted and the defendant obtains a result which is better than that offer then they are entitled to costs on an indemnity or party and party. Sorry, on--

MCNALLY: First of all on a party/party up to the date when the offer was served. After that--

HIS HONOUR: --indemnity or?

MCNALLY: The rules refer to indemnity basis, your Honour.

HIS HONOUR: They do now. They've changed. What were they before? What's the other word?

MCNALLY: Solicitor/client that's another way of--

HIS HONOUR: Yes solicitor and client. What's an indemnity, that changed recently?

MCNALLY: I don't have the old legislation with me your Honour.

HIS HONOUR: Shall I just say on the appropriate basis, on the basis as existed at 18 December 2000 or do we need to go and look it up?

MCNALLY: I think we might need to look it up, your Honour. If your Honour has an old copy of the Rules I will take that burden upon myself to find the appropriate section.

HIS HONOUR: No I haven't got the old--

ROWE: The defendant ..(not transcribable).. if your Honour put the appropriate as at that date.

MCNALLY: I'd be content if your Honour made it on a solicitor/client basis up until 20 October 2006 and thereafter on an indemnity basis, because certainly the last offer of compromise attracts the present Rules which refer to indemnity basis.

HIS HONOUR: I would think that's probably correct, because those Rules would have come in before 20 October '06.

The plaintiff is to pay the defendant's costs on a party and party basis up until 18 December 2000 and to

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then pay the defendant's costs on a solicitor and client basis up until 20 October 2006 and from 20 October 2006 on an indemnity basis.

The exhibits are to be retained by the court for 28 days and I grant the plaintiff a stay in relation to the payment of costs. Is that all I need to do?

ROWE: I think, your Honour, the stay will require a period--

HIS HONOUR: Twenty-eight days, that's the usual?

ROWE: Twenty-eight days, your Honour.

HIS HONOUR: Twenty-eight days.

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