[2024] JMCA Civ 36

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CIVIL APPEAL NO COA2021CV00028

BETWEEN YANIQUE SMITH APPELLANT
(Formerly a child but now of full age)

AND ALEXANDRIA FERGUSON RESPONDENT
(Formerly a child but now of full age)

Ms Jacqueline Cummings and Ms Dianca Watson instructed by Archer Cummings and Co for the appellant

Mrs Kaysian Kennedy-Sherman, Ms Simone Gooden and Ms Allodine Groves instructed by Townsend Whyte and Porter for the respondent

4, 5 March and 27 September 2024

Civil law – Negligence – Foreseeability – Standard of care required by and applicable to young children- Liability of a child under age 12 in negligence

STRAW JA

[1] I have read the judgment of my sister Foster-Pusey JA, and I agree with her reasoning and conclusion.

FOSTER-PUSEY JA

The background

[2] This is an appeal from the decision of Pettigrew Collins J ('the learned trial judge'), made on 25 February 2021, in which she found Ms Yanique Smith ('the appellant') liable for negligence. Ms Alexandria Ferguson ('the respondent') claimed damages as a result

of injuries she sustained while at school when the appellant pulled a chair on which she was about to sit, causing her to fall on the floor. The school was also sued and found negligent but did not appeal.

[3] This court heard the appeal on 4 and 5 March 2024 and reserved judgment.

[4] The main issue in this case is the legal test to be applied in determining whether a child is liable for negligence when his or her action has caused injury or loss. The appellant has also challenged some of the findings of fact that the learned trial judge made. Upon reviewing the law which the learned trial judge applied and her findings of fact, I believe the appeal should be dismissed. I provide the reasons for my view in the remaining paragraphs of this judgment.

[5] The appellant and the respondent were both students of the Quest Preparatory School ('the school'). At the time of the incident, the appellant was 10 years old, and the respondent was 11 years old. Both were grade five students. On Friday, 18 January 2008, both children lined up along the corridors outside their classroom in preparation for the morning's devotional exercise when the appellant moved a chair on which the respondent was about to sit. The respondent fell on the floor and sustained injuries, causing her to suffer pain in her neck and back.

[6] By a claim form filed on 22 May 2009 and an amended claim form filed on 29 July 2016, the respondent sued the appellant and the school, seeking to recover damages for negligence due to injuries she sustained. The respondent's claim was supported by particulars of claim filed on 22 May 2009 and further amended particulars of claim filed on 29 July 2016, which included the following extracted particulars of negligence of the appellant:

> "e) …the [appellant], not having any regard or being reckless as to the danger of removing the chair from under the [respondent];
>
> f) Failing to keep any or any proper look-out for the [respondent's] safety while she was on the premises of [the school]."

[7] There was no dispute that the appellant moved the chair, and the respondent fell. The appellant filed a defence and an amended defence on 15 March 2010 and 24 January 2018, respectively. The core of the appellant's defence was that at the time of the incident, the respondent had gotten up from the chair on which she was sitting, at the appellant's request, to allow the appellant to pass to the other side of the corridor. The appellant asserted that she moved the chair to pass, and the respondent attempted to sit back down, missed the chair, and fell. The appellant denied being negligent and denied that she wilfully removed the chair, causing the respondent to fall.

The grounds of appeal and orders sought

[8] The grounds of appeal challenging the decision of the learned trial judge are:

> "i. That the learned judge erred in fact in finding the appellant's actions were mischievous and deliberate as there was no evidence of this.
>
> ii. That the learned judge erred in fact in finding that the appellant wished to cause harm to the respondent;
>
> iii. That the learned judge erred in law in finding that the appellant foresaw, or should have foreseen, that her actions would have caused injury to [the] respondent.
>
> iv. That the learned judge erred in law in measuring the appellant's actions against the standards of an adult as opposed to the standard of an ordinary, reasonable child of similar age.
>
> v. That the learned judge fell in error and misdirected herself as to the law as it relates to determining whether a child can be found negligent, especially considering the tender age of the appellant."

[9] The orders sought were as follows:

> "I. That the judgment of the learned judge Mrs. Andrea Pettigrew-Collins dated 25th of February 2021 be set aside as it relates to judgment against the appellant herein and judgment be entered for the appellant against the respondent.

II. The appellant do have her costs in the Court of Appeal and the Court below.

III. Such further and other relief as this Honourable Court deems fit."

The issues

[10] Having examined the appellant's five respective grounds of appeal, four broad issues arise in this appeal. For ease of reference, grounds i and ii will be considered together as they are challenges to issues of fact, and grounds iv and v separately, as matters of law. Ground iii will be considered in part with both the issues of fact and law as it is an issue of mixed fact and law. The issues are as follows:

i. Whether the learned trial judge erred in fact in finding that the appellant's actions were mischievous and deliberate (ground i);

ii. Whether the learned trial judge found or it was open to her to find that the appellant wished to cause harm to the respondent (ground ii);

iii. Whether the learned trial judge erred in law when she found that the appellant foresaw or could have foreseen that her actions could have caused injury to the respondent (ground iii); and

iv. Whether the learned trial judge erred in law when she concluded that the appellant, a 10-year-old child, could be held liable for negligence, and having so found, whether she erred in law in the standard against which she measured the appellant's actions to determine liability (grounds iv and v).

[11] As the learned trial judge's findings of fact had to be grounded in the correct legal principles, I will first address issues iii (to some extent) and iv.

Issues iii and iv:

iii. Whether the learned trial judge erred in law when she found that the appellant foresaw or could have foreseen that her actions could have caused injury to the respondent; and

iv. Whether the learned trial judge erred in law when she concluded that the appellant, a 10-year-old child, could be held liable for negligence, and having so found, whether she erred in law in the standard against which she measured the appellant's actions to determine liability.

The submissions

Counsel for the appellant

[12] Ms Cummings, counsel for the appellant, submitted that the learned trial judge erred in law on three bases. Firstly, she erred in finding that the appellant foresaw or should have foreseen that her actions would cause injury to the respondent.

[13] Secondly, counsel submitted that the learned trial judge erred in law in measuring the appellant's actions against an adult standard as opposed to the standard of an ordinary, reasonable child of similar age.

[14] Thirdly, counsel impressed upon the court that the learned trial judge fell in error and misdirected herself on the law governing whether a child can be found negligent, especially at the tender age of the appellant. She indicated that the learned trial judge, in finding the appellant liable, would have concluded that a regular 10-year-old had a duty of care to an 11-year-old child and breached that duty resulting in harm to the 11-year-old. Counsel, however, was reluctant to accept that any such duty was owed by a child of tender years to another. Counsel stated that "[a]ll the cases cited to [the learned trial judge] below and having done a thorough search of authorities in Jamaica and

throughout to [sic] Commonwealth, there is no case we could find where a 10-year-old child has been found liable in tort regardless of the circumstances".

[15] Ms Cummings highlighted the distinguishing features in the cases cited by the learned trial judge. These were **Gough v Thorne** [1966] 3 All ER 398, **McHale v Watson** [1966] 115 CLR 199, and **Mullin v Richards and another** [1998] 1 All ER 920. She submitted that in **Mullin v Richards**, a 15-year-old was held not liable. In **Gough v Thorne**, a 13-year-old was not found liable due to his tender years, and in **McHale v Watson**, a 12-year-old was found not liable. Counsel submitted that these cases established that minor children do not have the cognitive skills to realise that what they are doing is dangerous and may cause harm.

[16] Counsel submitted further that the learned trial judge was wrong in comparing the standard of proof in criminal matters and the civil responsibility of a child. She relied on section 3 of the Juveniles Act. She indicated that the standard of proof being higher in criminal matters than the standard in civil matters, does not derogate from the fact that the laws that govern our country recognise the vulnerability and fragility of children under 12 years as it relates to their lack of cognitive skills. Counsel submitted that the learned trial judge was flawed in her pronouncement that "I do not think that the fact of not being criminally responsible for what would otherwise be criminal conduct is a basis on which it can be said that there should be no civil responsibility".[1]

[17] Ms Cummings concluded her submissions on these issues by emphasising to the court that to allow the learned trial judge's judgment to stand would open the floodgates for every primary and preparatory school student to sue their fellow students for every childhood accident, incident, or prank that results in injury. Counsel submitted, however, that if the court were to accept her submissions, this would not interfere with the fact that the injured party can take action against their academic institutions for negligence on the basis of improper or inadequate supervision by the adults employed there.

[1] Para. [44] of the learned trial judge's reasons

Therefore, counsel urged that this court set aside the learned trial judge's judgment against the appellant and award the appellant costs in this court and the lower court.

Counsel for the respondent

[18] Relying on the English House of Lords case of **Bolton v Stone** [1951] 1 All ER 1078 for guidance regarding the foreseeability test, counsel for the respondent, Mrs Kennedy-Sherman, stated that the learned trial judge was correct in her assessment of the evidence and the application of the relevant law concerning foreseeability, and as such the appellant's grounds of appeal did not have any merit. Counsel submitted that the learned trial judge appreciated that the exact nature or extent of the injury need not be foreseen; rather, it had to be foreseen that injury was likely to occur from the appellant's action and that the injury was not too remote.

[19] Counsel also relied on **Mullin v Richards** and **McHale v Watson** on the approach that should be taken by the court when considering the liability of a child in negligence. She noted that the foreseeability test is objective, and the question for the judge in cases such as the one at bar is whether an ordinarily prudent child of like age in the appellant's situation would have realised that injury could occur from her actions. Further, the standard by which a child's conduct is to be measured is not that to be expected of a reasonable adult but that reasonably expected of a child of the same age, intelligence, and experience.

[20] Mrs Kennedy-Sherman, therefore, submitted that it was reasonable for the court to find that an ordinary 10-year-old child as the appellant, who received various awards, was proved to be a mature grade 5 student with high cognitive and social skills and who understood social grace and etiquette, would have understood that the shifting of a chair, while someone is attempting to sit, could result in the person falling and sustaining an injury. Counsel stated that while the extent of the injury might not have been foreseen, some injury arising from the fall to the floor would have been.

[21] Counsel submitted further that the learned trial judge's conclusion was measured by comparing the appellant's state of mind with that of an ordinary child and not an adult. She indicated that the learned trial judge had cited and relied on **Mullin v Richards** and **McHale v Watson** in identifying the standard of an ordinary, reasonable child and the test that should be used to consider whether a child is liable for negligence. She highlighted that in **McHale v Watson**, while the child's age was taken into account, it was not the determining factor, as the child's mental state will also assist the court in determining whether to find him or her negligent. Counsel emphasised that a child may be found negligent by the court provided that based on the factual circumstances it was foreseeable by a child of similar age and experience that injury may result from their actions.

[22] In that regard, Mrs Kennedy-Sherman concluded that the learned trial judge applied the law correctly in finding that the appellant was negligent, given her capacity to understand the nature of her actions and possible results.

Discussion

[23] The learned trial judge carefully analysed three cases, in particular, for assistance on the law relating to negligence by children. Counsel on both sides have also referred to and relied on these cases in their submissions before this court but have arrived at opposing legal propositions.

[24] The first case to which the learned trial judge referred was **Gough v Thorne**. In **Gough v Thorne**, a 13½-year-old plaintiff, Elizabeth Gough, was hit by a motor vehicle when crossing a road after a motorist had stopped and beckoned for her to cross. She brought a claim against the defendant, John Arthur Edward Thorne, and the judge at first instance found the defendant negligent and the plaintiff 1/3 contributorily negligent. That decision was overturned on appeal on the basis that an ordinary child of 13½ (unlike an adult) could not reasonably be expected to pause to see for herself whether it was safe to go forward when the lorry driver had beckoned her on. So, the plaintiff had not been negligent in relying entirely on the lorry driver's signal for her to cross.

[25] Lord Denning MR wrote at page 399:

> "The judge has found that the defendant driver was negligent…Then there came the question whether the little girl, the plaintiff, was herself guilty of contributory negligence. As to that, the judge found that she was one-third to blame for this accident…
>
> I am afraid that I cannot agree with the judge. A very young child cannot be guilty of contributory negligence. An older child may be; but it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as reasonably to be expected to take precautions for his or her own safety: and then he or she is only to be found guilty if blame should be attached to him or her. A child has not the road sense or the experience of his or her elders. He or she is not to be found guilty unless he or she is blameworthy.
>
> In this particular case I have no doubt that there was no blameworthiness to be attributed to the plaintiff at all. Here she was with her elder brother crossing a road. They had been beckoned on by the lorry driver. What more could you expect the child to do than to cross in pursuance of the beckoning? It is said by the judge that she ought to have leant forward and looked to see whether any-thing was coming. That indeed might be reasonably expected of a grown-up person with a fully developed road sense, but not of a child of 13½.
>
> I am clearly of the opinion that the judge was wrong in attributing any contributory negligence to the plaintiff, aged 13½; and I would allow the appeal accordingly."

[26] Salmon LJ agreed. At page 400, he wrote:

> "**The question as to whether the plaintiff can be said to have been guilty of contributory negligence depends on whether any ordinary child of 13½ could be expected to have done any more than this child did.** I say, 'any ordinary child'. I do not mean a paragon of prudence; nor do I mean a scatter-brained child; but the ordinary girl of 13½. I think that any ordinary child of 13½, seeing a lorry stop to let her cross and the lorry driver, a grown-up person in whom she no doubt has some confidence, beckoning her to

> cross the road would naturally go straight on, no one in my view could blame her for doing so. I agree that if she had been a good deal older and hardened by experience and perhaps consequently with less confidence in adults, she might have said to herself: 'I wonder if that man has given the proper signal to traffic coming up? I wonder if that traffic has heeded it? I wonder if he ought to have beckoned me across when he did and whether he looked behind him before doing so?' She might not have gone past the front of the lorry without verifying for herself that it was safe to do so; but it would be quite wrong to hold that a child of 13½ is negligent because she fails to go through those mental processes and relies unquestioningly on the lorry driver's signal." (Emphasis supplied)

[27] The learned trial judge also referred to **McHale v Watson**. In **McHale v Watson**, the High Court of Australia, like counsel for the appellant, acknowledged the lack of judicial authority on the standard of care applicable to young children. In that case, Barry Watson ('Watson'), a child who was 12 years old at the time, threw a sharpened piece of metal (a piece of steel welding rod, about 6 inches in length and a quarter of an inch in diameter, which had been sharpened at the end and that was described as a dart), in the direction of a post with the intention of it sticking. When the dart hit the post, it ricocheted off at an angle and struck Susan McHale ('McHale'), a 9-year-old girl standing nearby in her right eye, resulting in permanent blindness in that eye. McHale brought an action against Watson and his parents on grounds of negligence.

[28] Windeyer J, the judge at first instance, found that Watson was not negligent in the legal sense. McHale appealed the decision. The High Court found that it could not ignore the boy's age and that his conduct had to be judged according to the standard of other boys the same age as himself, that is, 12-year-olds. McTiernan ACJ delivered a judgment in which he examined a wide range of material on the standard of care applicable to young children, including Canadian and American case law, academic writers, and the American Restatement of the Law of Tort. At paras. 5, 6, and 7 of the judgment, he wrote:

"5. The appeal was argued on two main grounds: first that his Honour was in error in holding that the liability or degree of responsibility of the defendant Barry Watson or the standard of care to be exercised by him in any way differed from the liability degree of responsibility or standard of care which would have been proper had he been over the age of twenty-one years; and secondly that his Honour should have made a finding of negligence whether he applied the standard of the ordinary reasonable man or the standard (whatever it might be) appropriate to a twelve-year-old boy…

6. I do not agree with either of those grounds. In my opinion the passage which I have quoted from His Honour's judgment does not contain any misdirection in law and I see no reason for interfering with his conclusion. The crucial question is whether his Honour erred in saying that he could not disregard the fact that the defendant Barry Watson was twelve years old at the time of the accident and in order to answer that question it is necessary to determine by what standard of care the infant defendant should be judged. It is a well-established principle that an infant may be held liable for torts which are not ex contractu, but there is a paucity of judicial authority on the standard of care applicable to young children…

7. There is ample authority for the proposition that in cases dealing with alleged contributory negligence on the part of young children they are expected to exercise the degree of care one would expect, not of the average reasonable man, but of a child of the same age and experience. **No Australian or English decision was cited relating to the standard to be applied where a young child is sued in negligence. The subject, however, is discussed in several textbooks and there seems to be consensus that the age and experience of an infant should be taken into account when considering the reasonableness of his conduct**…In Clerk and Lindsell on Torts, 12th ed. (1961), par. 157 it is stated: '**by analogy with the cases concerning contributory negligence of young children it seems probable that the age of an infant defendant is relevant in torts involving negligence or malice. If the defendant is of tender years it will be a question of fact whether he is of such age that he ought to have foreseen the consequences of his act, and that malice or want of due care could reasonably be ascribed to him**.' " (Emphasis supplied)

[29] After McTiernan ACJ examined a broad range of cases and material, he stated at para. 16 of his judgment:

> "16. In the present case we are concerned with a boy of the age of twelve years and two months. He was not, of course, a child of tender years. On the other hand, he was not grown up and, according to the evidence, he played as a child. I think it was right for the learned trial judge to refer to him in common with Susan and the other playmates as young children. **It cannot be laid down as an absolute proposition that a boy of twelve years of age can never be liable in negligence; nor that he would always be liable in the same manner as an adult in the case of that tort.** The defendant's conduct in relation to this object which he threw, a useless piece of scrap metal, is symbolic of the tastes and simplicity of boyhood. He kept the object in his pocket after using it earlier in the day to scrape marine life off the rocks at the beach; after that he carried it around with him for the rest of the day until the accident happened. It was the type of thing that a wise parent would take from a boy if he thought the boy would play with it as a dart in the company of other children. The defendant on his way from the beach took the object from his pocket to show Susan and her companions, whom he met playing in a paddock, what he was doing at the beach-apparently he was proud of how he had transformed the piece of scrap metal by rubbing it on the rocks. The game of chasings having ended, the wooden corner post was an allurement or temptation to him to play with the object as a dart. If it had stuck into the post at the first throw, doubtless, he would not have been content with one throw. The evidence does not suggest that the defendant was other than a normal twelve-year-old boy. His Honour considered that the defendant, being a boy of twelve years, did not have enough maturity of mind to foresee that the dart might glance off the post in the direction of Susan if he did not make it hit the post squarely, and that there was a possibility that he might not succeed in doing so. **It seems to me that the present case comes down to a fine point, namely, whether it was right for the trial judge to take into account Barry's age in considering whether he did foresee or ought to have foreseen that the so-called dart might not stick in the post but be deflected from it** towards Susan who was in the area of danger in the event

of such an occurrence. **I think that there is no ground for disagreeing with the conclusion of Windeyer J. on this question. The correctness of this decision depends upon the special circumstances of the case and it does not lay down any general principle that a young boy who cannot be classified as a grown-up person cannot be guilty of negligence** in any circumstances…" (Emphasis supplied)

[30] Kitto J agreed. He wrote at para. 6 of his judgment:

"6. The standard of care being objective, it is no answer for him, any more than it is for an adult, to say that the harm he caused was due to his being abnormally slow-witted, quick-tempered, absent-minded or inexperienced. But it does not follow that he cannot rely in his defence upon a limitation upon the capacity for foresight or prudence, not as being personal to himself, but as being characteristic of humanity at his stage of development and in that sense normal. By doing so he appeals to a standard of ordinariness, to an objective and not a subjective standard. In regard to the things which pertain to foresight and prudence - experience, understanding of causes and effects, balance of judgment, thoughtfulness - it is absurd, indeed it is a misuse of language, to speak of normality in relation to persons of all ages taken together. **In those things normality is, for children, something different from what normality is for adults**; the very concept of **normality is a concept of rising levels until 'years of discretion' are attained. The law does not arbitrarily fix upon any particular age for this purpose, and tribunals of fact may well give effect to different views as to the age at which normal adult foresight and prudence are reasonably to be expected in relation to particular sets of circumstances. But up to that stage the normal capacity to exercise those two qualities necessarily means the capacity which is normal for a child of the relevant age;** and it seems to me that it would be contrary to the fundamental principle that a person is liable for harm that he causes by falling short of an objective criterion of 'propriety' in his conduct-propriety, that is to say, as determined by a comparison with the standard of care reasonably to be expected in the circumstances from the normal person - to hold that where a child's liability is in question the normal person to be

> considered is someone other than a child of corresponding age." (Emphasis supplied)

[31] Owen J agreed with McTiernan ACJ and Kitto J. After conducting a similarly impressive survey of cases and material, he stated at paras. 7 and 8 of his opinion:

> "7. There is, then, a considerable body of opinion amongst the textbook writers, supported by decisions in Canada and the United States, that **where an infant defendant is charged with negligence, his age is a circumstance to be taken into account and the standard by which his conduct is to be measured is not that to be expected of a reasonable adult but that reasonably to be expected of a child of the same age, intelligence and experience**…
>
> 8. For these reasons I am of [sic] opinion that Windeyer J. rightly took into consideration the fact that Barry Watson was only twelve years old and that he did not misdirect himself as to the degree of care reasonably to be expected of a boy of that age…" (Emphasis supplied)

[32] The third significant case to which the learned trial judge referred was **Mullin v Richards**, a case from the English Court of Appeal. In **Mullin v Richards**, two 15-year-old schoolgirls and friends, Teresa Mullin ('M') and Heidi Richards ('R'), were playing around with plastic rulers, hitting each other's rulers in pretend sword fighting during a class, when one of the rulers snapped. A fragment of plastic entered M's right eye, causing her to lose sight in that eye. M brought proceedings for negligence against R and the local education authority. The judge at first instance dismissed the claim against the education authority but found that both M and R had been guilty of negligence, that M's injury was the foreseeable result and, accordingly, that M's claim against R succeeded subject to a reduction of 50% for contributory negligence. R appealed, contending that the judge had erred when considering foreseeability by omitting to consider that R was not an adult.

[33] Their Lordships, in that case, found that, although the test of foreseeability in negligence was an objective one, where the defendant was a child, the question for the judge was not whether the actions of the defendant were such as an ordinarily prudent

and reasonable adult in the defendant's situation would have realised gave rise to a risk of injury, but whether an ordinarily prudent and reasonable child of the same age as the defendant in the defendant's situation would have realised as much. Their Lordships cited and approved the approach taken in **Gough v Thorne** and **McHale v Watson** and affirmed that age affects the assessment of negligence. Hutchison LJ stated further at page 925 of the report:

> "**Applying those principles to the facts of the present case the central question** to which this appeal gives rise **is whether on the facts found by the judge and in the light of the evidence before him he was entitled to conclude that an ordinary, reasonable 15-year-old school girl in the first defendant's position would have appreciated that by participating to the extent that she did in a play fight,** involving the use of plastic rulers as though they were swords, **gave rise to a risk of injury to the plaintiff of the same general kind as she sustained**. In that connection I emphasise that a mere possibility is not enough as passages in the well-known case of *Bolton v Stone*…make clear." (Emphasis supplied)

[34] Hutchison LJ observed that the question of actual foreseeability raised great difficulties in the case. He noted that there was no evidence of the rulers' propensity or otherwise to break or any history of them having broken. It also appeared that the judge accepted that ruler fencing was commonplace. The learned trial judge further noted that there was no evidence that the practice was banned, frowned upon, or discouraged in any way. At page 926, he stated:

> "The question of foreseeability therefore has to be judged against that background, the prevalence of the practice, the absence of prohibition, the absence of warning against it or of its dangers and the absence of any evidence of there having been any previous injury as a result of it."

[35] Hutchison LJ concluded that the learned trial judge found negligence, although there was no material on which he could do so. He noted that in the absence of evidence, it was not clear why the ruler broke and that the girls were engaging in "nothing more

than a schoolgirl's game which was commonplace in the school" when the incident occurred. He found "no justification for attributing to the participants the foresight of any significant risk of the likelihood of injury". Hutchison LJ highlighted that the girls had not been told that the activity was prohibited and had not received any warning about it. They had also not been told of any injuries caused by engaging in the activity. He, therefore, proposed that the appeal be allowed. Sir John Vinelott and Butler Sloss LJ agreed.

[36] Upon a careful review of the above cases, in my view, the following principles can be extracted:

i. "An infant may be held liable for torts which are not ex contractu", (*ex contractu* means a transaction arising out of a contract). "It cannot be laid down as an absolute prohibition that a boy of twelve years [or any particular age within reason] can never be liable in negligence" (McTiernan ACJ in **McHale v Watson**). Thus, there is no particular age at which it can be stated definitively that a child can never be liable for negligence;

ii. "Where an infant defendant is charged with negligence, his age is a circumstance to be taken into account, and the standard by which his conduct is to be measured is not that to be expected of a reasonable adult but that reasonably to be expected of a child of the same age, intelligence and experience…" (Owen J in **McHale v Watson**). This is a similar approach to that taken in cases in which the alleged contributory negligence of a child is being considered (**Mullin v Richards**);

iii. The foreseeability of a child must be measured at the capacity that is reasonably expected or seen as normal for a child of the relevant age (Kitto J in **McHale v Watson**); and

iv. The question to be answered is whether an ordinary reasonable child of the age in question would appreciate that carrying out the activity in question gave rise to a risk of injury to the person hurt of the same general kind as was sustained. In relevant circumstances, foreseeability may need to be judged against "the prevalence of the practice, the absence of prohibition, the absence of warning against it or of its dangers and the absence of any evidence of there having been previous injury as a result of it". (Hutchison LJ in **Mullin v Richards**); It is a question of fact to be determined by the judge whether a child defendant ought to have foreseen the consequences of his or her act. (McTiernan ACJ in **McHale v Watson**).

[37] Additional research confirms the accuracy of the above summary of the relevant legal principles.

[38] The learned author, Larry C Wilson, of the Faculty of Law, University of Windsor, Windsor, Ontario, in the Canadian Bar Review, Volume 79, page 369[2], in examining the current state of Canadian law concerning the civil responsibility of children and their parents, opined at page 371 that: "Although children may be found responsible for both intentional torts and negligence, establishing liability is much more difficult than in cases involving adults". He indicated that:

> "**In the case of intentional torts there is no general immunity for children and there is no clear age limit for responsibility**. However, children under the age of four are probably beyond the reach of tort liability. It is suggested that children below that age lack the capacity to form the requisite intention." (Emphasis supplied)

[2] Larry C Wilson, Parental Responsibility for the Acts of Children, 2000 79-3 Canadian Bar Review 369, 2000 CanLIIDocs 95

[39] The learned editors of Halsbury's Laws of England, 4th edition, volume 45(2), in examining the general liability of children for torts, stated at para. 335:

> "Minority as such is not a defence in the law of tort. **If a child is of tender years it is a question of fact whether he had the capacity or particular state of mind required for the tort for which it is sought to make him liable.** A child of an age at which he is capable of distinguishing between right and wrong is liable for the consequences of his own wrongful acts. **A child above the age of seven years** is not protected from the consequences of their own fraud, and **is generally liable for a tort committed by them if it is not directly founded upon a contract on which they cannot be sued**." (Emphasis supplied)

[40] Therefore, in the words of the learned editors of Halsbury's Laws of England, Tort (volume 97A (2021)) para. 34:

> "**Accordingly, a child can be sued….for negligence.**" (Emphasis supplied)

[41] It is against the case law and material outlined above that the learned trial judge's approach must be assessed. At para. [6] of her judgment, the learned trial judge wrote:

> "Based on my findings of fact the main issue arising in respect of the [appellant] is whether an ordinary reasonable 10-year-old school girl in Yanique's situation ought to have appreciated that by deliberately pulling the chair on which she was aware that the [respondent] was about to sit, her conduct gave rise to a risk of injury."

[42] I believe this was a concise and correct summary of the legal principles established by the case law and which the learned trial judge was bound to apply to the facts before her. The question as to what the appellant foresaw or could have foreseen depended on the findings of fact that the judge would make, after her assessment of the appellant, bearing in mind what would be expected of an ordinary, reasonable 10-year-old child in the appellant's situation. The appellant's situation included her intelligence and experience. As stated above, ground of appeal iii is therefore not solely an issue of law,

but instead one of mixed law and fact. The learned trial judge stated the correct legal principle on foreseeability, and the question remains whether she correctly applied the law to the facts. This will be further considered below.

[43] In addition, the learned trial judge correctly rejected a submission from counsel for the appellant at first instance that because a child below 12 years of age cannot be criminally responsible, the appellant, a child of 10 years old, could not be liable for negligence. The matter of the age of criminal responsibility, now specifically addressed by section 63 of the Child Care and Protection Act passed in 2004, as the Juveniles Act on which Ms Cummings incorrectly relied had been repealed, does not apply to the arena of negligence. The case law examined above has also demonstrated this.

[44] Grounds iv and v are without any merit, as it is clear that the learned trial judge appreciated that the appellant's actions were to be measured against the standards of an ordinary reasonable child of the appellant's age. In addition, contrary to Ms Cummings' submissions, no case law supports a principle that a child of the appellant's age can never be found negligent.

[45] I note Ms Cummings' concerns about the floodgates opening if the court decides that a 10-year-old can be liable for negligence. However, as the previously examined authorities demonstrate, a child can be found negligent, and the case at bar would not be establishing any new legal principles.

[46] The next step, therefore, is to review the findings of fact made by the learned trial judge.

Issues i, ii and iii:

i. Whether the learned trial judge erred in fact in finding that the appellant's actions were mischievous and deliberate (ground i);

ii. Whether the learned trial judge found or it was open to her to find that the appellant wished to cause harm to the respondent (ground ii); and

iii. Whether the learned trial judge erred in law when she found that the appellant foresaw or could have foreseen that her actions could have caused injury to the respondent (ground iii).

The submissions

Counsel for the appellant

[47] Ms Cummings challenged the learned trial judge's finding that the appellant's actions were mischievous and deliberate and complained that the learned trial judge found that the appellant wished to cause harm to the respondent. Counsel contended that no evidence had been elicited to demonstrate, suggest, or infer that the appellant's actions were mischievous or deliberate or that the appellant wished to cause harm to the respondent. She emphasised that the only evidence of the appellant's mischievous behaviour was raised by the respondent, and pinching another student is very different from pulling a chair away from someone deliberately causing her to fall. Furthermore, the evidence of the appellant receiving numerous awards from her school for 'most disciplined' and a trophy for 'good citizenship' was contrary to the respondent's assertions that the appellant was mischievous.

[48] Ms Cummings also criticised the learned trial judge's statement that "[t]here would have been no need for there to have been any prior incident of a child pulling away a chair causing another to fall to the ground thereby receiving injuries for it to be known that such conduct was dangerous".[3] She questioned whether the learned trial judge was referring to the foresight of an adult or a 10-year-old child. Relying on the judgment of **Hughes v Lord Advocate** [1963] AC 837, also cited by the learned trial judge, counsel stated that children need to experience actions for themselves before understanding the

[3] Para. [51] of the learned trial judge's reasons

outcome. Continuing her argument, counsel posed the following question: If the children at the school never had the prior experience that a chair pulled away when a child was sitting resulted in injury, how would a child of age 10 know that such an activity would be dangerous, or would cause the person falling to sustain neck and back injury?

[49] Counsel noted that although the learned trial judge expressed the view that the consequence of the act was not intended, she nevertheless decided that "it must have been evident to a child such as Yanique in the circumstances that pulling away a chair from beneath another child who was about to sit could cause injury".[4] Counsel argued that the learned trial judge did not refer to what aspect of the evidence led her to this decision. Ms Cummings contended further that if the learned trial judge was of the view that the consequences were not intended[5], it meant that the learned trial judge believed that a 10-year-old would not have contemplated that pulling a chair away from the respondent, would cause serious or any harm to the respondent. Further, counsel asserted that there was no evidential basis that the appellant was ever aware that at the time of moving the chair, she knew the respondent was about to sit on it.

[50] Counsel challenged the learned trial judge's acceptance of the respondent's version of the incident since the learned trial judge did not accept aspects of the respondent's testimony. Counsel submitted that it was unfair of the learned trial judge to take into account the appellant's hesitation in answering two questions in the course of being cross-examined. She insisted that, contrary to the comment of the learned trial judge, she could not find any instance where the appellant disagreed with obvious and undeniably true suggestions.

[51] Ms Cummings highlighted the respondent's response in the trial when asked "Would this fall have been a simple accident?" and she replied, "She pulled the chair. I don't know if it was an accident". According to her, this evidence supported her view that

[4] Para. [53] of the learned trial judge's reasons
[5] Para. [52] of the learned trial judge's reasons

nowhere in the evidence was it suggested that it was a schoolgirl prank or there was a history of that occurring in the school before.

[52] Accordingly, it was counsel's submission that the only logical conclusion is that the entire episode was not a malicious and deliberate act meant to cause harm to the respondent. Counsel urged that the court should set aside the learned trial judge's finding of fact that the appellant mischievously and deliberately pulled the chair as there was no evidence to support it.

Counsel for the respondent

[53] Mrs Kennedy-Sherman submitted that an appellate court is generally unwilling to disturb a decision arising from an exercise of discretion given to the judge at first instance. She argued that an appellate court would only do so if it is shown that the judge made an error of law, misinterpreted or misapplied the facts involved in that exercise, or made an order that is so aberrant that no reasonable judge would have made, in the circumstances of the case. She relied on the case of **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042, which has been adopted in several cases in this court, including the decision of **Marilyn Hamilton v Advantage General Insurance Company Limited** [2019] JMCA Civ 48.

[54] Counsel submitted that the learned trial judge could accept and reject portions of a witness's testimony and relied on **Willard Williamson v R** [2015] JMCA Crim 8. Learned counsel declared that the learned trial judge was in a position to see the witnesses give the evidence, to assess the evidence, and to determine the evidence she found more credible. Counsel pointed out that while the learned trial judge found the respondent not credible in some regard, she was not persuaded by the appellant's evidence. She found the respondent to be a more credible witness than the appellant.

[55] Counsel also alluded to the aspects of the evidence that were led in the trial, particularly that the appellant stated that she could discern between right and wrong and that the chair was positioned in the middle of the corridor with space to the back and

front of the chair for someone to pass. Additionally, there was factual evidence for the court to surmise the intelligence and social awareness of the appellant as well as draw inferences that the appellant was mischievous. It was, therefore, reasonable for the Court to infer from the facts that the appellant was mischievous by pulling the chair away from the respondent in circumstances where there was adequate space to pass. Counsel submitted that there was no misapplication of the facts which would justify disturbing the learned trial judge's findings.

Discussion

[56] The approach taken by this court to review findings of fact made by judges at first instance is well established. As Viscount Simon wrote in **Watt (or Thomas) v Thomas** [1947] 1 All ER 582 at pages 583-584:

> "… an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached on that evidence should stand, but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide, **but if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight.** This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given." (Emphasis supplied)

[57] Brooks JA (as he was then) in **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7 also helpfully summarised how this court should treat a judge's findings of fact and rulings on the credibility of witnesses. He said at the following paragraphs:

> "**The law relating to findings of fact**
>
> [7] It has been stated by this court, in numerous cases, that it will not lightly disturb findings of fact made at first instance by the tribunal charged with that responsibility. Their Lordships in the Privy Council, in **Industrial Chemical Co (Ja) Ltd v Ellis** (1986) 23 JLR 35, an appeal from a decision of this court, approved of that approach. The Board ruled that it is only in cases where the findings of the tribunal are not supported by the evidence, or it is clear that the tribunal did not make use of the benefit of having seen and heard the witnesses, that the appellate court would disturb those findings. Their Lordships re-emphasised that principle in their decision in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21. The Board stated, in part, at paragraph 12:
>
> > '... It has often been said that the appeal court must be satisfied that the judge at first instance has gone "plainly wrong". See, for example, Lord Macmillan in *Thomas v Thomas* [[1947] AC 484] at p 491 and Lord Hope of Craighead in *Thomson v Kvaerner Govan Ltd* 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: *Piggott Brothers & Co Ltd v Jackson* [1992] ICR 85, Lord Donaldson at p 92. **Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole.** That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. **The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to**

> **undermine his conclusions**. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: *Choo KokBeng v Choo Kok Hoe* [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169.' (Emphasis supplied)
>
> ….
>
> [10] In the latter case, [*Watt v Thomas*] K Harrison JA, with whom the rest of the panel agreed, set out, at page 15, the following guiding principles:
>
> > 'The principles derived from the [previously decided cases on the point of findings of fact] can therefore be summarized as follows: (a) Where the sole question is one of credibility of the witnesses, an appellate court will only interfere with the judge's findings of fact where the judge has misdirected himself or herself or if the conclusion arrived at by the learned judge is plainly wrong. (b) On the other hand, where the question does not concern one of credibility but rather the proper inferences that ought to have been drawn from the evidence, the appellate court may review that evidence and make the necessary inferences which the trial judge failed to make.'" (Emphasis as in the original)

[58] It is also helpful to refer to the case of **Carlton Williams v Veda Miller** [2016] JMCA Civ 58, in which Edwards JA (Ag) (as she then was) cited the case of **Algie Moore v Mervis L Davis Rahman** (1993) 30 JLR 410. At para. [102], she recited the dictum of Patterson JA (Ag), which states:

> "Where there is an appeal from the trial judge's verdict based on his assessment of the credibility of witnesses that he has seen and heard, an appellate court '**in order to reverse must not merely entertain doubts whether the decision below is right, but be convinced that it is wrong**' (per Lord Kingsdown in Bland v Ross, the Julia (1980) 14 Moo P.C.C. 210 at p. 235) Lord Wright, in his opinion in Powell v Streatham Manor Nursing Home (supra) at page 67,

quoted Lord Sumner's views as to 'the proper questions which the Appellate Court should propound to itself in considering the conclusions of fact of the trial judge.

> i. Does it appear from the President's judgement [sic] that he made full judicial use of the opportunity given him by hearing the viva voce evidence?
>
> ii. Was there any evidence before him, affecting the relative credibility of the witnesses, which would make the exercise of his critical faculties in judging the demeanour of the witnesses a useful and necessary operation?
>
> iii. Is there any glaring improbability about the story accepted, sufficient in itself to constitute 'a governing fact which in relation to others has created a wrong impression' or any specific misunderstanding or disregard of a material fact or any 'extreme or overwhelming pressure' that has had the same effect?'" (Emphasis supplied)

[59] It is also important to note that, as McDonald Bishop JA (Ag), as she then was, accepted in **Williard Williamson v R,** para. [104], the credibility of a witness is 'divisible,' meaning that it is open to a judge to accept a part of a witness's evidence and reject other parts. This is a principle of general application in both civil and criminal matters.

[60] I examined the findings of fact that the learned trial judge made within the parameters outlined above.

[61] The learned trial judge found that the parties' accounts of how the incident occurred differed significantly. On a balance of probabilities, the learned trial judge found, however, that she preferred the respondent's account and, therefore, rejected the

appellant's account of what happened on the day in question. In coming to this decision, the learned trial judge opined at paras. [33] through [36] of her judgment that:

> "[33] …This is so notwithstanding the undisputed evidence that on a number of occasions before, and subsequent to the incident in question, Yanique received school prizes for most disciplined student. She also received a prize on one occasion for good citizenship. This evidence is of course potentially indicative of the [appellant's] lack of propensity for mischievous conduct. Indeed, it is this evidence as to character that the [school's] Attorney at Law has asked the court to rely on to say that the [appellant] did not wilfully pull the chair, knowing that the [respondent] was about to sit but rather that she pulled it with a view to gaining access to the other side of the corridor and the [respondent] happened to sit back down at that moment. It was however the [respondent's] evidence that Yanique was mischievous but would pretend to be otherwise in the presence of teachers. In the face of compelling evidence which propels me to a different view, I decline to rely on what is in essence, character evidence to come to a different conclusion.
>
> [34] My reason for accepting the [respondent's] account over that of the [appellant] is in some measure due to my observations of both the [respondent] and the [appellant] as they gave evidence. There were instances when the [appellant] was evasive in responding to questions and she disagreed to suggestions that were patently obvious and undeniably true, even in instances when she hesitated before responding, presumably giving thought to how she should respond.
>
> [35] Further it was demonstrated in my view through cross examination of the [appellant], that based on her account as to the location of the chair, there was sufficient space for her to pass along the corridor without the need to move the chair from its original position where according to her, the [respondent] was sitting on the chair. It was her account that the chair was in the middle of the corridor, almost totally blocking access to either side. On a photograph of the general area where it was agreed that the incident took place, the [respondent] pointed to an area closer to one side of the corridor as being the approximate location of the chair at the time of the incident. On a balance of probability, I accept that the chair was not blocking access from one side of the corridor to the next. The evidence was that it was

that time of the morning when children were lining up to go down to devotion.

[36] The [appellant] sought in re-examination to explain that even though there was space, there were bags and water bottles on the ground which rendered it necessary for her to ask the claimant to allow her to pass. That explanation in my view was the product of afterthought when she realized that her own account lacked credibility."

[62] The learned trial judge opined further at paras. [38] to [41] that:

"[38] As adverted to before, I am in no way saying that the [respondent] was an entirely truthful witness, as I am of the view that she was not truthful as to where she hit when she fell. Notwithstanding, her for the most part stolid and unhurried demeanour when responding to questions contributed to my taking the view that her account is more closely aligned with the truth. This court fully recognizes the difficulties entailed in deciding which individual to believe when the basis for that belief rests primarily on observing demeanour. However, in part due to the different accounts of how the incident transpired as put forward by the [appellant], the [respondent's] account is more believable.

[39] The [respondent's] account is that she was about to sit when Yanique pulled the chair from beneath her and she fell. In cross examination, she explained that she saw Yanique pull the chair, and she thought that Yanique was about to sit but then she observed that Yanique did not sit. She said however, that that was before the point in time when she fell. The [respondent] vehemently denied Yanique's account that she was sitting on the chair and that Yanique said 'excuse' signalling her intention to pass and that she got up from the chair and Yanique shifted the chair in order to pass onto the other side of the corridor and that she attempted to sit while Yanique was shifting the chair. The [respondent] also denied the suggestion put by Mr Nelson, counsel for the [school] that in her presence, Yanique told Ms McLean that she got up to pass and she leaned forward for Yanique to pass and the chair slipped and fell.

[40] It is not inconceivable that the [respondent] was about to sit at that point when other students were preparing to go downstairs. Her explanation that she was the tallest student and would therefore be at the back is plausible.

> [41] There is the question of whether the [appellant] in an act of mischief or horseplay, pulled the chair. I have already indicated that I reject the [appellant's] account that she was about to pass to the other side of the corridor. On the [respondent's] account which is accepted, there was no discernible reason for the pulling of the chair and such conduct must be viewed in the circumstances as mischievous behaviour."

[63] While counsel for the appellant was critical of the outcome of the learned trial judge's analysis and findings of fact, the learned trial judge's findings were open to her on the evidence as a whole. The extracts from the learned trial judge's analysis also demonstrate that she utilised the benefit of seeing and hearing the witnesses and took into account their demeanour in order to assess their credibility. This is a function best carried out by the judge who heard and saw the witnesses giving evidence. There is no glaring improbability about the version of facts that the learned trial judge accepted.

[64] In continuing to assess the appellant's grounds of appeal challenging the learned trial judge's findings of fact, it can be seen that the learned trial judge explained why she saw the appellant's actions as mischievous and deliberate (paras. [41] and [52] of the learned trial judge's reasons). This finding was open to her on the evidence. While counsel for the appellant has argued as a ground of appeal, that the learned trial judge erred in finding that the appellant wished to cause harm to the respondent, she could not identify any such finding by the learned trial judge. I, too, have not seen any such finding.

[65] There is nothing inconsistent with the learned trial judge's finding that the consequences were not intended and her finding that the appellant's actions were mischievous and deliberate. A finding of negligence does not depend on proof of intention to cause harm or to cause particular consequences. Therefore, these grounds of appeal, i and ii, must fail.

[66] However, the critical issue remains as to how the learned trial judge assessed the appellant's actions as a 10-year-old and how she applied the law to this assessment. At para. [42] of her reasons, the learned trial judge stated:

> "[42] This finding leads me at this point to seek to apply the relevant law in relation to the conduct of children. The undisputed evidence is that at the relevant time, the [respondent] was eleven years old and that the [appellant] was ten years old. From all indications, the [appellant] was a bright and intelligent student. That inference may be drawn in part from her evidence which is that she is now a student in the faculty of Medicine at the University of the West Indies."

[67] The learned trial judge, again correctly, noted at para. [45] of her reasons that "a child is not expected to appreciate cause and effect and to be able to assimilate and process the likely consequences of his/her conduct and therefore act with prudence in the way an adult would". She observed that **McHale v Watson** did not lay down any general principle that a "young boy who cannot be classified as a grown person could not be guilty of negligence in any circumstance".

[68] In light of the importance of this aspect of the learned trial judge's findings, it is useful to quote them and not summarise them. She stated:

> "[46] I reject the submission that because of her tender age at the time, the [appellant] could not have foreseen that injury would have been caused to the [respondent] by her deliberately pulling a chair on which the [respondent] was about to sit. Surely, a clear distinction may be made between the scenarios for example where the child in **McHale v Watson** (supra) aimed the metal rod at the wooden post, but it caught the claimant, or in **Mullin v Richards** (supra) where the common place act of fencing with rulers in which the claimant was a willing participant resulted in injury to the claimant.
>
> [47] The mischievous pulling of a chair when the [respondent] was about to sit cannot be viewed in quite the same way. It would have been foreseeable by an ordinary 10 years old child such as Yanique was at the time that when she pulled the chair, Alexandria would have fallen on the floor. It would have been foreseeable that she could sustain injury by falling. The likelihood of the [respondent] sustaining injury from falling to the ground could not be said in my view to be remote. We are not in the instant case concerned with a complicated chain of events. It was not as I understand the law, necessary that

> Yanique should have foreseen the exact nature or the extent of the injury which Alexandria sustained. What must have been foreseeable was that the sequence of events (as demonstrated by the case of **Bolton v Stone**), which in the instant case was simply the pulling of the chair, resulting in the [respondent] falling on her buttocks to the floor, would have led to injuries sustained by the [respondent]."

[69] In concluding her admirable analysis and application of the law to the facts, the learned trial judge continued at paras. [50]-[53] of her reasons:

> "[50] I have attempted to explain the above because of the [appellant's] Attorney at Law's submission that the [respondent] has failed to satisfy the court that the [sic] it was reasonably foreseeable that the [appellant's] actions would cause injury to the [respondent] or that it was foreseeable that the [respondent] falling would result in her sustaining the injuries she allegedly received.
>
> [51] It was said in **Mullin** that the question of foreseeability had to be judged against the background of the facts. The reasoning that there was no evidence of the propensity or otherwise of the rulers to break or any history of that having happened or that the practice of fencing was inherently dangerous cannot be applied to a very different scenario such [sic] the pulling of a chair from beneath someone who is about to sit. There would have been no need for there to have been any prior incident of a child pulling away a chair causing another to fall to the ground thereby receiving injuries for it to be known that such conduct was dangerous. The question remains whether a child of 10 years of age should possess that foresight. It may also be said of **Mullin** that the defence of volenti non fit injuria might have availed the first defendant since both children were engaged in playful conduct carrying out the exact same activity.
>
> [52] Unlike the fact scenarios in the cases cited, the actual conduct in the case at bar which led to the injury was a **deliberate and mischievous act**, albeit the consequences were not intended. In **McHale** for example, as mentioned before, the trial judge found that the rod that struck the claimant in the eye was not aimed at the claimant, but at a corner post with a view to sticking the rod in the post.

> [53] **To my mind, it must have been evident to a child such as Yanique was in the circumstances that pulling away a chair from beneath another child who was about to sit could have caused injury**." (Emphasis supplied)

[70] I have not identified any error in the above reasoning of the learned trial judge. It was open to the learned trial judge to find as a fact that the appellant would have foreseen that her actions could have caused injury of the type that the respondent suffered. In addition, the learned trial judge carefully explained why it was not necessary for a similar incident to have taken place before, in contrast with the scenarios in **Mullin v Richards** and **McHale v Watson**, for the appellant to foresee the possibility of injury.

[71] I acknowledge Ms Cumming's concern about the learned trial judge's reference to the fact that the appellant was bright and intelligent and that this inference could be drawn from the fact that she was, by the time of the trial, a student in the Faculty of Medicine. However, the learned trial judge did say that the inference was only drawn partly from that evidence, and there was other evidence led by the appellant from which it could be seen that she was bright and intelligent. This included the prizes she won for being the most disciplined student and for good citizenship. Ground of appeal iii, therefore, also fails.

Conclusion

[72] In concluding:

a. There is no general principle that a 10-year-old cannot be found liable for negligence.

b. The learned trial judge did not err in law in the standard against which she measured the appellant's actions as she measured them against what would be expected of an ordinary 10-year-old in the appellant's situation.

c. The question as to whether the appellant could have foreseen that her action of pulling away a chair from beneath the respondent when she was about to sit would or could have caused injury to the respondent was one involving the application of law to findings of fact. The learned trial judge applied the correct principles of law to findings of fact that were open to her in light of the evidence as a whole.

d. On the evidence before her, it was open to the learned trial judge to find that the appellant's actions were deliberate and mischievous.

e. The learned trial judge did not find that the appellant wished to cause harm to the respondent. This was not inconsistent with her finding that the appellant ought to have foreseen that injury could have resulted from her actions.

[73] In light of all of the above, it is my view that the learned trial judge did not err in law or in fact and that none of the grounds of appeal can succeed. As a result, I propose that the appeal be dismissed with costs to the respondent to be agreed or taxed, as I have not identified any factors that would compel us to derogate from the usual costs order.

V HARRIS JA

[74] I, too, have read the judgment of my sister and agree with her reasoning and conclusion.

STRAW JA

ORDER

i. The appeal is dismissed.

ii. Costs of the appeal to the respondent to be agreed or taxed.