HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, HAYNE, CALLINAN AND HEYDON JJ

TRUSTEES OF THE ROMAN CATHOLIC CHURCH
FOR THE DIOCESE OF CANBERRA AND GOULBURN
(AS ST ANTHONY'S PRIMARY SCHOOL) ` APPELLANT

AND

FARRAH HADBA BY HER NEXT FRIEND
AND FATHER NOUHAD HADBA RESPONDENT

Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn (as St Anthony's Primary School) v Hadba
[2005] HCA 31
15 June 2005
C17/2004

ORDER

1. *Appeal allowed with costs.*

2. *Set aside orders 1 to 4 of the orders of the Court of Appeal of the Supreme Court of the Australian Capital Territory made on 18 December 2003 and in their place order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of the Australian Capital Territory

Representation:

D F Jackson QC with G M Gregg for the appellant (instructed by Sparke Helmore)

B W Walker SC with S R Hausfeld for the respondent (instructed by Stacks with Sneddon Hall and Gallop)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn (as St Anthony's Primary School) v Hadba

Negligence – Standard of care – Breach – Eight year old child injured when pulled from flying fox in school playground by fellow student – Whether standard of care owed by school authority extends to the necessity to provide constant supervision over play equipment.

Negligence – Reasonable practicability – Whether constant supervision of dangerous equipment reasonably practicable.

Negligence – Causation – Whether a different system would have prevented the respondent's injuries.

1 GLEESON CJ, HAYNE, CALLINAN AND HEYDON JJ. This is an appeal from the orders favoured by a majority of the Court of Appeal, Supreme Court of the Australian Capital Territory (Higgins CJ and Crispin P, Spender J dissenting)[1]. The Court allowed an appeal against the order of the trial judge (Connolly J)[2] that there be judgment for the first defendant (appellant in this Court) in relation to the claim of the plaintiff (respondent in this Court) for damages for personal injuries she suffered in a schoolyard accident.

The background

2 The first defendant conducts a primary school known as St Anthony's Primary School at Wanniassa in the Australian Capital Territory. On 25 February 1999, the day of the accident, the school had about 540 pupils over seven years – kindergarten and Years 1 to 6. For the purposes of recess, the "junior school" comprised kindergarten, Years 1 and 2, and the "senior school" comprised Years 3 to 6. The pupils were taught by 20 permanent teachers. The plaintiff, Miss Farrah Hadba, who was eight years old, was in Year 3.

3 Each day there was a morning recess and a lunch recess between classes. It was customary for the senior school to play at the "top oval" and the junior school to play at the "bottom oval, asphalt and tuckshop area". Each area was supervised by two teachers. This meant that each teacher was on duty for two recesses each week. In answers to interrogatories, the first defendant stated that the duties of the two teachers in the senior area were divided thus: one teacher monitored the "[p]ath, oval and between units" area, while the other was responsible for "[t]oilets, bubblers and fixed equipment". At the morning recess on 25 February 1999, the latter teacher was Mrs Pauline McNamara. She was a capable teacher of considerable experience. She described her duties more fully as being to supervise the fixed equipment, the large handball area and eating area adjacent to it, the walkway adjacent to the eating area, the toilets at either end of the walkway, and the bubblers. The trial judge found this account to be consistent with the account given in answer to interrogatories. Amongst the items of fixed equipment was a "flying fox" – a metal apparatus consisting of a platform and vertical pole at each end linked by a horizontal pole to which a

---

1 *Hadba v The Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn (as St Anthony's Primary School)* [2003] ACTCA 25.

2 *Hadba v The Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn (as St Anthony's Primary School) and Australian Capital Territory* [2003] ACTSC 20.

sliding triangle was attached. The intended method of use was that a child should get on to the platform at one end, grasp the triangle, step off the platform and slide to the other end. There were apparently other recreational devices attached to, and also perhaps near, the flying fox.

4 The school devised a "hands off rule", requiring that the children not touch each other during play in the playground. It told the children of this in class, in assembly and by posters. It often selected the hands off rule as the "rule of the week" and in that way the children were reminded of it by the principal in assembly, by the teachers in their classrooms, and by display on whiteboards. The plaintiff's class teacher told the class that no-one was to touch another child while that child was using the flying fox. The hands off rule was enforced, and children seen touching other children were told to stop. The plaintiff's class was instructed in the use of the flying fox by their class teacher, who told them that while a child was on the platform, the others had to be in a line behind, had to take turns, and had to avoid being on the ground between the vertical poles. The school also required the flying fox to be used by particular years only at rostered times.

5 At the morning recess on 25 February 1999, it was the Year 3 children who were rostered to use the flying fox. This playground equipment had been at the school for a little less than six years before the accident. It must have been used almost every school day, twice a day, in that time – on many thousands of occasions. Yet there was no evidence that in the past any serious accident involving the flying fox had taken place[3]. Nor was there any evidence that any children had had their legs grabbed or had otherwise been pulled from the flying fox.

6 During the morning recess on 25 February 1999, the plaintiff ascended one platform on the flying fox and took hold of the triangle, ready to ride across to the other platform. There were about 40 children in the area. A boy and a girl, in breach of the school's hands off rule, each grabbed one of the plaintiff's legs. Those two children were in Year 3. There was no evidence that they had created any disciplinary problems in the past, or had any tendency to behave dangerously. The plaintiff struggled to free herself and called on the other children to desist. Although the girl complied, the boy did not. The plaintiff was pulled off the flying fox and her face struck the platform as she fell to the ground.

---

3 Children had fallen off, suffering skinned knees or bruises; and one child who fell felt pain above her left hip when she moved, but she returned to school the next day.

Her injuries were not the result of any defect in the flying fox; they were the result of the two other children having behaved in breach of the hands off rule.

7 These events leading to the accident were not observed and prevented by Mrs McNamara for the following reasons. The children had been behaving appropriately on the flying fox, and nothing gave her any warning of what was to happen. While moving about the area for which she had responsibility, and at a time when no child was misbehaving on the flying fox, she looked away from the flying fox to survey the bubblers and the toilet block. As she looked at the toilet block she saw children in the Year 6 classroom units. This was against school policy. She attempted to call them out of the classroom units. The plaintiff's accident happened in the 20 or 30 seconds which elapsed between the moment when Mrs McNamara left a point in the playground where she could see the flying fox to the moment when she was informed by two pupils of the plaintiff's accident.

The plaintiff's case

8 At least in this Court, the presentation of the plaintiff's case involved no criticism of Mrs McNamara. The criticism advanced was directed to the system with which Mrs McNamara had to comply.

9 The presentation of the plaintiff's case understandably sought to distance itself from suggestions (a) that any rise in teacher resources directed to playground supervision was called for; and (b) that primary schools are obliged to provide constant supervision of activities on playground equipment. Yet at the end of the day these conclusions are what the plaintiff's case called for.

10 It was common ground that the harm suffered by the plaintiff was reasonably foreseeable and that the first defendant owed a duty to the plaintiff to take reasonable precautions for her safety while she was at school. The plaintiff alleged that the first defendant was in breach of that duty in six respects:

"a) Failing to roster a sufficient number of teachers for playground duty.

b) Failing to ensure that a teacher was on playground duty to supervise the play equipment area.

c) Failing to institute and maintain appropriate rules for the use of the flying fox including banning the touching or interference with students hanging from the flying fox.

d) Failing to ensure that students did not interfere with other students whilst using the flying fox.

e) If the students were not able to safely and responsibly use the flying fox, failing to remove it or padlock it so it could not be used.

f) Providing an item of playground equipment without providing students with adequate instruction and supervision concerning its use."

11 In view of the "hands off rule", particulars (c) and (d) must fail. The accident was not the result of use of the flying fox, nor of any inadequacy in instruction of the pupils in its use; and indeed the plaintiff's class had been adequately instructed in its use; hence particular (e) and part of particular (f) have to fail. The balance of the plaintiff's case turns on questions of supervision.

12 In this Court the case for the plaintiff rested on the proposition that Mrs McNamara's sole duty should have been to supervise the play equipment area.

<u>Evidential gaps in plaintiff's case?</u>

13 As the first defendant submitted, the plaintiff's case was presented as a res ipsa loquitur case: as a case where in the ordinary course of human affairs an accident of the kind which happened was unlikely to have occurred without want of care on the part of the first defendant. Yet, in view of the school's hands off rule, the specific instructions given to the plaintiff's class by their teacher, the school's deployment of competent supervising teachers, the absence of any prior accident of a serious kind in nearly six years, and the absence of any sign of trouble just before the accident, whether from the boy and girl who grabbed the plaintiff or from any other child, it was not that kind of case at all. Of course, despite the factors just summarised, it was open to the plaintiff to establish a breach of the first defendant's duty of care. But, if she were to do this, it was incumbent on her to demonstrate that there was some system of supervision which was an alternative to that which the school was using at the time of the accident, which was free of the risk of which the plaintiff complains and which was available – not in a general or theoretical way, but in a practical sense.

14 The only witness called in the plaintiff's case was the plaintiff herself. The first defendant called Mr Timothy Smith (the Deputy Principal in 1999 and the Principal from 2001) and Mrs McNamara. On the question of whether there existed any normal or desirable practice in relation to the supervision of primary school children in playgrounds, the plaintiff called no school teacher from other

schools or other person qualified by training or experience to give expert evidence, she tendered no industry standards or industrial awards, and she tendered no instructions or guidelines published by governmental authorities. It was accepted on behalf of the plaintiff that the relevant onus in this respect lay on her. The question of what reasonable care calls for in supervising hundreds of young children at school recesses is a question which the parties to this case assumed could be resolved by taking account of the opinions of the persons who gave evidence on behalf of the first defendant and were persons of specialised training and experience.

15 Mr Smith said in examination-in-chief that the school's allocation of resources to playground supervision had proved adequate in the years up to 1999. He was not asked about that evidence in cross-examination, and was not asked to give expert evidence suggesting any deficiency in the school's system. In cross-examination Mrs McNamara was not asked to add anything significant to her evidence-in-chief that on occasions she could not see the flying fox. Neither was asked to describe what a superior system might involve.

Transposition of the junior area system?

16 To some degree the plaintiff's case fastened on statements by the majority in the Court of Appeal to the effect that the accident could have been avoided if the system used by the school in the junior area had been used for the senior area. Thus Crispin P said[4]:

> "The sole responsibility of one of the two teachers was to supervise the children in the junior play equipment area, whilst the other was responsible for supervising those in the other areas available to them. There was no apparent impediment to the adoption of a similar system for the more senior pupils. Yet the system in fact adopted required the teacher responsible for supervising children in the senior play equipment area to go to other areas including the toilets. It was this requirement that caused Mrs McNamara to leave the immediate vicinity of the play equipment and go to an area where she could not see what the children were doing and they could no longer see her."

---

4 *Hadba v The Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn (as St Anthony's Primary School)* [2003] ACTCA 25 at [31]. See also Higgins CJ at [6].

17 The weakness in this reasoning is that it is unsupported by the evidence. It is not the case, on the evidence, that the "sole responsibility" of one of the teachers in the junior school area was to supervise the junior play equipment area. Mr Smith said in examination-in-chief that one of the teachers in the junior area had to look after "the asphalt area, the junior toilets, the canteen area and … the side of the oval closest to the car park". He said that the other teacher "would be located near the junior play equipment and the – and covering the other side of the oval". As was conceded on the plaintiff's behalf, there was no cross-examination on that evidence. As was also conceded on the plaintiff's behalf, this may have been because the theory that all the school had to do was transfer to the senior area a system supposedly operating in the junior area by which the sole responsibility of one teacher was to concentrate on playground equipment was not a theory in play at the trial, and only entered the case in the Court of Appeal.

18 Hence it cannot be concluded that if the system in place in the junior area had been in place in the senior area, the risk of injury would have been reduced or avoided. Even on that system, the teacher supervising the play equipment had other duties.

<u>Obstacles to the plaintiff's success</u>

19 If the plaintiff is to succeed, it can only be on the basis of an argument put to and evidently accepted by the Court of Appeal: that one teacher should have been assigned to the supervision of the fixed equipment and nothing else; that a second teacher should have had responsibility for all other areas; and that if that task was beyond the capacity of the second teacher, a third should have been assigned to duty.

20 There does not appear to have been any factual investigation at the trial in the cross-examination either of Mr Smith or of Mrs McNamara of the question whether, if Mrs McNamara's duties had been confined to the fixed equipment, a second teacher could have effectively supervised the rest of the senior area. That second teacher, if unassisted by a third or fourth teacher, would have had to supervise not only the path, the oval and areas between the units, but also the toilets, the bubblers, the handball area, the eating area, and the walkway adjacent to it. The evidence left the size of these areas and the distances between them difficult to assess. It cannot be concluded on the balance of probabilities that that second teacher could have effectively supervised the relevant area.

21 The plaintiff's case would then depend on the employment of a third or fourth teacher. In assessing the reasonableness of that as a response by the first defendant to the risk of harm, it must be remembered that there was no evidence

of any serious accident on the flying fox in the past, there was no evidence of pupils having pulled each other from the flying fox in the past, and there was a well-known and enforced school policy against this. The magnitude of the risk of injury was not high, and nor was the degree of probability of its occurrence. Perhaps the existing staff could have carried out supervision without increased expense and without complaint or damage to morale. But for them to carry out recess supervision duties on three, or perhaps four or more, occasions per week rather than two was a course which entailed difficulties and inconveniences. As was conceded on behalf of the plaintiff, the teachers, as much as the pupils, were entitled to the benefits of a break from work. Reasonable persons in the position of the first defendant were entitled to regard it as desirable to secure staff those benefits with a view to teaching being properly conducted.

22 Nor, in the absence of evidence as to the cost of engaging extra staff to carry out supervision duties, and as to their availability, can it be held necessary to take that step as part of a reasonable response.

23 In short, the conclusion of the majority of the Court of Appeal, maintained by the plaintiff in this Court, that "there was an obvious need to maintain constant supervision" of the equipment which included the flying fox[5] was incorrect unless the plaintiff demonstrated that it was reasonable for this to be done using two teachers for the senior area, or for it to be done using a greater number of teachers. This the plaintiff did not do. The case advanced on her behalf in this Court, at the level of both evidence and argument, never addressed the difficulties involved in using two teachers if constant supervision of the flying fox and nearby equipment was to be provided, never stated whether the appropriate system involved two teachers or more than two, and never examined the problems involved if more than two were called for (because, as was conceded on behalf of the plaintiff, there was no evidentiary exploration of these matters at the trial).

24 There is another difficulty in the case presented on behalf of the plaintiff. The school operated a system under which particular teachers had specific duties of supervision. But, understandably, teachers were expected to minimise dangers of kinds other than those to which their specific duties related – as Mrs McNamara did when she saw the children in the classroom units. The Court of Appeal required that there be a teacher whose sole duty was to watch the

---

5 *Hadba v The Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn (as St Anthony's Primary School)* [2003] ACTCA 25 at [34], [38] per Crispin P; see also [2] per Higgins CJ.

flying fox and adjacent equipment. Let it be assumed that that teacher notices a crisis developing nearby – at the bubblers or the toilets – which the teacher responsible for those areas was not available to deal with. The teacher supervising the flying fox and adjacent equipment either will not be prohibited from intervening or will be prohibited from intervening. If the teacher is not prohibited from intervening and does intervene, that teacher will be unable to continue the constant supervision of the flying fox and adjacent equipment. If, on the other hand, the teacher is prohibited from intervening, how is the risk of harm at the bubblers or the toilets to be dealt with? The teacher (or teachers) responsible for those areas cannot be everywhere at once – unless the duties in relation to those areas are, like those relating to the play equipment, also duties of constant supervision, and sufficient teachers are deployed to enable them to be carried out. The number of staff required, the financial and other costs of providing them and the narrowly specialised responsibility required of them are going well beyond the bounds of reasonableness.

25 Nor is it reasonable to have a system in which children are observed during particular activities for every single moment of time – it is damaging to teacher-pupil relationships by removing even the slightest element of trust; it is likely to retard the development of responsibility in children, and it is likely to call for a great increase in the number of supervising teachers and in the costs of providing them.

26 Thus there is force in Spender J's dissenting opinion that the majority decision[6]:

> "is a requirement of unrealistic and impractical perfection. It is born of hindsight. It offends the standard of reasonableness. It amounts to the imposition of the responsibility of an insurer … ."

<u>Causation</u>

27 Since the presentation of the plaintiff's case did not seek to explain how, in a practical sense, constant supervision of the flying fox and adjacent equipment was to be carried out, it is difficult to conclude that a different system would have prevented the plaintiff's injuries. Although the period during which Mrs McNamara was not looking at the flying fox did not exceed 30 seconds, the period between the moment when the plaintiff's legs were grabbed and the

---

6 *Hadba v The Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn (as St Anthony's Primary School)* [2003] ACTCA 25 at [59].

moment when she fell was likely to have been much less – at most a few seconds. It is unlikely that a teacher, even a teacher watching the equipment uninterruptedly, would have been able to prevent the plaintiff's fall once the other two children had grabbed her legs. It was suggested in argument that children will only behave mischievously if they think that no adult is watching. The scope for juvenile mischief is, however, greater than that.

Orders

28 The appeal should be allowed with costs, orders 1-4 made by the Court of Appeal of the Supreme Court of the Australian Capital Territory should be set aside, and it should be ordered that the appeal to that Court be dismissed with costs.

29 McHUGH J. In my opinion, this appeal against a decision of the Court of Appeal of the Supreme Court of the Australian Capital Territory should be dismissed. The appellant was guilty of negligence in the system of supervision that it employed at St Anthony's Primary School. As a result, the plaintiff, who is the respondent to this appeal, suffered injury and is entitled to compensation.

30 The Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn conduct St Anthony's Primary School in Canberra ("the School"). In February 1999, St Anthony's had 20 permanent teachers and about 540 pupils. The plaintiff was one of them. She was aged eight years and four months and was in Year 3. During the morning recess on 25 February 1999, Year 3 children were rostered to use a "flying fox" which was a fixture situated in what was called the top oval area. The flying fox was made of metal. It consisted of a platform and a vertical pole at each end which were joined by a horizontal pole. Attached to the horizontal pole was a sliding triangle. To use the flying fox, a child stood on the platform at one end, took hold of the triangle, stepped off that platform and allowed the triangle to slide along the horizontal pole to the other platform.

31 At the beginning of the school year, the teacher had taken the Year 3 class out to the playground and instructed them how to use the equipment. The teacher had instructed them "that when there was a person on the platform, everyone else was to be in a line behind them and you take turns". The teacher had also instructed the class that nobody was to touch another pupil who was using the flying fox. This was but a particular application of a general school rule – the "hands off rule" – that pupils were not to touch each other while they were in the playground.

32 During the morning recess on 25 February 1999, the plaintiff joined other Year 3 children who were using the flying fox. She got on the platform and took hold of the triangle. In breach of the "hands off rule", two pupils each held one of her legs. Despite struggling to free herself and telling the children to let her go, the plaintiff was pulled off the flying fox. Her face struck the platform as she fell.

33 During the morning and lunch recesses, pupils in the top oval area were supervised by two teachers. One teacher supervised the "path, oval and between units" area. The other teacher supervised the "toilets, bubblers and fixed equipment" which included the flying fox. Another two teachers supervised "the junior school" children who played some distance away in the "bottom oval, asphalt and tuckshop area". During the morning recess on 25 February, Mrs Pauline McNamara was the teacher supervising the toilets, bubblers and fixed equipment area.

34 Unfortunately, the system in place for supervising the toilets, bubblers and fixed equipment area had an inherent defect that gave rise to a risk of injury to

young children in the equipment area. It was a risk that would have been foreseen and avoided if the School had exercised reasonable care. The defect in the system arose from the necessity for the supervising teacher to make periodic patrols to other parts of the top oval area. During the patrols, the teacher had his or her back to the playground equipment including the flying fox. Worse still, from time to time, these patrols took the teacher to areas where the playground equipment was out of sight. Consequently, at different times during recesses, children playing on or in the vicinity of the playground equipment were unsupervised. It was during one of these periods of non-supervision that the plaintiff suffered her injuries.

35 Mrs McNamara said she probably spent about 95 per cent of her time in the area where the playground equipment was visible to her. But the evidence did not reveal how often or for how long during that time a supervisor would have his or her back to the playground equipment. In evidence, Mrs McNamara was asked:

> "Were you doing circuits as it were? – Yes, just – yes, stand here, move away, yes. Haphazard, but –"

36 She also gave evidence as to what she was doing when the accident occurred:

> "At some stage did you turn your back on the open area including the handball courts and the flying fox and walk somewhere? – Yes.
>
> What direction did you walk? – Well, I walked in various directions from it, I'd been back to the handball courts, I didn't do a necessarily clock-wise patrol, I'd been walking round there 'cause there –
>
> It was an irregular pattern, was it? – Irregular, yes.
>
> Was that something you'd do every time you'd do your supervision, that sort of pattern? – Yes.
>
> Was it indeed, was it necessary to turn your back on the flying fox from time to time to carry out your duties? – It was, yes.
>
> Just explain why? – Well, I had to supervise the junior toilet block which is – unsights the play equipment, I was also required to look at the senior and junior toilets and the bubblers on the end of the – and all those areas necessarily cause you not to be able to see the play equipment.
>
> How did you manage your resources and your time in dealing with those different areas? – I can't be exact about it but most of my time was spent where all the children were, in that handball and play equipment area.

> On this day, as you've told us, you'd done your irregular circuits, from time to time you had your back turned to the flying fox, but did something happen that caused you [to] walk towards the Year 6 unit? – No, I just knew I had to do it, that was part of my job and that's why I went there.
>
> So, you walked through that gap and did you see something as you were going towards the toilets as part of your duties?
>
> MR PURNELL: Your Honour, I object to that.
>
> ...
>
> MR GREGG: Why did you walk through the gap occasioned by the toilet block and the adjacent unit? – Because I felt I should.
>
> Why? – Because it was part of my job and I thought I must go round there and just see that – that was expected of me –
>
> What were you intending to look at? – The behaviour in the toilets.
>
> In the course of doing that, did you see something? – I did, yes.
>
> Tell His Honour what you saw? – I saw children in the Year 6 unit at the door marked 'W'.
>
> On Exhibit 1? – On Exhibit 1, yes.
>
> What did you do, did you say something? – I did, I tried to attract their attention and said something like, 'What are you doing there? Please come out'.
>
> Where were you when you saw them, what physical position were you in? – Probably near the staff toilet door, yes.
>
> So, from the – ? Yes, as I came into view of the unit I could see students in the doorway."

37 The evidence of Mrs McNamara demonstrates that the supervising teacher not only had to turn his or her back on the playground equipment area but also had to look at "all those areas [that] necessarily cause you not to be able to see the play equipment."

38 A plan of the playground was in evidence. It showed a distance of about 30 metres from the end of the flying fox to the far corner of the toilet block. It was another 14 or 15 metres to the door of the Year 6 classroom. The trial judge was "satisfied that the accident occurred during a very short period of between 20 and 30 seconds when [Mrs McNamara] was not looking at the playground equipment because her attention was drawn to the presence of students in the out

of bounds classroom area." The shortness of the period between Mrs McNamara turning her back and the accident suggests that the children who took hold of the plaintiff's legs were waiting for an opportunity to be mischievous. And the shortness of the period indicates that they quickly availed themselves of the opportunity offered by Mrs McNamara turning her back.

39 Experience of the behaviour of young schoolchildren teaches that, when a supervising teacher leaves the classroom or the playground, there is a real risk that one or more of the children is or are likely to misbehave. What occurred on this day and caused the plaintiff's injuries fell within the very class of incidents that could be expected to occur when young schoolchildren playing on a flying fox are left unsupervised even for a short period. A child bent on mischief is unlikely to miss the opportunity presented when the supervising teacher's back is turned. In *Rich v London County Council*[7], Hodson LJ agreed with the trial judge's observation that:

> "You can supervise as much as you like, but you will not stop a boy being mischievous when your back is turned. That, of course, is the moment that they choose for being mischievous."

The risk of mischief is even greater when the children know that, as a matter of routine, they will be out of the teacher's sight from time to time.

40 Mrs McNamara gave evidence that in her "time at the school", she had not been aware of any serious accidents involving the flying fox. Other evidence revealed that children had fallen off the flying fox and received minor injuries. Moreover, the evidence does not – indeed could hardly – rule out the possibility that misbehaviour involving the equipment had occurred when the teacher's back was turned. But whether that is so or not is beside the point. The critical matter is that, when the teacher's back was turned – and more importantly when the teacher was out of sight of the children using the flying fox – an opportunity for mischief presented itself. And, if a mischievous child availed him or herself of the opportunity, pushing or shoving of children using the flying fox with consequent injury was "on the cards".

41 Accordingly, the system of recess supervision at St Anthony's gave rise to a reasonably foreseeable risk of injury. Furthermore, that risk caused the plaintiff's injury. The probability is high that the injury would not have occurred if the system had not required Mrs McNamara to turn her back on the children. It is extremely unlikely that the two children would have grabbed hold of the plaintiff's legs if Mrs McNamara had been watching them. And, if they had, the

---

7 [1953] 1 WLR 895 at 903; [1953] 2 All ER 376 at 380.

likelihood was that she would have stopped them, physically or by warning, before the plaintiff suffered her injury.

42 But was the risk of injury significant enough and the probability of an injury occurring great enough to require a system of what Crispin P called "constant supervision"? Undoubtedly, it was reasonably practicable to have constant supervision of the playground equipment. The School could have used one of the remaining 16 teachers to make periodic patrols of those areas of the playground that were out of sight of the teacher supervising the playground equipment area. It would not even have required the extra teacher to be on full-time recess duty. But reasonable practicability is only one of the integers of the negligence calculus.

43 Once a reasonable person foresees that a system or situation for which he or she is responsible gives rise to a risk of injury, negligence doctrine requires that person to consider the magnitude of the risk and the probability of its occurrence. It then requires the person responsible for the risk to balance those variables against any conflicting responsibilities and the expense, difficulty and inconvenience of taking action to eliminate or reduce the risk. Finally, negligence doctrine requires the person who is responsible for the risk to make a value judgment as to whether the variables calling for action are outweighed by the burden of taking action.

44 In determining the probability of an occurrence, the vulnerability of the person at risk is a critical factor. A risk may have a low probability of occurring when the person is a mature adult of ordinary intelligence. It may have a high probability of occurring when the person at risk is a small child. So action on the part of the risk maker that is reasonably required in one situation may not be required in a different situation. Hence, negligence doctrine will generally impose a higher standard of care on a person who creates or is responsible for a risk of injury to an employee, a prisoner or a school child[8] than it will impose in respect of many persons falling outside those categories. The boredom and familiarity of repetitive work and the fatigue induced by long hours may cause the employee to lose concentration and increase the risk of injury. The restrictions on freedom imposed on the prisoner take away his or her autonomy and lessen the prisoner's capacity to guard against danger. The immaturity of a child – especially a young child – makes the child insensitive to danger to him or herself and other children.

45 Before the plaintiff's injury occurred, no serious accident had occurred in six years of using the flying fox at St Anthony's. But that does not mean that the magnitude of the risk was low or that the probability of injury – including serious

---

8 *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 271 per Mason J.

injury – was low. Using the flying fox required the children to ascend a metal platform and to launch themselves from the platform while holding onto a metal triangle and then to be carried above ground level to the other metal platform. A slip or push – or the holding of a child's body – could result in the head, face or body of the child striking a metal platform or the ground. The range of injuries could extend from abrasions to a fractured skull or worse. The magnitude of injury arising from the defective system, therefore, was potentially great.

46 Similarly, the probability of an injury occurring while Year 3 children were unsupervised was not remote or negligible. On the spectrum of school child maturity, Year 3 children are at the lower end. They are, for example, more vulnerable to injury from their own or class members' activities than Year 6 children. As I have indicated, what occurred on this day was the kind of incident leading to injury that might well arise while Year 3 children were unsupervised. It is true that the children had been warned against holding or touching other children. But it requires little experience of young children to conclude that such warnings, given in the past, would not be in the forefront of a young child's mind when an opportunity and inclination for mischief were present. Furthermore, the incident occurred not more than a month after the children had commenced Year 3 and when they were still relatively unfamiliar with the higher risk equipment. The existence of the "hands off rule" did not convert the inherent risk of the supervision system to a safe system with a remote risk of injury.

47 On the other side of the negligence equation was the lightness of the burden imposed on the Trustees of the School if they took remedial action. As I have also indicated, constant supervision did not require another teacher to be engaged during the whole of a recess. The evidence does not suggest that any particular risks of injury were associated with the toilets or bubblers that the recess teacher had to inspect. The toilets and bubblers did not require constant supervision. Periodic inspection of those areas was sufficient to discharge the standard of care imposed on the Trustees of the School.

48 Mrs McNamara said that she spent 95 per cent of her time in the area where she could see the playground equipment and where her presence was visible to the children. This evidence indicates that perhaps one or two short inspections of these areas during the morning recess and three to four inspections during the luncheon recess would have discharged the Trustees' duty in respect of the toilets and bubblers. And it does not follow from the need to supervise Year 3 children that "constant supervision" was required when it was the Year 6 children's turn to use the equipment. Furthermore, having a system under which another teacher made periodic inspections of the toilets and bubblers was cost free in terms of monetary expense and industrial relations. It is not a tenable view that the teachers at St Anthony's cared so little for the welfare of the Year 3 children that they would regard the small period of time taken up in inspecting the toilet and bubblers as an intolerable breakdown of their working conditions.

49 The present case was not one calling for expert evidence as to what a proper system of supervision required. Determining the magnitude of the risk and the probability of its occurrence was within the competence of any lay person. Similarly, once Mrs McNamara's evidence showed that only about five per cent of her time was required to inspect the toilets and bubbler area, it was within the competence of a tribunal of fact to hold that the exercise of reasonable care required a system where the use of the playground equipment by Year 3 children was under constant supervision.

50 Accordingly, the majority of the Court of Appeal correctly held that the Trustees were negligent and that their negligence caused the plaintiff's injury.

Order

51 The appeal should be dismissed with costs.