

**THE HIGH COURT**

**[2024] IEHC 172**

**Record No.: 2020/1228P**

**BETWEEN**

**SEAN KAVANAGH**

**PLAINTIFF**

**AND**

**SALESIAN OF DON BOSCO OF IRELAND**

**DEFENDANT**

**JUDGMENT of Ms. Justice Denise Brett delivered on the 20th day of February 2024.**

**INTRODUCTION: BRIEF SUMMARY OF THE ISSUES**

1. The plaintiff in this personal injury action is now a family man of 24 years with 2 young children but at the relevant time for these proceedings he was a schoolboy of almost 14 years. He was in his first term of the second year in the defendant's large all boys' secondary school in Celbridge, Co. Kildare. His claim for damages arises from an incident which occurred in the school on the 3<sup>rd</sup> October 2012 when he was kicked in the groin by a fellow second year student. Thus the claim arises from an event which occurred over 11 years ago.

2. The incident occurred after the normal school day and therefore when formal class supervision had ended. The plaintiff had made his way from the main school building, among the large exodus of schoolboys and staff, to a room designated for the homework club in the adjacent resource department. The club was a name used for the activity provided by the

School for 1<sup>st</sup> and 2<sup>nd</sup> year students who required assistance or a quiet space to do their homework. Participants attended on a voluntary basis.

3. It is the plaintiff's case that no supervision was provided in the homework club on the day and that due to this lack of supervision, the incident was allowed to develop whereby JD, a schoolboy, dragged RK, another schoolboy, out of the homework room to a classroom across the corridor from where RK could be heard calling out for him to stop. The plaintiff then left the homework room to find a teacher. When none could be found and no adult intervened, he went to RK's assistance. JD then grabbed him by the arms, kned him in the groin and then kicked him in the testicles. The plaintiff developed swelling and pain of one of his testicles which continues to affect him and causes ongoing pain and discomfort. He has undergone several surgical procedures for recurring cystocele and epididymitis. Fortunately, his fertility has not been affected.

4. The plaintiff alleges that had adult supervision been provided in the homework club room, then the incident between JD and RK would have been stopped early and would not have developed and he, the plaintiff, would not have needed to intervene to protect RK and then been kicked in the groin and, particularly, he would not now be suffering the effects of such kick.

5. Mr. O Connell SC, for the plaintiff argued that such adult supervision should have been in place once the room was open to admit the homework club participants. In addition, he asserted that the incident was foreseeable, given JD's disciplinary history such that the defendant should have taken steps to minimise a risk he posed.

6. Mr. Fox SC for the defendant school denies liability contending that the incident occurred before the homework club had actually started and thus the usual supervisors, Salesian Brothers Dominic and Paul, had not yet arrived. The defendant school's position is that the incident occurred during a transitional phase at the end of the day, when the entire student and staff body was moving en masse throughout the school on their way home or to after-school activities. The School asserts that there is no obligation to directly supervise such transitional times as there was no practical reality in supervising every student when the school day is over and no school is expected to do so.

7. The issue for the court to determine is whether it constituted a breach of the school's duty of care to the plaintiff if the homework club was not appropriately supervised at a time to prevent injury to the plaintiff.

**THE EVIDENCE:**

8. The school principal, Ms Brenda Kearns, provided some background to the homework club. It was a voluntary, informal service provided by the school for 1<sup>st</sup> and 2<sup>nd</sup> year students, with the support of the parents. Its purpose was to provide a quiet environment and support for that group to do their homework. Attendance varied but averaged four to six students daily. Participants were expected to conduct themselves in a responsible manner, in accordance with the school's Code of Conduct. An older, transition year student was available to assist with questions to do with homework. The homework club was not like a school class or even like the study club for exam class students, which had structured timing and teachers engaged and supervising. Study club participants were required to be present from a definite start to a definite end. There was also a cost implication to parents.

9. It was common case that, in homework club, participants arrived within a 15 minute window after formal school ended. They left individually when their homework was complete, rather than at a set time.

10. The plaintiff's evidence was that he had made his way from the main school building to the homework club room in the resource department. He sat down and began his homework. A transition year student and four other club participants were also then present. Two students came through the door into the homework club, RK, a first year student, was part of the homework club but JD, a second year student, was not. JD then grabbed and pulled RK out of the room and across the corridor into an unused classroom from where the plaintiff could hear RK calling for help. The plaintiff asked the transition year student to intervene but when he did not take any action, the plaintiff left the homework room in search of an adult to intervene. He looked in several places without success and then went to RK's assistance. At that stage, JD turned on him, grabbed him by the arms, kned and then kicked him in the groin, causing his injuries. Ms Gráinne Ward, a resource teacher, then came into the room. Having questioned the boys she ultimately sent JD home and the plaintiff back to the homework club room. He remained for about 20 minutes when the pain caused him to leave. He later described the incident to his friend who told him to examine himself. When he

examined himself he found that his right testicle was very swollen. He went home and told his mother who took him to a doctor who referred him to paediatric emergency at Tallaght Hospital, where he was admitted overnight.

**11.** The plaintiff was adamant that there was no adult supervisor in the corridor or in the homework room before the incident or in the homework club after his return.

**12.** In cross examination the plaintiff conceded that the attack took place before the homework club had started. He accepted there was still some time before it actually began.

**13.** Notwithstanding a full Defence, putting the plaintiff to full proof, neither the incident as outlined by the plaintiff nor the injury were materially challenged in the trial. It was fully accepted that JD had in fact kicked the plaintiff in the groin and that the plaintiff was injured. Contributory negligence allegations against the plaintiff, including a suggestion of horseplay, were not pursued and a suggestion that the incident was fighting was not progressed when it was rejected by the plaintiff in cross examination. A one day suspension had been imposed on JD as a sanction for his behaviour, and after having admitted the incident when questioned.

**14.** The Defendant's discovery documentation provided a typed note by a resource teacher, Ms Grainne Ward. Ms Ward actually came upon JD and the plaintiff in the empty classroom. The plaintiff confirmed this without hesitation, albeit he originally thought she was a special needs assistant. Nothing turns on that. Her status as a teacher was accepted. Ms. Ward believed this note was typed by her the following day as she was heading home at the time. This is the only contemporaneous witness record of events furnished to the court. The note comprises two paragraphs typed up by Ms Ward, but confusingly dated for two different dates, Wednesday 3<sup>rd</sup> and Thursday 4<sup>th</sup> October.

**15.** Ms Ward's evidence was key to the liability issue and especially in relation to the location of the incident and its timing before the homework club had begun. She outlined that she was returning to the resource department to collect her belongings to go home. She was neither rushing, as she wanted the main school traffic to clear before leaving to collect her daughters whose school was at the other end of Celbridge, nor was she delaying given that she had other school collections to do too. Her attention was drawn to loud noise coming from a classroom. On investigating, she found two boys in physical engagement. She recognised JD as one of the participants as she knew him but she did not recognise the other

boy. In cross examination now, almost 11 years later, Ms Ward accepted that it was possible her typed record of what she personally witnessed may have related to a different encounter on a different date.

**16.** However, the likelihood of two such similar events resulting in groin injury involving JD with two different students from the homework club on two consecutive days is highly unlikely. Common sense dictates that both paragraphs of her memo relate to the incident involving the plaintiff which occurred on 3<sup>rd</sup> October.

**17.** Ms Ward was a very credible witness and I accept her record as bone fide. That said, the version of events Ms Ward recorded was not put to the plaintiff and I do not rely upon that portion of her note. Her record corroborates some elements of the plaintiff's account, including that JD chased RK to the resource department and that the plaintiff intervened to block him. In respect of the student she didn't recognise, whom I accept was the plaintiff, Ms Ward recorded she "*allowed him to leave as homework club was about to start and was just across the corridor.*"

**18.** The factual assessment in this case was rendered difficult as material witnesses to the incident were not called. Contemporaneous records of the investigation were not furnished, other than its outcome and the note of Ms Ward. Mr. McEvoy, the Vice Principal, who carried out the subsequent investigation, did not give evidence. The plaintiff and his mother met with Mr. McEvoy on 8<sup>th</sup> October, the Monday following the incident but no record of that meeting, or of the plaintiff's contemporaneous account of what happened, was furnished to the court. Statements made by RK and JD, which the plaintiff's mother testified that Mr. McEvoy told her were taken from those boys were not provided. The principal, Ms Kearns gave lengthy evidence but was not actually involved in the events nor did she carry out the investigation that was conducted at the time, other than imposing the one-day suspension sanction on JD.

**19.** It was surprising that the plaintiff was cross examined on the basis of evidence which would be given by witnesses available in court, particularly the P.E. teacher, Mark Ryan. Such evidence was not then led nor the witnesses called. Witnesses who could have given best direct evidence to the court, such as RK or JD; Mr McEvoy, the Vice Principal or the transition year student, did not give evidence. Most notably, neither Brother Dominic nor Brother Paul, who the school asserted were supervising the homework club that day gave

evidence, notwithstanding that Ms Kearns indicated she had spoken with them for the purposes of this case. The school maintained no records regarding rostering Brothers for supervision of the homework club at the time nor of duties carried out by them. There was no reference to them in the defendant's pleadings or documentation prior to the trial.

### **TIME:**

20. On a Wednesday, the day this incident occurred, school ended at 3:20pm. It was common case there was an interval of 15 minutes between the end of the formal school day and the beginning of homework club. This was to facilitate students having a break, attending to personal needs, getting their books and moving to the homework club. The plaintiff conceded in cross examination that the events happened before the homework club started.

21. Neither side pinned down with precision when or for how long the altercation involving the 3 schoolboys endured. Dr McDaid, the education expert called by the Plaintiff, only took his instruction from the Plaintiff's solicitor and reports a time of 3:30pm. Replies to particulars, verified by affidavit although not referred to in oral evidence, records "approximately 3:30". The Plaintiff's GP, Dr Dillane, reported in 2018 that the plaintiff gave a history to her that the incident happened on school grounds, '*as he was on his way to a homework club*', though when this was put to the plaintiff, he said the doctor was wrong. Ms Ward, who came upon the incident, had only left the main building to return to the resource centre to collect her belongings to go home, recorded that homework club was still 'just about to start'. This was at the end of her conversation with the student we now know was the plaintiff when she directed him to go to the homework room. On the basis of that cumulative evidence, and the plaintiff's further concession that 'there was going to be some time before [the homework club] actually began' when the incident happened, I find as a fact that the incident complained of happened and was completed in the period between the end of the school day at 3:20pm and the start of the homework club at 3:35pm.

### **SUPERVISION:**

22. Normal common sense indicates that, had any adult been present in the homework room before RK and JD arrived, the situation between them would not have occurred or would have been observed and immediately stopped, which is exactly what happened when Ms. Ward heard the altercation going on as she entered the resource building later.

23. The plaintiff's recollection of supervision of the homework club was that it was normally supervised by a transition year student, overseen by a teacher. Miss O' Byrne had supervised in first year and Mr. Mark Ryan in second year, but not as closely as Ms O' Byrne had. The school asserted Salesian Brothers supervised.

24. No direct evidence of any Brothers' supervision was given in hearing. They do not appear to have been involved in the investigation of the incident even when the school authorities were made aware that the Plaintiff was admitted overnight in hospital following his injury. The plaintiff firmly disagreed any Brothers were present on the day at any time he was involved in the homework club.

25. The Plaintiff's own direct evidence, which was not contradicted, allows me to find as a fact that there was no adult supervision in the homework club on the day either before or after the incident, while the plaintiff was present. I also draw the inference open to the court that the defendant's election not to call pertinent witnesses capable of rebutting the plaintiff's evidence on supervision strengthens his evidence (see *Whelan v AIB* [2014] 2IR 199 at paragraphs 91- 95, most recently cited by Barr J. in *Donnelly & Sons Ltd v Hoey* [2024] IEHC 52).

26. I therefore find as a fact there was no adult supervision either in the homework room or in the corridor outside the homework room close to the room where the incident occurred.

27. That finding does not however determine the case. The unruly incident occurred before the homework club commenced. While the school had decided the homework club should be supervised, the lack of this self-imposed supervision requirement on the day did not and could not have contributed to an event which occurred beforehand.

28. The plaintiff bears the onus of establishing not only that supervision would have prevented the injury occurring but that the injury and the incident occurred at a time when there was an obligation to provide such supervision.

### **LEGAL PRINCIPLES:**

29. In any secondary school of 700 boys, incidents of the kind complained of can happen. If it were otherwise there would be no requirement for a Code of Conduct or disciplinary procedure in schools. Supervision is intended to minimise the possibility of unruly behaviour

breaking out and to deal efficiently and safely with it when it does. Turning then to the issue of supervision in schools in law.

**30.** There was no dispute over the applicable legal principles governing liability of schools although the parties differed as to how they applied to the facts of this case. The duty of care a school owes to its students is well established as that of ‘a careful parent would of his children’ and children do not require ‘to be under constant supervision and watched every instance’ (see *Murphy v Wexford V.E.C.* [2004] 4 IR 202; *Lennon V McCarthy* (unreported, Supreme Court, 13<sup>th</sup> July, 1966); *Williams v Eady* (1893) 10 T.L.R. 41); *Rawsthorne v Ottley* [1937] 3 All E.R. 902; *Flesk v King* (unreported, High Court, Laffoy J., 29 October, 1996; *Maher (a minor) v Presentation School Mullingar* [2004] 4 IR 211). The standard required of a school is reasonableness, not perfection (*Lennon v McCarthy*).

**31.** The Supreme Court in *Murphy* confirms “ *[t]he extent of such supervision will depend on a number of factors, for example, the age of the pupils involved, the location of the places where the pupils congregate, the number of pupils which may be present at any one time and the general propensity of pupils at that particular school to act dangerously.*”

**32.** The facts of *Murphy* related to the failure by the school to provide supervision to fifth- and sixth-year students over lunchtime. In that case, there was evidence that a formal roster of supervision had been introduced in response to a previous history of serious disciplinary problems, to the level of fighting giving rise to multiple expulsions. The determining factors for the imposition of liability on the school in *Murphy* were (i) the particular circumstances of that case (ii) the history of indiscipline in the school and (iii) the fact that the school had a newly created rota system for supervision with which it had not complied.

**33.** Applying the *Murphy* factors to the facts of this case: the homework club catered to students of thirteen / fourteen years of age, in a quiet room where an average of four to six participants attended to do their homework in a supportive environment. It was an informal arrangement which facilitated the students getting help with their homework as needed. There was never any suggestion of unruly behaviour there in the past. There was also no suggestion of a general propensity by the pupils of the defendant school at large to act dangerously. Quite the opposite, the principal outlined praise it had received from the Department of Education.



**34.** In addition, the injury in *Murphy* had occurred *within* the supervised activity time such that the absence of the expected supervision constituted negligence on the part of that school. The injury to the plaintiff in this case occurred outside of the expected supervision time.

**35.** Applying the finding that the assault complained of happened before 3:35pm, when the homework room session had not begun, the question to be determined is whether there is an obligation on the school to provide supervision during that 15 minute interval.

**36.** Dr. McDaid, an education expert, prepared a report predicated on the plaintiff being in the homework room where homework activity club had actually commenced. He confirmed that only general rather than specific supervision was all that was required of the homework club. He did not specifically assess what would require of a school during a 15-minute break between the end of a school day and the transitional time to reach the homework club. He maintained in evidence that the incident occurred at the start of homework club. This does not accord with the evidence of the Plaintiff or the teacher who witnessed the end of the incident.

**37.** At the end of any school day, students are mobilising to and from all corners of a school. Depending on where any of the 700 students in this school were coming from or going to, the various corridors and rooms were either teeming with activity or relatively quiet, with lesser traffic. Either way, as the principal indicated, it would have been physically impossible to have had adult supervision in every nook and cranny of the school at this time, nor would she have had the staff capacity to do so. I accept her evidence in this regard. I do not accept the argument of the plaintiff that, merely because the homework room was open, that imposed an obligation on the school to have supervision there from the moment schoolboys entered. The facts of the homework club were that the participants would arrive individually, numbering up to only four to six on daily average.

**38.** In my view, on the particular facts of this case, there was no duty on the school to have formal supervision in place during this transitional time of the day. I do not believe that it would be reasonable or practical to expect to have an adult supervisor present before the homework club of a small attendance commenced. The facts relating to the homework club have been outlined. The particular activity involved a small group of thirteen- and fourteen-year-olds, was entirely voluntary, with the support of the parents. The students engaged in a relatively quiet activity of doing their homework with the assistance, if such need arose, of a

volunteer transition year student. Participants turned up because they wanted to, it was not a detention class where there might be reluctant attendees.

39. I do not accept that there is a general obligation on a school to have supervision in place once a classroom is open to admit students. This ignores the need for time to permit adults themselves to transition from one duty or location to another to engage in class supervision. More specifically, I do not accept that because a classroom is open to students in a 15 minute pre-class period, this in and of itself creates an obligation to have supervision in place before the 15 minutes expired.

40. I do not believe that the law demands that an adult supervisor must at all times be present in every open room in the school. The alternative would be to keep all classroom doors locked until a class was due to start, and the supervisor had arrived. Had this occurred, it would only mean a collection of schoolboys congregating for several minutes before they could get into the room which could create its own issues.

#### **PROPENSITY AND FORESEEABILITY OF ATTACK:**

41. The plaintiff also asserted that the attack on him was foreseeable such that the school should have been alerted to additional supervision of JD given his prior behavioural record.

42. The plaintiff accepted in cross examination that neither he nor the school had any reason to think JD would hurt either the plaintiff or RK specifically.

43. JD's disciplinary history prior to this incident was revealed in two reports furnished in discovery; the first in September 2011 and the second in September 2012. Nothing is recorded for the intervening year. The single 2012 record comprised a composite of 3 incidents, 2 of which involved physical contact, one a push and the other a lashing out in response to bullying behaviour directed at JD himself. Dr McDaid suggested this evidenced a propensity to violence.

44. Dr McDaid defined 'specific supervision' as being required "*when participant behaviours so indicate i.e. when the teacher / supervisor has notice of the "propensity" of the individual to behave in a manner which either is self injurious or injurious to others*". While he criticised the inadequacy of a one-day suspension from school for JD's behaviour towards the plaintiff, he did not fully analyse whether JD's behaviour met the standard quoted nor did

he express any view that specific supervision ought to have been in place for JD in advance of this incident.

**45.** The principal firmly rejected any suggestion JD was a known threat or danger to other students in the school. She confirmed her view that the recorded incidents, individually and collectively, would not give rise to school security concerns. Had they done so, she said a serious suspension would already have been applied to JD after the Sept 2012 record. I accept her evidence and find that JD's prior history did not highlight him as a significant risk to the student population or, more specifically, to the plaintiff. As mentioned above, the plaintiff accepted that there was no reason to believe that JD would target either the plaintiff or RK. I do not find that it was reasonably foreseeable that JD would chase RK to the homework room and forcibly extract him necessitating the plaintiff's intervention leading to the assault on the plaintiff.

**46.** Having found as a fact that the incident occurred in the 15 minute interval before the homework club started, a club involving a small group of 4-6 students with no history of aggressive behaviour, gathered in a voluntary and supportive environment; and that there was no obligation on the defendant school to have had supervision in place during that interval period; and applying the general considerations previously outlined from the *Murphy* decision above, I cannot see any basis for imposing liability on the defendant school for an incident which took place in a place and during an interval when no supervision of such students was expected.

**47.** The plaintiff's action therefore fails.

**48.** For the sake of completeness, the plaintiff also outlined a subsequent interaction with the PE teacher in late November 2012. This interaction occurred upon his return to school when he was exempted from attending PE class. He described additional humiliation when he was asked in front of the class why he was not engaging in PE. The defendant school objected to the inclusion of this separate claim being made for the first time during the opening of the case, based on particulars delivered only the previous week. The plaintiff did not raise this matter with any doctor then or since, despite being treated for anxiety. While on balance I accept that the plaintiff as a 14-year-old boy did suffer acute embarrassment when asked the reason for his non engagement in PE, I do not accept that this embarrassment gave rise to any separate heading of injury. If the plaintiff had succeeded on liability I would in

any event have found that any additional humiliation, embarrassment or anxiety he experienced was inextricably linked to the original injury.

**49.** In dismissing the plaintiff's claim, I do so with considerable sympathy for the plaintiff. He undoubtedly suffered a very significant and lasting injury in 2012 which continues to affect him today. He required serious medical treatment including numerous surgeries and strong medication. His schooling was affected. However, on the particular facts of this case I cannot impose liability for this injury on the school.