



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2023: No. 18

**BETWEEN:**

**ABC (A MINOR)**  
**(Through his parents and legal guardians ABC-F and ABC-M)**

**Plaintiff**

**and**

**MINISTRY OF EDUCATION**

**Defendant**

## RULING

*(Claim for damages for personal and emotional injury, Special circumstances of a vulnerable child, Application for stay unless Plaintiff consents to having photographs and video recording taken for use by defence expert, Admissibility of existing photographs and video recordings of child taken by the school, Whether Personal Information Protection Act 2016 applies to exclude evidence)*

**Date of Hearing:** 6 February 2025

**Date of Ruling:** 15 August 2025

**Appearances:** ABC-F, in person, for Plaintiff

Richard Horseman, Wakefield Quin, for Defendant

**RULING of Mussenden CJ**

**Introduction**

1. This matter appears before me by the Defendant’s Summons dated 30 January 2025 for the following orders:
  - a. That the matter be stayed until such time as the Plaintiff’s parents (the “**Parents**”) provide their consent in writing allowing the Defendant to take pictures photographs and/or videos of the child ABC (the “**Child**”), during the ordinary course of school activities (“**School’s Requested Photo/Video Evidence**”) to be used as evidence in these proceedings; and
  - b. That pursuant to Order 38 Rule 5 of the Rules of the Supreme Court (“**RSC**”), the photographs and videos that the Defendant already has in his possession (“**School’s Existing Photo/Video Evidence**”) are admissible in evidence and may be provided to the Defendant’s expert witness and deployed at the hearing of the assessment of damages. The evidence includes as follows:
    - i. The Child running in a school race on 20 January 2023 – this photograph was disclosed in the Defendant’s List of Documents dated 16 May 2023.
    - ii. Still photographs from a video showing the Child climbing a tall climbing wall; and
    - iii. Still photographs from a video showing the Child climbing a waterslide.
2. The Summons is supported by the second affidavit (12 pages) of the Acting Principal of the School sworn on 21 January 2025 (“**AP 2**”) along with exhibits.
3. The Plaintiff<sup>1</sup> objected to the application, supported by his affidavit (45 pages) sworn 31 January 2025 (“**ABC-F**”) along with several exhibits.

### **Background**

4. The Plaintiff (through his parents) caused a Writ of Summons to be issued on 13 September 2023. The Amended Statement of Claim (the “**ASOC**”) set out that the Child was a student at the School attending the Autism Spectrum Disorder (“**ASD**”) class. The child suffered injuries in a playground accident whilst attending the School on 5 February 2021. The

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<sup>1</sup> References to the Plaintiff are to the father, unless otherwise stated to be the mother or both parents

Plaintiff has claimed Special Damages and General Damages which include fair compensation for the loss of enjoyment of life, that is, participation in life's activities to the quality and extent normally enjoyed before the injury based on the Plaintiff's pain, discomfort, suffering, disability, and anxiety already experienced and reasonably probable to be experienced in the future as a result of the accident.

5. On 25 November 2024 the Defendant admitted liability only on the basis that the playground equipment at the School posed a foreseeable risk of injury to the Plaintiff and the Defendant breached its duty of care to the Plaintiff which caused the plaintiff injury. The Plaintiff took issue with the claim for damages and requested the Court to assess damages.
6. On 5 December 2024 the Court awarded judgment on liability with damages to be assessed. By a Consent Order dated 23 December 2024 the parties agreed various directions for the assessment of damages including the filing of witness statements and calling two expert witnesses each as to the nature of the injuries and the effect of those injuries on the Plaintiff. The experts would prepare their reports, including a joint report, and would be made available for cross-examination at a hearing for the assessment of damages.
7. AP 2 set out that the Plaintiff indicated in an earlier stage of proceedings that he was seeking damages in the approximate amount of \$670,000. At the hearing, the Plaintiff indicated that he seeks damages in excess of \$1 million dollars.

### **Defendant's Evidence**

8. AP 2 set out that in the ASOC, the Plaintiff claims were for damages for physical injuries and psychological injuries including: (i) psychological distress; (ii) loss of social activities and educational impacts; (iii) emotional distress, anxiety and fear related to attending school and participating in outdoor activities; (iv) loss of trust in educators and persons in positions of authority; (v) heightened fear of further injury and safety at school leading to a reluctance in play and social interaction with peers; (vi) psychological effects of the incident affected the Plaintiff's ability to focus in school and engage in normal childhood

activities, resulting in academic challenges an social withdrawal; and (vii) a sense of learned helplessness exacerbating feelings of anxiety and low self-esteem.

9. AP 2 explained that she was of the view that the claims have no merit. She stated that the Child is very active in school and engages in vigorous play with his fellow students. She relied on two videos showing the Child playing with his peers and scaling a tall waterslide and climbing wall. Mr. Horseman disclosed the videos to the Plaintiff in an attempt to settle the claim for damages.
10. AP 2 showed that thereafter, correspondence flowed between the parties. In essence, the Plaintiff has objected to the use of the videos stating in essence that the activities are not relevant to the elbow injury. He also objected to a picture that was disclosed on 16 May 2023 which shows the Child running in a school race where he is ahead of another student. AP 2 takes the position that the videos and pictures are relevant to the claims that the Child suffer from anxiety and fear related to attending school and participating in outdoor activities, has a reluctance to play and engage in social interactions with his peers and has social withdrawal among other issues.
11. AP 2 showed that in the correspondence Mr. Horseman stated that the videos and pictures were taken in the normal course of the School's activities. They were not intrusive and the Child was unaware that he was being photographed or videotaped while participating in the school activities. Mr. Horseman requested a Consent Order be signed by the Parents to continue to take such pictures and videos in a discreet manner noting that the School regularly takes photos and videos of the pupils participating in school activities. He also requested consent of the Parents for their child psychiatrist who has expertise with autism be allowed to meet with the Child in order to appropriately evaluate the Child in order to prepare reports and testimony.
12. The Plaintiff refused consent for the taking of further photos and videos and accused Mr. Horseman of violation of ethical standards in that it was a significant breach of privacy and ethical standards, noting that schools in Bermuda are required to obtain parental or guardian authorization for any recordings or photographs of students especially when used

for purposes beyond standard education activities. He stated that as parents they had received authorization forms from the school for taking photos of the Child.

13. The parties exchanged further correspondence on the issue of the admissibility of the photographs and waiver of privacy once the litigation had commenced with Mr. Horseman relying on *Disclosure 6<sup>th</sup> Edition* and RSC Order 38 Rule 5 on the limitation of plans, etc, in evidence. The Plaintiff in turn relied on his understanding of the *Disclosure* extract and the RSC as well as the Bermuda Personal Information Protection Act 2016 (“**PIPA**”) which governs the collection, use and disclosure of personal information in which he stated obtaining the video and photographic evidence without the Plaintiff’s consent would be a breach of privacy with a penalty of imprisonment of up to 2 years.
14. On 14 January 2025, the Plaintiff instructed the school by email that he was not consenting to any pictures or videos being taken of the Child.
15. On 17 January 2025, Mr. Horseman disclosed various photographs to the Plaintiff which were provided to him by the School on 10 January 2025. The Plaintiff objected to the photographs on the basis that they were taken without consent and that they did not prove anything relevant to the issue. He did not object to Mr. Horseman using the pictures in the proceedings. When Mr. Horseman sought confirmation of that position, the Plaintiff replied that the current position was having an impact on the Child because recently he had been pulled out of a group picture, and due to his ASD, causing the Child to not understand why he was excluded and to cry, causing further emotional distress.
16. AP 2 explained that due to the Plaintiff’s continued reference to PIPA and terms of imprisonment thereunder, the Ministry was seeking an order that protects the Ministry and its staff in sharing a copy of the Child’s file and records to its counsel and its expert, relying on PIPA’s exceptions in respect of legal proceedings.

### **Plaintiff’s Evidence**

17. The Plaintiff filed an affidavit which comprised some factual evidence which I have taken into consideration as necessary. It also comprised of a swath of opinion of the Plaintiff on medical and physical capability issues, which is really expert material to be considered at trial if adduced by an expert. Thus, I am unable to attach any weight to the Plaintiff's opinions. The affidavit also contains legal submissions and references to case authorities which the Plaintiff should be reminded should not be in an affidavit. However, I have reviewed the submissions and case authorities as necessary.
18. The Plaintiff filed supplemental disclosure on 31 January 2025 of photographs and videos (the "**Plaintiff's Photo/Video Evidence**") which he stated were taken in his capacity as the legal representative for the Child:
- a. Photographs that he took on 10 and 13 January 2025 of the School playground showing children playing which it is asserted was without supervision.
  - b. Video recordings of the School playground taken on 28 March 2024 and 10 June 2024.
  - c. A video recording of the Child taken on 29 January 2025 after the School cross-country run, which it is asserted showed the Child collapsing and remaining unattended by any teacher for 5 minutes.
  - d. Photographs of the playground on North Street, near TCD, with measurements, to show that playgrounds meeting safety standards is available and achievable in Bermuda.
  - e. The Child's growth chart and some articles on improving Autism Interoception and Supervision on the School Playground.

### **The Defendant's Submissions**

19. Mr. Horseman submitted that the Plaintiff's claim is highly exaggerated and is likely a dishonest claim. He submitted that the Child has recovered from the accident and is well adjusted and contrary to the claims of the Plaintiff, he engages in normal school activities, plays with his peers, does not have anxiety and distress in going to school and is not

reluctant to play. He recognized that the Defendant will have to rely on expert evidence to establish those facts.

20. Mr. Horseman submitted that ABC-F is refusing to consent for the photographic evidence to be admitted or for the Child to be observed as he wishes to withhold credible relevant evidence from the Court and cash in on a big payment, the claim now standing at nearly \$1 million. He referred to some case authorities on staying proceedings as a result of a plaintiff unreasonably refusing to consent to a medical examination, such circumstances being analogous to the current application. Mr. Horseman submitted that the photographs and videos are relevant to the claims and that ABC-F's position that the evidence should be excluded because it was obtained unlawfully and disregards the Child's privacy should be rejected.

### **The Plaintiff's Submissions**

21. The Plaintiff opposes the application for several reasons. He claims that the application is a late application, that it is frivolous and vexatious, and that it is an abuse of process because: (i) there are improper motives to get the Parents to consent to something which is against the Child's rights; and (ii) there was unlawful conduct in the taking of the pictures and video recording which were obtained without consent, thus violating the Child's rights and privacy, in breach of both common law and PIPA. He also claims that the evidence has no genuine purpose or relevance as they are overly invasive and irrelevant. Further, he claims that the evidence would be prejudicial to the Child in that there is harm that outweighs any benefit and that there would be an impact on the Child who is a vulnerable person.

### **Analysis of the Defendant's Applications**

22. In my view, the Defendant's applications should be granted for several reasons.

#### **School's Existing Photo/Video Evidence**

23. First, the School had taken the School's Existing Photo/Video Evidence in the normal course of school activity. I accept the Acting Principal's evidence that the Child was not singled out in taking the pictures/videos but it was normal school activity. To this point, I also accept that the process of taking the pictures/videos was not intrusive and that the Child was unaware that the pictures and videotapes had been taken.
24. Second, in my view the evidence is relevant to the issues in quantum. The Plaintiff has set out not only a claim for physical injuries suffered, but also for emotional injury, listing a number of activities that the Child cannot participate in due to the emotional injuries. On the face of it, the Defendant is entitled to adduce the evidence to challenge the Plaintiff's assertions about participation and involvement as a result of the emotional injury. It will be for the Court to assess the evidence at trial of the quantum. To that point, I see no merit in the Plaintiff's argument that the Court has been prejudiced by the evidence. The Court is well suited to view evidence and then to determine its admissibility and to go on to a trial of the matter.
25. Third, defendants in personal injury cases have been permitted to rely on covert photographs and videos to expose exaggerated claims provided the evidence was disclosed in time. In *Plans. Photographs and Models, Disclosure 6<sup>th</sup> Edition* [para 23-26] it states that caselaw had been built up on the admissibility of covert video and film evidence of the plaintiff in personal injury or medical negligence cases to the point where the evidence is admissible once made available to the other party beforehand. This was in the interest of proper case management and to avoid wasted court time by having the matter ventilated with the judge managing the case at the first practicable opportunity once a decision had been made to rely upon it. In *Douglas v O'Neil* QBD 9 February 2011 the Court stated that *"Surveillance evidence was a legitimate weapon for a defendant to put before a court that might demonstrate that a claimant's evidence was false. ... The interests of justice militated in favour of O being permitted to use the surveillance material he had obtained. On the face of it, there was no doubt that the evidence was relevant to issues in the case and rendered T's contentions suspect. O had been entitled to obtain evidence that was helpful to his case by video surveillance and not disclose the fact that he was doing so to T. He had also been entitled to wait until T produced a witness statement with a declaration of*



*truth before disclosing the evidence. He had served the DVD evidence on the first reasonable opportunity after service of T's witness statement and his delay in producing the film had not been caused by apathy or an attempt to take unfair advantage of T so that he could be said to have been "ambushed".* The English Court of Appeal had made similar findings in *Ralle v Hume* [2001] 3 All ER 248.

26. It is clear that the above-mentioned cases were in respect of surveillance for which the evidence was admissible. In the present case, the Defendant's evidence was not in respect of surveillance but in the ordinary course of school activities, which to my mind, is far less contentious than covert surveillance recordings, thus putting admissibility on a firmer footing than evidence received by covert recordings.
27. Fourth, the Plaintiff relies on section 78 of the Police and Criminal Evidence Act 2006 ("PACE") which permits a Court to exclude evidence if it was obtained unfairly. I reject this contention as PACE applies to criminal proceedings.
28. Fifth, I reject the Plaintiff's reliance on PIPA for which he implies that the Defendant and its staff are subject to imprisonment of up to 2 years for due to violations of PIPA. In my view, PIPA allows for the information to be used in civil proceedings.
  - a. Section 7(1) of PIPA defines "sensitive personal information" to include, *inter alia*, any personal information relating to an individual's physical or mental disability and physical or mental health.
  - b. Section 7(3) of PIPA provides exceptions that permit the use of personal information in civil proceedings and/or in accordance with an order made by the Court.
29. Sixth, the Plaintiff made repeated submissions that the School's Existing Photo/Video Evidence was obtained without the consent of the Parents in breach of PIPA and the common law right to privacy. PIPA was assented to on 27 July 2016 and various sections were brought into force on 2 December 2016, namely sections 1, 2, 26, 27, 28, 29, 35, 36, 51 and 52. Sections 26, 27, 28, 29, 35 and 36 provide for the establishment and operation of the office of the Privacy Commissioner. The remaining sections that were brought into

force on 2 December 2016 are not relevant to this issue. Thus, the main parts of PIPA that provide for the general principles, rules, rights of individuals and exemptions were not brought into force until 1 January 2025. Thus, they do not apply to the collection of the School's Existing Photo/Video Evidence which took place before that date. In any event, PIPA does provide for exclusions, namely section 4(3)(b) which sets out that PIPA shall not apply so as to limit the information available by law to a party to any legal proceedings. Thus, in my view, it is not open to the Plaintiff to rely on PIPA to exclude the School's Existing Photo/Video Evidence.

30. Seventh, in respect the common law, the Plaintiff submitted that in the UK and Bermuda, minors possess privacy rights that protect them from being photographed without consent, especially in contexts where such actions could infringe upon their reasonable expectation of privacy.

- a. He cited the case of *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446. Mrs. Murray, the author of the Harry Potter books which she wrote under the name of JK Rowling, was the mother of a child, David, whose picture was taken by a photographer for publication by media houses. The Court of Appeal at paras 57 – 58 stated as follows:

*“57... subject to the facts of the particular case, the law should protect children from intrusive media attention, at any rate to the extent of holding that a child has a reasonable expectation that he or she will not be targeted in order to obtain photographs in a public place for publication which the person who took or procured the taking of the photographs knew would be objected to on behalf of the child. That is the context in which the photographs of David were taken. ...*

*58 It is important to note that so to hold does not mean that the child will have, as the judge puts it in [66], a guarantee of privacy. To hold that the child has a reasonable expectation of privacy is only the first step. Then comes the balance which must be struck between the child's rights to respect for his or her private life under Article 8 and the publisher's rights to freedom of expression under Article 10. ...”*

- b. He also cited the case of *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB). Paul Weller is a well known musician and former member of “Jam” and “Style Council”. An article was published in the Mail Online which showed seven photographs of Paul Weller and his children who were out shopping and relaxing

in a café in Santa Monica, Los Angeles. The Court of Appeal cited *Murray*, including at para 57 as set out above, and went on to address the balancing exercise between the children's Article 8 rights and the publisher's Article 10 rights. The Court found that the judge was right to hold that (i) the claimants had a reasonable expectation in the privacy of the photographs and (ii) their Article 8 rights outweighed the defendant's Article 10 right.

- c. The Plaintiff cited the Media Council of Bermuda's Code of Practice section 8 which deals with the photographing of children under the age of 16.

31. In my view, these cases and the Code of Practice are in relation to the privacy rights of the children and the intrusion of the media on those rights with the aim of publishing the photographs. In my view, they are distinct from the context of the present case which involves the taking of photographs by a school to be used for school purposes, which in turn, in the circumstances of this case, wish to use them for the purposes of litigation in a civil matter. Thus, in my view, there will not be a breach of PIPA or the common law rights if the Court makes an order that the evidence is admissible or if it is used in these civil proceedings.

32. Thus, pursuant to RSC Order 38/5, I direct that the School's Existing Photo/Video Evidence is admissible in evidence and may be provided to the Defendant's expert witness and deployed at the hearing of the assessment of damages.

#### School's Requested Photo/Video Evidence

33. Eighth, it appears to be without dispute that the Child has been diagnosed with autism and has a receptive-expressive language disorder which affects his ability to fully articulate his complaints or experiences. Thus, the Plaintiff does not wish for the Child to be examined by a psychiatric expert. I accept that in such a case, a plaintiff in a personal case would be required to submit to a medical exam, and for this aspect of the case, a psychiatric assessment. In *Atkin's Court Forms* commentary, it states "*A claimant who is seeking to recover damages for personal injuries should be prepared to submit themselves for examination by the defendants' medical experts. If a claimant unreasonably refuses to*

*make themselves available for this purpose, the court will, under its inherent jurisdiction, stay the action unless and until they do so.” In Karen Clemons v Minister of Education [2016] Bda LR 106 the Court set out in the history of the proceedings that “January 8, 2015: The Court orders Plaintiff to submit herself for medical examination by Defendant’s expert and to produce particulars of a Grievance Hearing.”*

34. In my view, the Defendant, cautious of a direct approach for examining the Child, offered a reasonable solution by way of seeking the consent of the Plaintiff to have the Child photographed and videotaped in a sensitive manner such that the Child would not be singled out, namely conducting the exercise in a discrete manner and of group activities only. I accept the evidence that such photographing and video recording of school group activities is a normal occurrence in any event, and thus it would not cause alarm to the Child. In my view, the Plaintiff’s refusal to consent to such a course of action is unreasonable as his offer is for the psychiatric expert to speak to the Parents to gather information about the Child’s issues. That proposal seeks to deny the Defendant the opportunity to address the issues in the case in a meaningful way, especially if as proposed by the Plaintiff, the psychiatric expert has to rely on what the Parents choose to tell him. The Parents are the plaintiffs in this case. To my mind, there must be fairness in the proceedings, in order to assist the Court to determine the issues, and thus the psychiatric expert should be allowed to rely on independent evidence, such as a collection of photographs and video recordings.

35. Ninth, in my view, I should grant a stay of the proceedings unless the Parents consent to the Defendant obtaining evidence as they have proposed. In my view, it is a reasonable method to assist the defence expert to in turn assist the Court in determining the quantum in this case. Further, the Plaintiff’s refusal is unreasonable. In *Starr v National Coal Board* [1977] 1 ALL ER 243 the headnote stated as follows:

*“The court had jurisdiction to grant a stay if the defendant’s request for a medical examination was reasonable and the plaintiff’s refusal of it was unreasonable. The plaintiff was acting unreasonably if his conduct in refusing the defendant’s reasonable request was such as to prevent the just determination of the cause. In exercising its discretion whether or not to grant a stay the court should balance, among other factors, the plaintiff’s right to personal liberty against the equally fundamental right*

*of the defendant to defend himself in the litigation as he and his advisers thought fit, which included the freedom to choose his own expert witnesses. There was a duty on each party to expose the reasons for his action and to provide the court with the necessary material known to him so that the court was fully informed before it exercised its discretion, but at the end of the day it was for him who sought the stay to show that in the discretion of the court it should be imposed.”*

36. I also rely on *Disclosure 6<sup>th</sup> Edition* at para 23 – 24 where it stated:

*“However, there is still no general power for the court to order a medical examination in a case where the condition of a party is in issue. Nevertheless, the common law has found a way, in its inherent jurisdiction to stay proceedings for good cause. Thus, where a defendant in a personal injury case in light of further evidence sought a further medical examination of the plaintiff, but the plaintiff refused to submit voluntarily, the Court of Appeal ordered a stay of the proceedings until the examination was completed. The reason is that a claimant who sues for damages for personal injury must afford the defendant a reasonable opportunity to have him medically examined. By choosing to sue he forgoes his right to protest at the invasion of his privacy which a medical examination involves.”*

37. This application is in respect of the gathering of evidence on which the defence psychiatric expert can rely in order to assist the Court. Whilst it is not in respect of an actual psychiatric examination, due to the circumstances of the Child which negate a direct consultation with the defence psychiatrist, in my view, by parity of reasoning, the principles for a stay apply in respect of the issue of gathering evidence for such a psychiatric examination.

## **Conclusion**

38. I reject the Plaintiff’s arguments in total.

39. For the reasons above, I allow the Defendant’s Applications as follows:

- a. That pursuant to Order 38 Rule 5 of the RSC, the School’s Existing Photo/Video Evidence is admissible in evidence and may be provided to the Defendant’s expert witness and deployed at the hearing of the assessment of damages; and
- b. That the matter be stayed until such time as the Parents provide their consent in writing allowing the Defendant to take pictures photographs and/or videos of the Child, during the ordinary course of school activities to be used as evidence in these proceedings.

40. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Defendant against the Plaintiff on a standard basis, to be taxed by the Registrar if not agreed.

Dated 15 August 2025



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**HON. MR. LARRY MUSSENDEN**  
**CHIEF JUSTICE**