

Osgoode Professional Development

The Complete Guide to School Law for K-12 Education Professionals

Negligence and Liability Concerns for Schools

Hear No Evil, See No Evil, Speak No Evil

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LEGAL PRINCIPALS

- ◆ TORT = a wrong that is compensable in damages
- ◆ 2 TYPES OF TORTS: intentional and unintentional
- ◆ NEGLIGENCE is by far the most common unintentional tort
 - ◆ **failure to do what a reasonable person would do**
 - ◆ **doing something that a reasonable person would not do**



ELEMENTS OF NEGLIGENCE

- ◆ The defendant owes a **DUTY OF CARE** to the plaintiff.
- ◆ The defendant breached his/her **DUTY OF CARE** to the plaintiff.
- ◆ The plaintiff suffered **FORESEEABLE** and **ACTUAL** damage.
- ◆ The defendant's breach was the **PROXIMATE CAUSE** of the plaintiff's damage.



SPECIAL STANDARD OF CARE FOR EDUCATORS

The Educator must act as a “careful or prudent parent”.

- ◆ NOT careful or prudent teacher
- ◆ NOT reasonable person
- ◆ NOT reasonable teacher



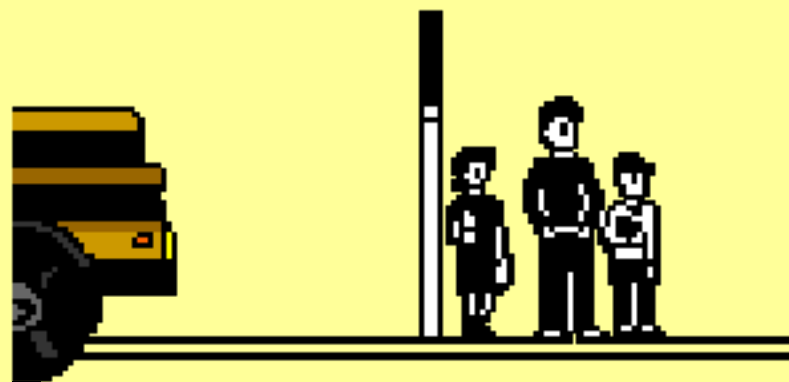
SPECIAL STANDARD OF CARE FOR EDUCATORS – cont'd

- *Myers v. Peel County Board of Education* – leading case
- “Careful and prudent parent” standard of care depends upon:
 - ◆ number of students
 - ◆ nature of the exercise or activity
 - ◆ age of the students
 - ◆ competency and capacity of the students
 - ◆ degree of skill and training the students have received
 - ◆ nature and condition of equipment



THE LONG ARM OF THE SCHOOL

- Educator's duty of care can apply:
 - ◆ in the classroom
 - ◆ in the schoolyard
 - ◆ on excursions
 - ◆ before and after school hours
 - ◆ during transportation of students
 - ◆ off school property





VICARIOUS LIABILITY

- ◆ school board may be liable for an individual educator's misdeeds
- ◆ imputed liability
- ◆ deep pockets / insurance coverage



DEFENCE OF CONTRIBUTORY NEGLIGENCE

- ◆ students can be held responsible for their injuries
- ◆ students have a duty to care for their own safety
- ◆ apportionment of liability / full or partial defence



SIGNIFICANCE OF THE ONTARIO *EDUCATION ACT*

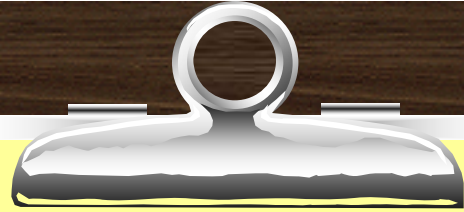
- ◆ statutory duties for:
- ◆ school boards
- ◆ principals
- ◆ teachers
- ◆ breach of *Education Act* is evidence, but not proof, of negligence



Foreseeability

- Is it PREDICTABLE?
- Is it PREVENTABLE?
- If yes...negligence will be found and...

IT IS PAYABLE!!



LIMITATION PERIODS

- BEGIN WHEN THE PERSON ATTAINS THE AGE OF 18
- Effective January 2, 2004, the limitation period is 2 years from the date of the occurrence.



Purposes of Tort Law:

- **Deterrence:**
 - Prevention of accidents/future harm by enforcing objective standards of conduct to so as to prevent the creation of reasonably foreseeable risks (i.e. encourage risk management/avoidance).
- **Compensation:**
 - Reimburse victims for economic loss, and pain and suffering.



Intentional Torts:

- **Battery:**
 - Intentional contact with another person that is harmful or offensive;
 - Protects bodily security/integrity from deliberate interference by others.
- **Assault:**
 - Intentional creation of the apprehension of imminent harmful or apprehensive contact (i.e. no need to prove actual contact).
- **Intentional Infliction of Mental Suffering:**
 - Intentional infliction of severe emotional distress;
 - More than mere insult or hurt feelings: alleged victim must establish existence of a real and provable illness
- **False Imprisonment**
 - Intentional and total confinement of another person within fixed boundaries (i.e. within a room or a motor vehicle).



Intentional Torts:

- **Malicious Prosecution:**

- Prosecution without reasonable grounds and with malice/for an improper purpose;

- **Elements:**

- Prosecution was initiated or continued by the defendant;
- Proceedings were terminated in favour of the plaintiff;
- Proceedings were instituted without reasonable and probable grounds, i.e. in the absence of an honest belief in the guilt of the accused (plaintiff faces high threshold to establish this); and
- The defendant acted out of malice or for an improper purpose.

- **Example: *McKenna v. Boland 2006 CarswellOnt 4236 (S.C.J.):***

- After altercation between teacher and parent, teacher commences proceedings to obtain a peace bond against father;
- Provincial court judge dismisses application for peace bond;
- Father's commences action against teacher for malicious prosecution;
- Father's action is dismissed: father failed to establish that teacher: i) lacked reasonable and probable grounds to fear for her safety; and ii) that she acted for any improper purpose.



Intentional Torts:

- **Misfeasance in Public Office**

- Only recently recognized as a distinct intentional tort by the Supreme Court of Canada: *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263.
- A deliberate, unlawful act or omission in the exercise of a public function;
- May involve a straightforward breach of the relevant statutory provisions, or from acting in excess of the powers granted or for an improper purpose.
- Defendant must have been aware that his or her unlawful conduct would harm the plaintiff.
- Plaintiff must also prove the requirements common to all torts: i.e. that the defendant's conduct was the legal cause of the plaintiff's injuries, and that the injuries suffered are compensable in law; the harm complained of is a reasonably foreseeable consequence of the alleged breach; there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants; and, there exist no policy reasons to negative or otherwise restrict that duty.



Defences to Intentional Torts:

- **Consent:**

- May be express or implied by conduct.
- Vitiating if obtained by duress or undue influence.
- Minors cannot give valid consent unless capable of fully appreciating nature and consequences of that to which they are consenting.

- **Self-Defence:**

- Available where one is threatened by another and/or reasonably believes that an attack is imminent.
- Force used in self-defence must be reasonably proportionate to threatened harm.

- **Legal Authority:**

- *Criminal Code*, section 43:

Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances. [emphasis added]

- *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4: Supreme Court of Canada upholds section 43, concluding 16 that it does not infringe the *Canadian Charter of Rights and Freedoms*.



Defamation:

- **Defamation includes:**

- **Libel:** written words that are defamatory;
- **Slander:** spoken words.
- In Ontario, the *Libel and Slander Act* is provincial legislation that governs legal actions based on words that are published in a newspaper or on a television or radio broadcast, with strict time limits for giving notice of a potential claim and to commence Court proceedings.

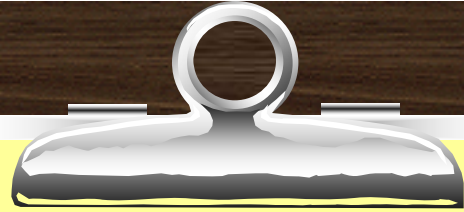
- **Plaintiff must prove:**

1. The words were defamatory:
 - Words are defamatory where they have the “tendency to do harm, injure, disparage or adversely affect the reputation” of an individual, or to diminish the opinion of that person that is held by others;
 - Objective test: assessed through the eyes of a reasonable person;
2. The words referred to the plaintiff; and
3. The words were published to a third person.



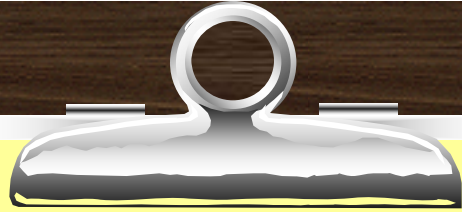
Defences available to defendant:

- The words are true (**justification**);
- The defendant had the plaintiff's **consent** (consent may be express or implied);
- The words were published/spoken on an occasion of:
 - **absolute privilege**;
 - by public officials holding high or executive office (relating to matters to state);
 - during parliamentary or legislative proceedings (or proceedings of their subcommittees); or
 - in judicial or quasi-judicial proceedings (whether by judges, counsel, parties or witnesses with respect to anything said or done during the course of proceedings, or in supporting documents).



Defences available to defendant:

- **qualified privilege** and the plaintiff is unable to prove that the defendant was acting with malice:
 - No hard and fast rule about occasions to which qualified privilege will attach;
 - Court will focus on the purpose of the communication and whether it was intended to further the legitimate interests of the defendant (i.e. responding to a personal attack) or another person (i.e. responding to a request by another employer for a reference), or a shared interest (i.e. communications between company personnel) or public interest (i.e. between government officials during the course of their duties);
 - Generally, will not apply to statements made by a public official to the world at large.



Defences available to defendant:

- The words are **fair comment** (i.e. opinion) made honestly and in good faith on a matter of public interest.
 - Example: *Lane v. Nanaimo-Ladysmith School District No. 68*, 2006 CarswellBC 170 (B.C.S.C.):
 - Duty of elected School Trustees to inform public about dismissal of superintendent;
 - Trustees' comments to media regarding reasons for dismissal of superintendent, while possibly defamatory, represented fair comment on a matter of public interest (and also were shielded by qualified privilege).



Cyber Bullying

Central role of the Internet in teen culture:

- On-line chat rooms.
- Instant messaging.
- Personal websites and blogs.
- Cell phone text messaging, photos and video.

Impact of cyber bullying may be worse than traditional schoolyard bullying in two ways:

- 1. Cyber bullying does not end when the child arrives home.**
- 2. Cyber bullies are often more vicious and hurtful than in-person bullies, saying things on-line they would never say face to face, and affording them anonymity. Having no actual physical contact with their victims, the cyber-bully's feelings of empathy and remorse are minimized.**



Dealing with Cyber Bullying Under the Safe Schools Act

- Mandatory expulsion or suspension only where infractions committed by the student “while he or she is at school or is engaged in a school-related activity”.
- Can cyber bullying be considered school-related activity?
- Section 1 of the *Education Act* defines “school” as:
 - a) the body of elementary school pupils or secondary school pupils that is organized as a unit for educational purposes under the jurisdiction of the appropriate board; or
 - b) the body of pupils enrolled in any of the elementary or secondary school courses of study in an educational institution operated by the Government of Ontario,

and includes the teachers and other staff members associated with the unit or institution and the lands and premises used in connection with the unit or institution;



Dealing with Cyber Bullying Under the Safe Schools Act

- Argument that “school-related activity” should be broadly interpreted, to the extent that definition of “school” focuses on the body of pupils, so long as there is some nexus or connection to the school and/or its students.
- Remember Board’s authority to establish discretionary suspensions or expulsions under sections 307 and 310 of the *Education Act* for activities contrary to Board policy.
- Also consider O. Reg. 474/00: principal may exclude a student from the school premises where “his or her presence is detrimental to the safety and well-being of a person on the premises”.



Who is OSBIE?

- The General Liability Insurer for 95% of the school boards in Ontario
- Founded in 1987 by Ontario School Boards – due to increased premiums and inability to obtain coverage
- Owned and Operated by member school boards



Liability Insurance

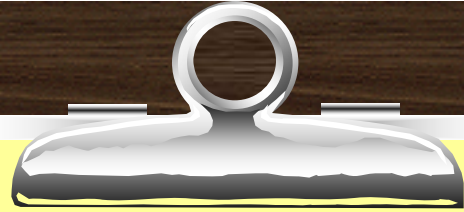
To protect a person or entity against any legal responsibility arising out of a *negligent act* or a *failure to act* as a prudent person, which causes bodily injury or property damage to another party.



Who is Covered?

- Administrators
- Teachers
- Trustees
- Volunteers
- Coaches
- School Councils
- All employees
- Co-op students while on work placement

■ *...while acting within the scope of their duties as defined by the board...*



You are Covered for...

- \$20 million per occurrence
- Acts of Negligence while acting within scope of your duties
 - Personal injury to third party
 - Property damage of others property
 - Non owned auto
- Automobile Liability in excess of your personal limit to a combined \$20,000,000



You are NOT Covered for...

- Criminal Code Convictions
- Penalties, fines under statute: HTA, WHIMIS, OH&S
- WSIB Coverage
- Punitive damages
- Intentional Acts



RISK MANAGEMENT INVOLVES THE FOLLOWING STEPS

- ◆ **Identify and assess exposures to injury.**
- ◆ **Identify various risk management strategies to address these exposures.**
- ◆ **Select and implement the appropriate strategy or strategies.**
- ◆ **Monitor results and make improvements where necessary.**



RISK MANAGEMENT STRATEGIES

There are three strategies to choose from:

- ◆ Risk Avoidance
 - ◆ Risk Reduction
 - ◆ Risk Transfer



RISK IDENTIFICATION

- ◆ Is the activity age appropriate?
- ◆ How much supervision is required?
- ◆ What risks are inherent in the activity?
- ◆ Does the facility have liability insurance?
- ◆ What is your emergency plan?



ASK YOURSELF ...

- ◆ What risks will the students be exposed to?
- ◆ How great are the risks, and are they worth taking?
- ◆ What can I do to reduce or remove the risks?
- ◆ Have the risks materialized in the past? How often? What was the result?
- ◆ What have others done to manage these risks in the past?
- ◆ If these students were my own children, what would I do?





RISK AVOIDANCE

- After completing the Risk Assessment you may determine that the risks are too high and decide to Avoid the activity altogether.



RISK REDUCTION

- ◆ Can the activity be modified to reduce the risk?
- ◆ Should equipment be worn?
- ◆ Research various policies and procedures.
- ◆ Be familiar with the location of the field trip-prior inspection.



RISK TRANSFER

- ◆ Field trips involve private vendors or operators from outside the school, such as amusement park operators, ski resorts, excursion or tour operators, or equipment suppliers, etc.
- ◆ In many of these situations the planning, control, instruction, and supervision of the activity is outside the control of the school trip organizers.
- ◆ Have you ensured that they have the necessary expertise and certification required to provide those services?
- ◆ Are they appropriately insured against liability?



Select and implement the appropriate
strategy or strategies



MONITOR RESULTS

- ◆ After the trip through interviews and surveys, the teachers, volunteers, and students should evaluate the experience and determine:
- ◆ What educational value resulted?
- ◆ What problems were encountered and how can they be avoided in the future?
- ◆ Share your results.



CASE #1

RIVERDALE FARM



CASE #2

CHEERLEADING SQUAD



CASE #3

**DEFAMATION, MALICIOUS
PROSECUTION, AND ABUSE OF
AUTHORITY**



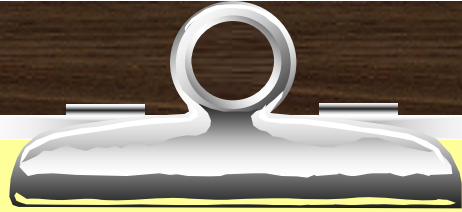
Unnecessary Risks





Unnecessary Risks





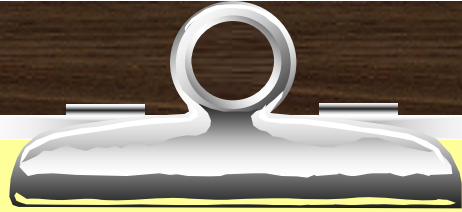
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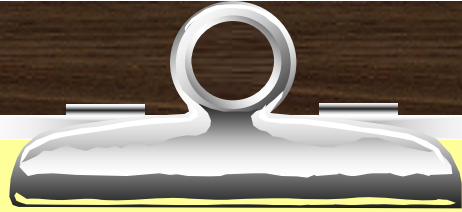
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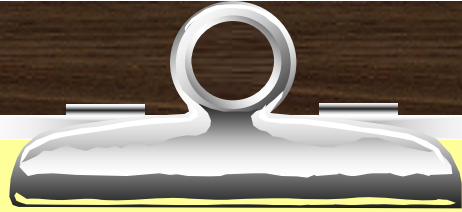
Unexpected Accidents Happen





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