Osborn v. City of Waterbury, 333 Conn. 816 (2019):

Is the Supervision of Children on a Playground beyond the Common Knowledge of a Layperson?

By CHARLES D. RAY and MATTHEW A WEINER

A number of interesting negligence cases came our way in 2019. There was the case in which the Supreme Court held that a doctor owed a duty of care to his patient's girlfriend, who contracted an STD after the doctor incorrectly informed his patient that he was STD-free. *Doe v. Cochran*, 332 Conn. 325 (2019). There was the court's adoption of the alternative liability doctrine in a case where three defendants had negligently disposed of cigarettes, but it was unclear which cigarette had burned down a mill. *Connecticut Interlocal Risk Management Agency v. Jackson*, 333 Conn. 206 (2019). There was the case of a pedestrian, struck by a stolen taxicab, who sued the cabdriver because he had left his taxicab unlocked in a high crime area. *Snell v. Yellow Cab Company, Inc.*, 332 Conn. 720 (2019). To close the year, December brought us *Osborn v. City of Waterbury*, 333 Conn. 816 (2019), and the question of whether expert testimony was needed to resolve the standard of care for the supervision of schoolchildren.

In *Osborn*, the child-plaintiff was a fifth grader at a public elementary school in Waterbury. One day, during a lunchtime recess, a group of students assaulted the child by, among other things, punching her and throwing stones at her face. The attack left the child with facial scarring, posttraumatic headaches, and a "lingering effect on [her] emerging personality and self-image."

At the time of the incident, the school's classroom teachers were on their lunch break. Because the student body ate and went outside for recess together, as many as 400 students were on the playground when the plaintiff was attacked. Evidence presented during the subsequent civil trial suggested that between one and five adults were monitoring the 400 students on the playground when the attack occurred. Evidence further "demonstrated that the paraprofessionals who broke up the incident and attended to the child after the child was hurt had to run from *inside* the building to address the situation." (Emphasis in original.)

The plaintiff and her mother sued the city and the board of education, among others, claiming that the defendants were negligent in that they failed to provide adequate supervision over the students at recess. After a court trial, the trial court ruled in favor of the plaintiffs and concluded that "1 student intern and 3 or 4 staff members were not sufficient to exercise control over as many as 400 students" on the playground. The court awarded the plaintiffs money damages in the amount of $67,090.47.

On appeal to the Appellate Court, the defendants claimed that the plaintiffs had failed to produce evidence "that the pertinent standard of care required more than four or five adults to monitor students on the playground...." In particular, the defendants claimed that, without expert testimony, the trial court could not properly have concluded that the standard of care required the defendants to provide more than five adults to monitor 400 elementary school students. A unanimous Appellate Court agreed with the defendants and concluded "as a matter of law, that without expert testimony, the [trial] court could not properly have found that the defendants breached their duty of care to the child [on the basis that] there was an inadequate number of adults on the playground to supervise the students at the time the child was injured." The Appellate Court therefore reversed the trial court's judgment and remanded with direction to enter judgment in favor of the defendants.

On certification to the Supreme Court, the plaintiffs argued that the trial court did not need expert testimony to determine that the defendants had breached their duty of care to the child. Justice Mullins, writing for himself and Justices Palmer, D'Auria, and Ecker, agreed.

The majority opinion began its legal analysis with a clarification. The majority read the complaint—and the trial court's ruling thereon—to involve a claim of inadequate supervision. Thus, the majority understood the operative claim as being broader than that there was "an inadequate number of staff on the playground." Thus, "the supervisor to student ratio was not the *sole basis* of the trial court's conclusion that the defendants were negligent...." (Emphasis in original.) Instead, the plaintiffs had alleged, and the trial court had concluded, that "the defendants did not exercise proper control over the students" regardless of the supervisor to student ratio.

Turning next to the legal question before it, the majority explained that expert testimony can assist the fact finder in understanding the standard of care applicable in a negligence case and in "evaluat[ing] the defendant's actions in light of that standard…." However, expert testimony is *required* only if the question "goes beyond the field of the ordinary knowledge and experience of judges or jurors."

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Usually, expert testimony is required when a plaintiff asserts a claim of professional negligence or malpractice. But there are exceptions. For example, even in a case arising from a professional relationship, expert testimony is not required when "the negligence is so gross as to be clear to a layperson." Similarly, expert testimony is not required if "the alleged claim of error involves a task that is within the common knowledge of a layperson."

In this case, the alleged error involved the supervision of children. For the majority, then, the dispositive question was whether this task involved "professional judgment or skill"—and, therefore, required expert testimony regarding the standard of care—or whether it was one more akin "to those that laypeople routinely perform."

The majority concluded that supervising children is not a task beyond the ken of the average person. It, after all, requires no scientific or specialized knowledge. And the fact that the incident at the heart of this case "occurred on a playground during school hours, rather than on the same playground after school hours, does not change the fact finder's ability to determine what constitutes adequate supervision."

Moreover, the majority disagreed with the Appellate Court that expert testimony was needed to determine whether the supervisor to child ratio was adequate. In doing so, the majority reiterated that the plaintiffs' claim was broader than merely that the defendants had failed to maintain an adequate ratio. "Indeed, even if there had been expert testimony regarding the desired ratio of staff to children and the facts demonstrated that the school met that ratio, the fact finder still may have determined that the supervision was not adequate because adequacy is not based just on numbers, and nothing in the complaint limited the plaintiffs' claim to a mere numerical calculation between the number of students and the number of adults."

Justice Kahn, writing in dissent for herself, Chief Justice Robinson, and Justice McDonald, disagreed. For the dissent, a crucial piece of the record, not adequately considered by the majority, was testimony from the elementary school's principal. Specifically, the principal testified that the Waterbury Board of Education had a supervision policy requiring a minimum of one supervisor for every 125 students on the playground. Thus, if there had been 400 students on the playground at the time of the incident, supervised by four or five adults, the student to supervisor ratio would have been within the parameters of the board's policy. For the dissent, then, the legal issue was whether the trial court could have properly concluded, in absence of expert testimony regarding the standard of care, that the defendants had acted negligently "notwithstanding the fact that the supervisor to student ratio complied with or exceeded the goals set forth in the board's policy."

In concluding that expert testimony was needed, the dissent likened the case to *Santopietro v. New Haven*, 239 Conn. 207 (1996). In *Santopietro*, a spectator at a softball game, injured by a bat thrown by a frustrated player, sued the umpires of the game. The plaintiffs alleged that various players in the game had engaged in unruly behavior prior to the bat throw, and that the umpires had acted negligently by not taking control of the game. The Supreme Court concluded that because umpires receive formal training, possess specialized knowledge, and make highly discretionary decisions, to prevail the plaintiff had to present expert testimony establishing that the umpires' failure to act constituted an abuse of their broad discretion.

As the dissent observed, the defendant education professionals, like the umpires in *Santopietro*, obtain specialized training and knowledge. Therefore, "[a]lthough many fact finders may be familiar with the supervision of children, and even the supervision of large numbers of children, that familiarity does not preclude the need for expert testimony when the fact finder would not be familiar with the procedures and considerations of education professionals when determining appropriate supervisor to student ratios." In fact, the need for a policy setting forth an appropriate ratio, itself, "supports the view that

Continued on page 40 →

■ Any views expressed herein are the personal views of DASA Weiner and do not necessarily reflect the views of the Office of the Chief State's Attorney and/or the Division of Criminal Justice.

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Supreme Deliberations

Continued from page 35

the appropriate supervision ratio for an elementary school playground based on the unique circumstances of that setting is not a simple issue with which every adult would be automatically familiar."

Certainly, reasonable minds can differ regarding whether the supervision of large numbers of children is a task within the "common knowledge of a layperson." But perhaps the most intriguing thing about *Osborn* to us appellate nerds was the starkly different ways that the majority and the dissent viewed the record; in particular, the testimony regarding the existence of a policy concerning the appropriate supervisor to student ratio. The principal testified that the board had a policy of "1 staff to 125 students" and that the policy was included "in the handbook for policies and procedures." It was this testimony upon which the dissent based its argument that the plaintiffs needed an expert to establish that the defendants had violated the applicable standard of care *notwithstanding their compliance with the written policy*.

But as the majority pointed out, the dissent's use of the principal's testimony seems contrary to how reviewing courts typically view the evidentiary record. The trial court, after all, did not make a finding regarding the existence of a policy or what the policy entailed, and the written policy itself was not admitted into evidence at trial. Thus, how do we know that the trial court found the principal's testimony credible? And doesn't the principle that an appellate court should read the record in the light most favorable to sustaining the judgment require the reviewing court to assume that the trial court did *not* find the testimony regarding the policy credible?

Perhaps the takeaway is that trial court judges in civil cases would be well advised to include a footnote in their written opinions that states something like the following: "any...evidence on the record not specifically mentioned in this decision that would support a contrary conclusion, whether said evidence was contested or uncontested by the parties, was considered and rejected by the court." *State v. Diaz*, No. CR-17-0176287, 2018 WL 4955690, at *1 n.1 (Sep. 24, 2018) (*Vitale, J.*). Some judges in criminal cases have been dropping such a footnote over the past few years and, to our knowledge, none of the decisions containing the footnote has been subject to the scrutiny employed by the dissenters in *Osborn*. ■

Remote Depositon

Continued from page 22

ing available support staff for potential troubleshooting; and exhibit chain of custody, which should be the same as at a traditional deposition.

A growing number of attorneys have started to use remote deposition technology to enhance their practice and save time and money. If you have been considering it and the above benefits align with your practice's needs, then remote deposition technology may be right for you. ■

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Pro Bono

Continued from page 33

will need to gather supplemental documentation, such as police incident reports and probation letters), and may appear at just one brief hearing before the Board of Pardons and Paroles. The legal services programs can mentor pro bono attorneys who are interested in this work, which can be done with an individual referral outside of a clinic context.

The assistance and support of a compassionate attorney goes a long way to helping men and women with criminal records complete the pardon application process. The pardon process requires all applicants to revisit their criminal past. They must write a personal essay about why they want a pardon and how they have changed since their criminal activity. For many, writing the essay is an intensely painful and emotional experience, as they relive the years of addiction, victimization, mental illness, and troubled relationships. And in order to get the required references they must disclose their full criminal history to people who now know them as trustworthy co-workers, fellow congregants, or neighbors. Many people simply do not complete the application process because of the emotional pain involved.

Everyone who is granted a pardon will tell you that it is liberating to be unburdened by their criminal record, able to work and live without fear of being judged and obstructed for mistakes in their past. General Counsel David Robinson of The Hartford stated: "The Hartford was thrilled to support GHLA's first Pardon Clinic and help members of our greater Hartford community, who have paid their debt to society, move forward to lead productive lives without the often debilitating limitations of a criminal record."

GHLA will follow up the success of our first pardon clinic with a second in the fall of 2020. We welcome inquiries from attorneys who would like to participate in our next clinic, plan a clinic, or begin a pardon project in their region. Let's use our legal skills to secure pardons for more men and women who have profoundly changed their lives.

E-mail sgarten@ghla.org if you are interested in learning more about how you can help individuals get a pardon. ■