Chapter Fourteen

Teaching Within the Law:

Liability for Physical Harm and the Need for Proper Risk Management

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INTRODUCTION TO CHAPTERS FOURTEEN AND FIFTEEN

Although, from time to time, each of us is cynical about the law and its purposes, practices, and effects, one thing is clear: entanglement with the law is generally not a pleasant and fulfilling experience. Teachers can find themselves affected by many laws, some possessing sharp teeth. Those who are the targets of allegations of wrongdoing may face an array of legal actions and implications, depending on the nature of the situation. In general, these include (a) possible criminal sanctions under the *Criminal Code* for assault or criminal negligence, to cite just two examples; (b) civil liability for damages for an intentional tort, such as assault, or for negligence; (c) disciplinary action by their school boards, including reprimand, suspension, and dismissal; (d) a complaint lodged with a human rights commission[1] or under the *Canadian Charter of Rights and Freedoms* (hereafter the "*Charter*")[2] concerning discriminatory treatment of a student or group of students; and (e) professional discipline by a college of teachers, teachers' federation, or ministry of education, that could result in the suspension or revocation of their professional certification.

It is indisputable that understanding one's legal obligations and potential liability is critical for teachers' self-preservation. However, my ex-

perience has shown me time and time again that practising and aspiring teachers are among the most altruistic and self-sacrificing of professionals and that their motivation is very often much more about the interests of the children they teach or will teach than their own. On one hand, that can be dangerous for the teacher who may risk her personal legal welfare to satisfy what she feels needs to be done educationally, socially, or morally on behalf of a child. On the other hand, given that our laws are also fundamentally concerned with the best interests of children and other vulnerable persons, "teaching within the law" should serve the dual purposes of teacher self-preservation and the best interests of children. To take a simple example, practising reasonable risk management in outdoor education activities insulates teachers against tort liability because, in legal terms, they exercised a "reasonable standard of care" and, in practical terms, the likelihood of something bad befalling the students in the activity will have been dramatically reduced.

There is no point trying to cover adequately in one chapter all the areas of legal concern outlined above. Instead, in Chapter Fourteen I will examine tort, and even criminal, liability for accidents and the need for appropriate risk management that mirrors the legal principles of negligence.[3] Chapter Fifteen will consider some human rights dimensions of teaching physical and health education, including the accommodation of students with disabilities; the accommodation of students whose religious beliefs and practices may collide with curricular content and clothing requirements; the need to provide a tolerant and harassment-free learning environment; and, the attendant question of a health education teacher's right to disclose and speak affirmatively about his or her sexual orientation.

LIABILITY FOR PHYSICAL HARM AND THE NEED FOR PROPER RISK MANAGEMENT

A Dearth of Information

It is important to understand, as trite as it may seem, that risk has two dimensions: the relative chances of something bad occurring, and the chances that this misfortune will be serious. Anyone who has studied school accident cases in any depth will agree that the areas of seemingly greatest risk—in both senses described above—are athletics and physical education. Not only do injuries occur there frequently, but they also tend to be serious enough to evoke lawsuits. It would be nice to be able to provide definitive statistics supporting the assumption that physical education and sports produce the greatest number of school-based accidents and the most serious injuries related thereto, but there appears to be a dearth of data permitting such a conclusion. Even in the United States where one might have expected to find such data, given Americans' appetite for litigation, it is apparently either non-existent, or so well-hidden as to be useless.[4] In fact, the Centers for Disease Control ("CDC") state that "[t]here is no national reporting system for school-associated injuries or violence, and only a handful of states have voluntary or mandatory reporting systems" (Centers for Disease Control 2004). However, based on a conglomeration of sporadic data, the CDC concluded that

- injury is the most common condition treated by school health personnel
- about four million children and adolescents are injured at school each year
- most injuries are unintentional
- the most frequent causes of injuries requiring hospitalization are falls (43 percent), sports (34 percent) and assaults (10 percent).

A search of the literature and the Internet yielded very little data for Canada on the incidence and type of school injuries. Although it is not an unreasonable assumption that such information is squirreled away in the files of school board insurance companies and exchanges, and of the boards themselves, it does not appear to be easily accessible. Having such data and the ability to analyze it would shed light on the management of risk and assist in drawing sensible conclusions about where to focus policies and practices.

Tort Law

Accidents are the business of the law of torts—an area of law largely defined and carried out under the common law, that is, according to judge-made case law. Tort is defined as a civil wrong a person commits against another. The term "civil" connotes that the wrong is actionable through a claim in damages, although the very same conduct could also lead to criminal liability. The two types of liability are not mutually exclusive. Hence, a punch in the mouth is both the intentional tort of battery (leading to an award of compensatory damages) and the crime of assault (leading to criminal sanctions, such as a fine or imprisonment). Since we

are justified in concluding that very few teachers go around punching their students, whereas far more fail to supervise them properly, it is appropriate that we focus on the *unintentional* tort of negligence.

Negligence and Its Elements

The legal definition of negligence is comparatively straightforward: it is the failure to take reasonable care to avoid foreseeable harm that results from that failure. An action framed in negligence has the following elements:

- a legal duty of care
- breach of a recognized standard of care
- a causal link between the breach and injury (MacKay and Dickinson 1998, 3)

Duty of Care

Although it is possible to identify, in any number of school acts and their regulations, duties imposed on teachers concerning student safety, the notion of duty of care in negligence law arises under the common law, that is, as a result of case law. There is no civil liability in damages for simply failing to do one's statutory duty unless the statute specifically states such a remedy exists, and I am unaware of that being the case in the education legislation of any province. There has been no doubt for more than a century, however, that teachers owe a legal duty of care to their students to keep them safe from physical harm. A succession of cases since the benchmark English case of *Williams v. Eady* (1894) has cemented this principle into Canadian law.

Standard of Care

The general standard of care in negligence law historically has been the conduct one might expect of a "reasonable person" acting under like circumstances (Fleming 1987, 97). For over two centuries the British common-law doctrine of *in loco parentis* defined the legal relationship between children and persons who, for various reasons, were standing in for their parents. Hence it was hardly astounding when the standard of care expected of the teacher in *Williams v. Eady*—a case involving mischievous adolescents who took phosphorus from a locked cupboard and burned themselves—was held to be that of the careful or prudent parent. The careful-parent test has remained the quintessential standard of care expected of teachers ever since, despite some reservations having been expressed about its appropriateness.[5] It seems an unlikely model in situations where special experience, training, and expertise are required of a supervisor because of the nature of the activity. This seems particularly true in situations involving coaching and instruction in physical education, especially gymnastics or other demanding, high-risk activities.

Although the courts have recognized this anomaly, and suggested that a test based on the notion of the "competent instructor" might well apply (e.g., *McKay v. Board of Govan* 1968; *Thomas v. Board of Education* 1994), they have been averse to relying on it, choosing most of the time to fall back on the careful-parent model. In practical terms, however, in cases involving gymnastics or football accidents the evidence of expert professionals has often been a critical determinant of the outcome (e.g., *Thomas v. Board of Education* 1994; *Myers v. Peel County* 1981). In any event, there is every reason to believe that this touchstone used by the courts to define the standard of care is not what is most important: after all, who would recognize the quintessential "careful parent" on the street? Such a person is clearly a legal fiction. Of far more importance and interest are the particular facts of negligence cases that courts analyze within several areas of inquiry to determine whether there was a breach of the duty of care.

The Determinants of Breach of the Standard of Care

Judicial analysis of the facts in negligence cases has become almost formulaic; several factors are routinely examined to determine whether a breach of the duty of care occurred, including:

- the overall foreseeability of harm
- the nature of the activity
- the student's attributes (age, intelligence, experience, strength, coordination etc.)
- previous instruction received by the student and his or her knowledge of the risks
- whether similar accidents had occurred previously
- whether approved general practice was followed. (Thomas 1976, 42)

Liability for negligence is not based on a standard of perfection or one that is tantamount to insuring student safety. The general concept framing most of the factors determining breach of duty is reasonable foreseeability. In its most basic form, the question is: Would the careful parent (or competent instructor should the court entertain the model)

have foreseen risk leading to injury? Note that the question does not ask whether the teacher *actually* foresaw the risk. It is not a subjective, but rather an objective, inquiry. Indeed, if a teacher foresaw and recklessly ignored a risk, and injury ensued, it might be a matter for the police and criminal courts, as well as the civil courts. Section 219 of the *Criminal Code* (1985) establishes the offence of criminal negligence where a person "shows wanton and reckless disregard for the lives or safety of other persons" in doing or failing to carry out a duty imposed by law. Although few teachers have faced such a charge, it remains a possibility for those who, for example, subscribe too wholeheartedly to the "sink or swim" model of teaching, without careful appraisal of whether the students are prepared and able to undertake the particularly risky tasks set for them.

An interesting but worrisome dichotomy pits the teaching of self-reliance, responsibility, and self-confidence against protecting students from harm. Proponents of the former view decry what they see as the coddling of students by a paternalistic approach fostered by a tort system all too inclined to lay responsibility at the feet of teachers rather than the students themselves. Such views, while not entirely without appeal, can lead to dangerous absurdities, such as the refusal to place matting underneath climbers because it gives the students "a false sense of security" (van Holst and Dickinson 1988). Such a stance also fails to take into consideration that part of students' education and personal development is to teach them that judgment is formed rationally through assessing risk and planning how to avoid or reduce it, not through the "school of hard knocks" experienced during trial and error. In many places in the school setting, the "errors" can have tragic consequences.

Foreseeabilty is logically affected by many of the factors outlined above. The type of activity, especially coupled with the attributes of the would-be participants, is suggestive of risk, not only of something bad happening but also of the seriousness of any injury that were to occur. The calculus involves a careful matching of student attributes to the nature of the activity. This is of particular relevance given the wide spectrum of student abilities and exceptionalities—physical, intellectual, and behavioural—that one routinely finds in classes today. As sympathetic as we may be to the plight of teachers who face large and diverse classes, it is no excuse in law to say, "How can I be expected to know *all* my students and their strengths, weaknesses, and exceptionalities?" The Supreme Court of Canada ruled in *Myers v. Peel County* (1981) that a teacher who had let an unsupervised student work on the rings in a part of the gym where he could

not be seen should have anticipated that he would not follow directions about spotting because of "the proclivity of young boys of high school age to act recklessly in disregard, if not in actual defiance, of authority" (282). Unfortunately, the student, who had continued to practise a reverse-straddle dismount after his spotter had left, fell and broke his neck. Understanding one's students and their abilities and proclivities is even more pertinent in the case of students with disabilities. It is clear that the courts will expect a higher standard of care in the supervision of such students, as discussed below. Hence, their inclusion in one's class is an important factor to be taken into consideration in risk-management planning.

The amount of prior instruction given to students is another factor the courts consider. It is related to foreseeability as well as to ensuring a proper match between ability and the task to be performed. Prior instruction not only provides information to the students about risk, allowing them to assess for themselves their ability to perform the task or to follow measures to avoid harm, but when the instruction is "progressive" it also enables both teacher and student to assess the student's readiness to attempt increasingly risky actions.

The courts will expect teachers to follow practices generally approved in the field, such as progressive instruction, deployment of matting appropriate to the activity, the teaching of proper techniques for landing, falling, and tackling, and the proper use of safety equipment—along with the supervision and enforcement of such practices! Simply following such practices, however, is not a guarantee of exoneration from liability because the courts will not delegate their responsibility for determining negligence, which necessarily has to be done on a case-by-case basis. Moreover, the very fact that such practices are called "general" practices indicates that they may not be deemed appropriate for all students in all circumstances. Nevertheless adherence to approved practice is usually strong evidence of compliance with the standard of care.

The factor perhaps most closely connected to foreseeability is the occurrence of previous accidents under similar circumstances. Prior occurrences are warnings that teachers ignore only at great risk—to their students, in terms of injury, and to themselves, in terms of legal liability. In *Thornton v. Board of School Trustees* (1978) the teacher, who took no steps to find out why a student had fallen awkwardly during a makeshift vaulting activity, was found liable when another student subsequently overshot the foam matting and broke his neck. Not only had he not investigated why the first accident had occurred and whether the students were competent

enough to perform the stunts safely, the steps he had taken after the prior occurrence did not amount to reasonable care because the hard add-a-mats that he deployed were entirely unsuited to absorbing a fall such as that experienced by the student-victim.

Duty of Care to Students with Disabilities: More Than Semantics

The general principle that requires attention be paid to student attributes—both in a general and specific sense—has been extended by the courts to effectively ratchet up the standard of care where pupils with disabilities are involved. The first indication of this was *Dziwenka v. Regina* (1972), a case in which a student with a hearing disability was injured while operating shop equipment. The Supreme Court of Canada pointed out that a higher duty was owed such a student because he was unable to be verbally warned on the spot if danger arose suddenly (MacKay and Dickinson 1998). In a later case, *F.C. (Litigation Guardian of) v. 511825 Ontario Ltd.* (2003), a developmentally challenged twenty-one-year-old student wandered away from his school and was missing for four days during which he suffered severe frostbite requiring the amputation of his legs. The Ontario Court of Appeal refused to set a higher standard of care *per se* in the case of pupils with disabilities but held that an exceptionality[6]—its nature and extent—was simply an important component of the student-victim's attributes, which the courts have routinely considered as bearing on the issue of whether the standard of care was met. So the issue was not whether a different legal characterization of the standard of care is necessary or whether the standard of care applied to students with disabilities was "higher" than that applied to other students; rather, "the important questions...[were] how the standard is to be applied in this case, given F.C.'s particular circumstances, and whether the Board exercised the care that would be expected of a reasonably prudent parent in like circumstances" (para. 50).

Two points are worth noting: first, the court reaffirmed the importance of paying particular attention to an individual student's characteristics in determining negligence, and, second, it displayed the usual judicial reluctance to deviate from use of the careful-parent test. Whether one can say that there is a higher standard of care in the case of a student with a disability, or that one simply needs to be scrupulously careful about weighing such a student's special characteristics in determining proper supervision, seems little more than semantics. In practical, if not in juridical terms, a higher standard of care toward students with disabilities will be expected.

Indeed, in a recent comment on this case, the author observes that while the court refused to adopt a new standard of care, it clearly was applying a test based on the standard of "the reasonably prudent parent of a vulnerable student" (Court of Appeal confirms 2004, 4). When supervising exceptional students, therefore, teachers are well advised to assume that their actions will be scrutinized on the basis that their degree of care is expected to rise in accordance with the extent and nature of any exceptionalities that render the students more vulnerable. This returns us one more time to the exhortation: "know thy students!"

Defences to Negligence Based on Student Responsibility: Passing the Risk?

A fair question to ask, especially given the tension between student-self-actualization and an alleged overprotective legal model of negligence, is whether students are ever responsible for their own injuries. The question is likely of even greater interest to physical education teachers and coaches because one might argue that there is somewhat more opportunity for students to exercise choice and judgement in the course of these activities. In general, plaintiffs in negligence actions can be held fully or partially responsible for their own injuries in two ways: through the voluntary assumption of risk and by contributing to their injuries through their own negligence. The application of these defences does not necessarily mean that no one else was careless or negligent but rather that, as a matter of law, recovery of damages will be denied altogether in some cases or reduced in others.

Voluntary Assumption of Risk

The legal doctrine of voluntary assumption of risk operates in cases where it can be shown that the plaintiff voluntarily assumed the risk that caused his or her injuries. Successful application of this defence completely bars recovery of any damages. Because of its winner-take-all (or more rightly loser-lose-all) character, the defence is not particularly popular with courts and judicial rules have developed that limit its chances of success. All we need to know here is that in the case of students, who are usually minors (under the age of eighteen in most provinces), the defence is even more problematic.

First, one must convince the court that the activity or the student's actions giving rise to the injury were "voluntary—a simple enough word in ordinary usage but one fraught with difficulty in this context. It is more

than conceivable that a student's desire to impress his teacher or his peers, or to obtain a higher grade, might push him to attempt something he should not. The pressure of grades has been recognized as an influence on students' actions (see, for example, *Myers v. Peel County* 1981[7]) and peer pressure, especially in sports, is also a familiar reality. Furthermore, it is unlikely that students themselves should be expected to know and appreciate the nature and extent of the risks involved in all their activities. There is an obvious linkage to the expectation, discussed above, that prior and progressive instruction, including warnings about risk, will be provided to students. The fact remains, however, that it is the teacher who is expected to understand risks and to communicate them fully and clearly to students.

Second, it is not enough that the *physical* risks of the activity be understood and voluntarily assumed; assumption of risk in law also includes the assumption of the *legal* risks. This means that quite apart from consenting to participate in a risky activity in the full understanding of its risk of physical harm, the student must also understand that, in doing so, he or she is assuming all the legal responsibility and agreeing that the teacher and school board will not be responsible for damages, even if there is negligence. Whether students understand this to be the case will obviously vary according to their ages and relative sophistication and knowledge, but it is probably fair to say that not many young people think about, let alone weigh, the legal niceties of liability before engaging in athletics or other physical activities. Lastly, there is always the problem of proving all of these components of consent.

One way to attempt to obviate the problems of proof is to provide students with consent or waiver forms that must be signed by them and/or their parents before they are permitted to participate in an activity. The use of such forms makes little sense in most curriculum-related activities because it is contradictory to request evidence of consent to something that presumably in most instances is required in the curriculum. Moreover, the issues raised above about teacher and peer pressure need to be taken into account.

Consent and waiver forms are much more legally viable when the activities are voluntary in nature, especially participation on sports teams and in non-mandatory out-of-school excursions and trips. Once again, though, based on the emphasis placed on the academic, social, and health benefits of co-curricular activities and athletics, one might question whether such participation is truly "voluntary." More difficult legal problems exist, however. First, it is fairly well accepted under the common law

that minors cannot contractually waive their right to sue someone for negligence that might cause them harm (MacKay and Dickinson 1998). Second, case law also suggests that parents cannot waive their children's independent right to sue.[8] Quite apart from whether such waivers are valid in law, is the question of whether it is ethical for schools to attempt to shift onto students and parents the legal and economic risk of activities they sponsor and recommend.[9] Nonetheless, permission forms remain a valuable, and likely indispensable, tool of communication, especially for field trips, as discussed below under Risk Management. Henderson (1991 as cited by Shackelton-Verbuyst 1999, 123–124) suggests that the following information should be obtained and provided in a release and permission form for participation in athletics:

- parental permission for the student's participation
- a physician's statement (if applicable) verifying the student's physical ability to participate
- parental permission to transport the student to and from off-school sites
- medical information about the students that the staff should know
- any other information that the parents consider important under the circumstances
- the extent to which the medical and personal information should remain confidential[10]
- parental and student acknowledgment that the student will abide by all safety rules and instructions regarding the activity and that failure to do so could exclude the student from participation
- a statement that all athletics involve an element of risk and that the school will provide due care to each participant but cannot insure that he or she will not suffer injury.[11]

It is critical that all types of consents or permissions be "informed." Therefore, especially in high-risk activities, the use of permission forms should be supplemented by information sessions that provide teachers or coaches with the opportunity to meet parents and to provide information and answer any questions they may have regarding the proposed activities and their risks. If nothing else, parental permission given in the full knowledge of the proposed activities can only reinforce a teacher's claim, should it become necessary, that he or she acted as a prudent parent.

Contributory Negligence

Lest we leave this part of the discussion believing that students are rarely held responsible for their own actions and injuries, it should be noted that courts frequently apply the doctrine of contributory negligence to that end. This doctrine rests on the theory that, because there can be numerous parties responsible for causing an injury, including the plaintiff himself or herself, formal and meaningful apportionment of fault should occur. Accordingly, courts will determine the degree of fault of various parties and apportion responsibility for the damages on that basis.[12] Hence, a student found to have been contributorily negligent by failing to act as a reasonable person of like age, intelligence, and experience would have acted, will have her award of damages reduced in proportion to the degree of her own fault. In *Myers* (1981), for example, a fifteen-year-old gym student performed a dangerous dismount from the rings without a spotter, in violation of the instructions given to him. Although the court refused to accept the defence of voluntary assumption of risk, it did find young Myers contributorily negligent and 20 percent responsible for his injury.

Managing Risk

The concept of risk management is inherent in many spheres of human endeavour, from dangerous physical activities, to politics and warfare, to business affairs and investment strategies. Despite the variability of the enterprises, the nature and purpose of risk management remain the same, as captured in the following definition:

> *Risk management* is a coordinated effort to protect an organization's human, physical, and financial assets. The first step is systematic *identification of risks* to which a district may be exposed and *analysis of their probable frequency and severity*. Then loss control measures are implemented to reduce or eliminate risks. [Emphasis in original] (Gaustad 2004, 2)

In the broadest sense the management of risk comprises two tasks: managing physical risk and managing legal risk. In many respects, the former can be seen as looking after the latter as the proper fulfillment of one's duty to reasonably reduce physical risk should in most instances obviate legal liability. Although there are ways of managing or avoiding legal risk that involve underwriting risk through insurance, attempting to shift the risk by requiring parents and students to carry their own insurance, or attempting to have the province enact liability-limiting provisions in their school legislation,[13] these system-wide policy issues need not concern us here. Instead, our attention needs to be focused on the local management of physical risk of accident and injury.

Some General Considerations

Proper risk management requires the careful melding of the legal concepts and principles outlined above with the best practices in one's specialty. Although those practices will vary, common principles can be identified to guide sound risk management. The first is *planning*. Despite how experienced and talented a teacher might be, no one can practise proper risk management "on the spot." The components of reasonable foreseeability—knowledge of the inherent risk of the activity and of the characteristics of the participants, and the need to match tasks with participants and to ensure that each participant is given progressive instruction where applicable and warnings about risks—all suggest a considerable investment of time and effort in the planning phase. This is clearly not the place to make up the rules as one goes along or to "fly by the seat of one's pants," as the popular saying goes.

Most risk-management models begin with the identification of the possible risks of the proposed activity. Identifying the risk should come easily to someone with proper training, education, and experience in the activity. If it does not, the first question to be raised is whether he or she is suited to be a leader for the activity. There are ways of obtaining information about the risks inherent in certain activities, including consulting colleagues and other professionals in the field, journals and professional publications,[14] school records regarding adverse events related to such activities, and information provided by private insurers and school insurance collectives who are in the business of assessing risk. Beyond these, one can also scout out the proposed sites for activities or excursions, as well as getting to know the characteristics of the student-participants that might increase the risk of certain activities. Student records can be consulted and personal interviews of students and parents conducted.

Risk has two dimensions: the *chance* of injury and the *severity* of injury. While one might consider factoring the two to arrive at a risk index, the assumption that both elements are of equal weight is dangerous. Given the dire consequences of severe injury or death, in both human and economic terms, severity should always be given more weight than frequency in quantifying risk. Risk elimination or reduction is the second part of the management model. One foolproof tactic, it must be said, is the elimination of the activity. Indeed that should be considered if the activity's cur-

ricular or co-curricular merits are non-existent or marginal, or if the risks are such that they cannot be eliminated or brought within a reasonable sphere of risk tolerance. In general terms, risk reduction can be accomplished in the following ways:

- providing additional supervisory personnel
- obtaining advice from specialists or people with local knowledge (for excursions)
- providing additional training and preparation of supervisors
- ensuring the availability of first-aid equipment and that supervisors have up-to-date first-aid and CPR qualifications
- obtaining additional or better equipment, and maintaining and repairing existing equipment
- training and preparing the student-participants
- making changes to activity sites, if possible, to make them safer
- establishing rules targeting the dangerous aspects of the activity
- communicating with students and parents about special medical needs or health problems
- acting consistently in policy implementation and enforcement
- having contingency plans based on foreseeable risks.

Many of these general risk-reduction tactics have financial implications. The unavailability of funds is certainly a rational reason—though often an unpalatable one for students and parents—for cancelling an activity, but it will never be seen by the courts as a viable excuse for failure to meet a reasonable standard of care if the activity does go ahead and injury occurs because of failure to spend what was necessary to provide sufficient supervision or proper equipment (Roher and Hepburn 2004).

To help give context to the general risk management model outlined above, it is useful to turn to case law and post-tragedy inquiries, for some "tragic lessons."

Tragic Lessons

Lessons from the Bench

Although countless school negligence cases exist in the jurisprudence of Canada, the United States, and the United Kingdom, it is possible to synthesize several general principles related to managing risk. I shall provide ten—though there are doubtless more—with very brief exemplary case descriptions.

1. *The degree of supervision required rises and falls in accordance with the degree of danger or risk of an activity:*
   - In *Thornton* (1978), a teacher's casual supervision of gymnastics using an inherently dangerous configuration of equipment was held negligent;
   - In *Myers* (1981), a teacher's failure to provide on-the-spot supervision for inherently dangerous rings exercises was found negligent;
   - In *Board of Education for the City of Toronto* (1959), the Supreme Court of Canada held that it was not a teacher's duty to keep all students under minute-to-minute observation during general playground supervision.
2. *Teachers cannot rely on warnings, rules, or directions alone to escape liability, and must expect students to act recklessly and possibly even defiantly:*
   - In *Myers* (1981), the Court stated that the teacher should have expected careless action by the plaintiff because adolescent boys have a "proclivity" for reckless and even defiant behavior;
   - In *Kowalchuk* (1991), the failure to remove matting on which students were playing a dangerous game, despite being ordered to stay off the mats, resulted in liability for negligence.
3. *Prior mishaps must be treated as warning signs that raise the foreseeability of another accident or injury and hence are ignored at great risk:*
   - In *Thornton* (1978), the teacher's failure to recognize that a previous accident involving a boy's failure to land on the foam chunk matting was the result of the students' basic ineptitude in the manoeuvres they were attempting, to put a stop to the activity, and to provide a wider landing area of foam were central reasons for a finding of negligence.
4. *Care must be taken to properly match activities with student abilities, sizes, strength, coordination, and other physical and behavioural exceptionalities:*
   - In *Boese* (1979), the court held that a prudent parent would not have required an obese thirteen-year-old boy to complete a

seven-foot vertical jump, especially as he had expressed anxiety about doing it;

- In *Thornton* (1978), the court found the teacher negligent for permitting students to participate in an activity they had designed that involved using a springboard to propel themselves over a box-horse; the activity exceeded their gymnastic abilities, resulting in many students' landing awkwardly and dangerously out of control.

5. *Students must be properly instructed and warned of the risks of activities prior to their engaging in them—even those with relatively low risk:*

   - In *McKay* (1968), a student's lack of experience and training on the parallel bars led to a finding of negligence;
   - In *Petersen* (1991), a teacher was found negligent for failing to warn students of the danger of being hit by a bat and the need to pay attention to the batter during a game of rag-ball.

6. *Because of their special legal relationship with students, teachers are under a duty to provide emergency first-aid assistance at a level expected of a reasonable provider of first-aid:*

   - In *Board of Education for the City of Toronto* (1959), a teacher ignored a student's complaints of an injured hip after he had fallen on the ice and forced him to march in line into school, thus aggravating the injury;
   - In *Poulton* (1975), a school's hockey coach was found liable for refusing a player's request to see a doctor for an infection and hip injury;
   - In *Mogabgab* (1970), two football coaches were found negligent and liable for the death of a student player suffering from heatstroke whom they had wrapped in a blanket while they consulted first-aid manuals.

7. *Deviation from plans or protocols, especially regarding field trips, can lead to liability because of the impact on planned risk-reduction measures:*

   - In *Moddejonge* (1972), during a field trip, students persuaded an outdoor education teacher, who was unable to swim, to allow an unplanned excursion to an unguarded swimming beach; the teacher was found liable after two of the students drowned;

   - In *Bain* (1993), a teacher was found liable after a student fell off a steep cliff and suffered serious brain injury after he and other students on a forestry field trip had convinced the teacher to permit them to climb a mountain rather than going to a movie as planned.

8. *Equipment must not only be provided and maintained in proper condition, but must also be appropriate for the activity and not be permitted to be used in an unusual manner that renders it dangerous:*

   - In *Thornton* (1978) and *Myers* (1981), the teachers were found negligent for providing matting that was insufficient for the activities;
   - In *Everett* (1978), negligence was found because a hockey helmet supplied by the coach of a school team was found unsafe after a puck came through a gap and struck the player's head;
   - In *Thornton* (1978), the court observed that the vaulting equipment used by students was safe and in good condition but that its unintended use in a "dangerous configuration" posed an inherently dangerous risk.

9. *Teachers who permit students to participate in games or athletic activities without proper clothing or equipment run a high risk of liability should injury result:*

   - In *Brod* (1976), a teacher was found negligent for permitting a student who had left his gym shoes at home to go barefoot during a ball game in the gym; the student lost his balance when his foot stuck to the floor causing him to strike his head against the concrete wall;
   - In *Berman* (1983), a student was awarded more than $80,000 in damages for dental injuries suffered after he was struck in the face during a floor-hockey game for which no protective equipment had been supplied due to the administration's failure to purchase it despite the teacher's request.

10. *The common-law doctrine of vicarious liability, and hence the insurance of the school board, will indemnify teachers found liable for damages for negligence only if the conduct of the teachers occurred within the ordinary scope of their duties; although courts are averse to ruling against the doctrine's application for obvious practical reasons, it is*

nevertheless still important that teachers not engage in activities prohibited by board rules or by their principal:

- In *Beauparlant* (1955), a board was held not vicariously liable for a teacher's negligence when the teacher had given his class a half-day holiday and packed them into the back of a truck, from which some of them had tumbled during a trip to a neighbouring town. Although the result in this case is unclear, the implication is that the teacher would have been held solely liable and responsible for the damages awarded to the victims.

Lessons from Inquiries and Inquests

Unfortunately, the seriousness of some school accidents has far surpassed the broken bones or teeth, or dislocations or bruises that most often result from such mishaps. Indeed, there have been cases in which several students have lost their lives—often on school outdoor education excursions—necessitating both judicial and independent inquiries to investigate what went wrong and how to avoid a recurrence of the tragic events. Therefore, these inquiries are excellent vehicles for learning more about managing risk, especially related to the activities in question, but also in general. Two such inquiries are discussed below.

The Tobermory "True North II" Inquest[15]

In June of 2000, thirteen grade 7 students set out on a camping trip to Flowerpot Island in Georgian Bay off Tobermory, Ontario. They were to travel to and from the island on a tour boat named the *True North II*. When the time came to leave the island, the lake was rough and a small-craft warning had been issued. No arrangements had been made for communicating with the campers if the weather were too foul to pick them up. The tour-boat master set out despite the rough seas. During the return trip the boat began to take on water and sank quickly, so quickly that there was insufficient time to hand out life jackets. Two students drowned. At the conclusion of a coroner's inquest in July 2001 the coroner's jury issued several recommendations.

The jury's recommendations were aimed at various parties involved in the accident. The recommendations provided below are paraphrased and edited excerpts of those directed specifically at the school board.

- Students should be briefed fully in advance of the field trip regarding the use of safety gear and emergency procedures

- There should be contingency plans for each aspect of an excursion and they should be communicated to parents, students, and anyone providing transportation
- A Safety Management Plan should be developed and filed, containing the following components:

1. The trip's educational rationale
2. Specific details about the activity
3. Emergency contact numbers
4. A proposed itinerary, with anticipated risks and countermeasures
5. A route map and escape plans
6. A health information summary
7. An expense summary
8. A list of participants and their supplies and equipment
9. A list of all modes of transportation

- The board should hold a parent information meeting to explain risks and answer questions
- A mandatory buddy system should be established to determine student numbers quickly in an emergency

As Warner (2001) emphasizes, the coroner's jury did not opt for the "foolproof" risk-avoidance measure I mentioned above—the elimination of this type of excursion—but recommended that outdoor education trips be continued as "an important educational tool."

The Strathcona-Tweedsmuir School Avalanche Disaster Review

Strathcona-Tweedsmuir School in Alberta has operated outdoor education excursions for more than twenty-seven years with a "very good safety record" (Cloutier 2003, 10). Unfortunately, an extremely serious occurrence during a 2003 skiing excursion badly marred that record. In February 2003, fourteen fifteen-year-old grade 10 students from the elite academic private school that also specializes in outdoor education, participated in a course-required back-country ski trip to Rogers Pass in the Rockies, an area with a known propensity for avalanches. On the day in question the avalanche risk posted by the Glacier National Park staff was "considerable" but "moderate" below the treeline where the skiers intended to ski. However, some risk associated with unstable early winter snowfalls had been noted (Na 2003, 9–10). Seven students were asphyxiated when an avalanche slid off Cheops Mountain and buried the group. This tragedy

prompted a review of the school's outdoor education program and policies, in general, and of the Rogers Pass trip, in particular. The review was conducted by Ross Cloutier, Chair of the Adventure Programs Department of The University College of the Cariboo. His report (Cloutier 2003) listed thirty-two recommendations, the most pertinent of which I have summarized and adapted as follows:

- There should be a *rationalization and articulation of the written goals and objectives* for the outdoor-education program as well as each individual course and trip, within the context of the program's overall philosophy, educational benefit, and the school's tolerance for risk.
- The school should *provide staff with direction regarding the tolerance for risk*; it should not be left to the staff to determine on behalf of the school and parents.
- *A disclosure policy enabling parents to assess levels of risk* for each trip should be implemented.
- *The impact of grade effect, curricular requirements, peer and teacher pressure, commercial influences*, etc. on program structure and activity locations should be considered.
- *The communication process should ensure adequate information* about a trip is given to parents.
- Receiving and tracking mechanisms should be checked to *ensure that all consent forms are collected* and accounted for before each trip.
- The format for disclosure should *assume that parents do not understand outdoor-education* terminology and concepts.
- *The form and content of information should motivate parents* to read and understand it.
- *Reviews of trip leader qualification requirements* should be conducted and the levels of qualification acceptable for staff, assistant leaders, and volunteers should be determined, including drawing a distinction between trip leaders playing the role of chaperones and those playing leadership or instructional roles.
- *The location of trips and the level of activities should be adjusted* to correspond to the qualifications and abilities of activity leaders.
- *Local leadership knowledge should be tapped*, including adding locally based leaders where the level of risk suggests it.
- *An adequate ratio of qualified leaders to students* should be ensured.

- *A standard-of-care policy recognizing the difference between school and commercially operated outdoor activities* related to operating standards, staff qualifications, and the acceptability of activities should be developed.
- Consideration should be given to *whether the program should be reactive to student demand* or enrolment should be limited.
- *An intentional, consistent, and documented trip-planning process* should be implemented.
- *A formal decision-making model* that documents decision-making points, and that is subject to administrative controls, should be implemented.
- *Group sizes should be reviewed* so as to be in line with norms regarding the activity in question.
- *A rule-based hazard criteria system* should be used to set objective limits to determine when outdoor activities will not be conducted, such as weather conditions, water levels and conditions, etc.
- *Specific policies and procedures should be developed for outdoor education activities that have high risk*, such as horseback riding, whitewater canoeing, kayaking, backcountry skiing, scuba diving, mountaineering, and rock climbing.[16]

Summary

Looking at all of the above messages about risk management permits several general conclusions. First, risk for all activities must be assessed and measured. Second, a suitable level of "risk tolerance" must be determined by the school or, more likely, school board policy. Third, consideration must be given to the practical solutions available to eliminate or reduce the risks in a given activity. Fourth, the nature of the activity and its risk must be clearly and transparently communicated to students and parents in order for them to provide informed consent. Lastly, there should be a proper fit between the proposed activity, on one hand, and program philosophy, curricular goals, and general academic worth, on the other.

Conclusion

As Thomas (1976) correctly observed, "accidents will happen." Although the law of torts does not expect physical education teachers to guarantee the safety of students under their care, liability will be imposed

where negligence can be proven. Negligence involves the breach of the teacher's legal duty of care through acts or omissions that fail to meet the standard of care expected of a prudent parent (or in some cases, a reasonable instructor of physical education) and that result in injury. Such injuries are compensated through monetary awards called damages. Although damages can be substantial, especially where injuries are serious and permanent, so long as the negligence occurred in the ordinary course of the teacher's employment, the doctrine of vicarious liability will apply and the school board's insurance will satisfy the award of damages.

Negligence is an objective concept. It is therefore determined according to whether a prudent parent (or competent instructor as the case may be) would have reasonably foreseen the risk of accident and injury and what steps one would reasonably expect to have been taken to avoid that risk. Key analytical criteria include the victim's attributes, the degree of risk inherent in the activity, the degree of prior instruction and preparation given the student, adherence to general practice, and attention paid to prior occurrences.

Students can be held responsible for their own injuries through the legal principles of voluntary assumption of risk and contributory negligence. The former involves showing that a student accepted both the physical and legal risks associated with an activity. A complete defence to a negligence claim, voluntary assumption of risk is not commonly accepted by the courts in cases involving child plaintiffs. Contributory negligence is based on the court's determination that the plaintiff bore a measure of responsibility for his or her own injury as the result of the failure to live up to the standard of care reasonably expected of someone of like age, intelligence, and experience. Damages are reduced *pro rata* with the degree of the plaintiff's fault.

Risk management represents the praxis of tort theory and educational practice. The two dimensions of risk—physical and legal—can be controlled through proper risk management strategies. Planning is crucial. Risk identification helps teachers establish and practise safety measures specifically targeted at reducing the risks, or eliminating them where possible. Responsible physical educators learn and practise effective risk management. By so doing they not only avoid the financial and human costs of litigation but, more important, the human tragedy associated with loss of life or serious injury.

Notes

1. All provinces and territories have human rights acts or codes, most of which apply to educational services.
2. Part of the federal Constitution, the *Charter* applies to all laws and governmental actions in Canada, including those at the provincial level. Though not yet definitively decided by the Supreme Court of Canada, it is well accepted that the actions of school boards and their employees comprise governmental actions to which the *Charter* applies.
3. For a more comprehensive consideration of this area, including an activity-by-activity examination of cases, see Shackelton-Verbuyst (1999).
4. When my research assistant queried one U.S. expert about finding such data, he simply responded, "I wish there were such a source, but I don't believe there is."
5. It has been suggested that because teachers supervise far more children than do parents, and usually in activities of more complexity and risk, the test is inapposite: see, e.g., Hoyano (1984) and MacKay and Dickinson (1998). Others, however, argue that "'there could not be a better definition'" of the standard of care than Lord Esher's classic test: see Metcalfe (2003–04).
6. The court used the term "exceptionality" because Ontario's *Education Act* (1990) employs that nomenclature to describe students who are entitled to receive special education services.
7. In *Myers* (1981), the Supreme Court stated, "The manoeuvre attempted by the appellant is admittedly one of some danger. He had not been told not to try it. In fact, he had been virtually invited to do so, since higher marks could be obtained by the performance of Level 2 exercises" (para. 18).
8. For a more detailed explanation of this complex area, see MacKay and Dickinson (1998), 69–71.
9. While it extends beyond our immediate concern, the question of shifting or spreading risk is nevertheless an important one for school boards, for whom potential liability for student injury remains financially onerous, and suggestions have been made how this might be solved through no-fault insurance or hybrid tort-insurance schemes: see Brown (2002–03).
10. Medical and other personal information is subject to provincial privacy laws, typically under both school acts and privacy legislation (in Ontario, for example, the *Education Act*, 1990 and the *Municipal Freedom of Information and Protection of Privacy Act*), and must not be disclosed without the express consent of a parent or the student, where he or she is an adult.
11. The Ontario School Boards' Insurance Exchange (OSBIE) provides a sample permission/acknowledgment form online at: www.osbie.on.ca/english/rma%2FP%2D1print%2Ecfm
12. In some provinces such apportionment is affected by statutory provisions.
13. See, e.g., the Saskatchewan *Education Act*, 1995, section 232, and Brown (2002–03).

14. For example, the Ontario Physical and Health Education Association (OPHEA) provides Ontario Safety Guidelines for Physical Education (Secondary Curriculum), accessible online at: www.ophea.net/upload/6930_1.pdf
15. The information about this tragedy and the inquest recommendations are taken from Warner (2001).
16. OSBIE has set out risk categories for school activities. Included in its list of high-risk field trips are "extreme" sports activities (skydiving, skateboarding, downhill mountain biking, snowboarding); whitewater rafting, cliff rapelling; rock climbing; firing ranges; paintball games; and wilderness or winter camping. Also included as high-risk under the category of "travel" are excursions to natural disaster areas, war zones, or places with political instability and the threat of terrorism: Ontario School Boards' Insurance Exchange (2003). For a good discussion of travel-related risk management, see Shariff (2004).

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Chapter Fifteen

Teaching Within the Law:

The Human Rights Context of Physical and Health Education

Gregory M. Dickinson

Introduction

The diversity of students today carries the corollary of an ever-expanding envelope of human rights that must be respected and modelled in school. Physical, emotional, intellectual, and other exceptionalities must be accommodated according to most provincial education acts (Smith and Foster 2003–04). Failure to do so can evoke not only appeals under such legislation but also complaints to human rights commissions and even to courts under the *Canadian Charter of Rights and Freedoms*. Moreover, rules and practices, and even curricula, that are insensitive to ethnic and religious diversity not only provoke political strife within a school community but can also be the subject of human rights litigation claiming discrimination and a failure to accommodate. Similarly, issues relating to sexuality and sexual orientation are often catalysts for conflict in schools, sometimes in health education, and can lead to involvement by human rights tribunals and the courts.[1]

The Duty to Accommodate Students with Disabilities

The legal rights of students with disabilities in Canada have been the subject of many books and articles.[2] The general principles discussed