

# **Supervision of Students: An Exploratory Comparative Analysis**

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## **Abstract**

A major challenge confronting educators throughout the world is maintaining safe learning environments for students. When difficulties arise in the area of what is commonly referred to as negligence, school officials may face years of lengthy, and costly, litigation. In light of their shared British common law system of law, this article reviews the law of negligence in Australia, the United States, and Canada. After examining the elements of negligence in all three of these Nations, the article offers a brief analysis of the similarities with regard to how negligence applies in the three countries.

## **Introduction**

A major challenge confronting educators throughout the world is maintaining safe learning environments for students. When difficulties arise in the area of what is commonly referred to as negligence, school officials may face years of lengthy, and costly, litigation. Moreover, although school officials tend to avoid liability in all but the most serious cases, having to deal with the legal system and related frustrations can have a significant impact on the operation of schools.

In light of their shared British common law system of law, this article reviews the law of negligence in Australia, the United States, and Canada. After examining the elements of negligence in all three of these Nations, the article offers a brief analysis of the similarities with regard to how negligence applies in the three countries.

## **Australia**

### **The Elements of Negligence**

In Australian, a plaintiff must satisfy three elements in order to succeed in an action for negligence: duty, breach and damage. The third element, damage, is sometimes expanded into three elements, damage, causation and remoteness<sup>1</sup> although, in this article, it is treated as one, with causation and remoteness comprising its sub-elements. In order to be liable in negligence, therefore, a defendant must be shown to have owed a duty of care, to have breached that duty, and that damage was caused by the breach that was not too remote. Each and every element must be established in order to succeed in an action for negligence.

In the case of teachers and school authorities, the general law applies with equal vigour, although there are some specific issues that relate solely to their position. As such, this section of the article canvasses the three elements of negligence as they apply to school authorities and

teachers. To the elements of duty, breach and damage must be added the role of defences available to a defendant. The primary defences in schools are contributory negligence and *volenti non fit injuria* or assumption of risk. Insofar as defences are pleaded by a defendant, they are not, strictly speaking, elements of the tort.

### **Duty of Care**

In a negligence claim involving personal injury or property damage, there is typically no pre-existing relationship between a plaintiff and defendant. However, Australian common law, by virtue of the injury suffered, retrospectively imposes on defendants a duty to take reasonable care to ensure that others, such as a plaintiff, are not injured by their acts or omissions. The classic statement of the general duty of care in relation to personal injury or property damage is found in *Donoghue v Stevenson*, a decision of the English House of Lords, in which Lord Atkin enunciated his ‘neighbour test’:

... there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances ... The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.<sup>2</sup>

This statement of the law, still recognised as seminal concerning the general duty of care for personal injury or property damage in Anglo-Australian law, has undergone much refinement since it was written.<sup>3</sup> That need not concern us here; for our purposes, Lord Atkin simply states the fact that a general duty of care exists for personal injury or property damage caused by any person. Every teacher and school authority clearly owes this duty to all others to take reasonable care to ensure that their acts or omissions do not cause reasonably foreseeable injury to others.

In addition to the general duty to take care against harming others, there is a pre-existing specific duty relationship that exists between teachers and their pupils.<sup>4</sup> This duty, which supersedes the general duty for personal injury or property damage, is known as an ‘existing relationship of dependency’, which imposes a positive duty to act, to provide physical protection or to control others,<sup>5</sup> and thus liability for an omission.<sup>6</sup> Chief Justice Winneke of the Full Court of the Supreme Court of Victoria stated the rationale for the duty between teachers and pupils as:

... the need of a child of immature age for protection against the conduct of others, or indeed of himself, which may cause him injury coupled with the fact that, during school hours the child is beyond the control and protection of his parent and is placed under the control of the schoolmaster who is in a position to exercise authority over him and afford him, in the exercise of reasonable care, protection from injury ...<sup>7</sup>

This existing relationship of dependency has a broad scope: it does not end with teachers, but also extends to school authorities.<sup>8</sup> Thus, in *Watson v Haines*<sup>9</sup> the New South Wales Supreme Court held that the State of New South Wales, Department of Education, but no individual

teacher, was directly liable for failing to provide appropriate neck strengthening exercises to ensure the safety of boys with long thin necks playing hooker in school football. The plaintiff was such a boy, and was rendered a quadriplegic after sustaining a neck injury while playing hooker in a rugby scrum.

That said, the duty owed by a teacher or school authority requires not that they insure against all harm but rather, only that they take reasonable care to protect pupils from reasonably foreseeable risks of injury. In *Kretschmar v The State of Queensland*, for instance, the Full Court of the Supreme Court of Queensland made the point that ‘... where the physical or intellectual capacity of the child is such as to enlarge the risk, then the school and the supervising teacher must take the appropriate precautions’.<sup>10</sup> In other words, when the foreseeable risks are greater the duty expands to cover them.

Duty applies to positive acts which cause injury as well as to omissions which, if action had been taken, injury might have been prevented. The fact is that many such injuries are the result of a failure to take steps to exercise proper supervision as required by the circumstances.<sup>11</sup> In *Geyer v Downs*,<sup>12</sup> for instance, the plaintiff alleged that there was inadequate supervision of the playground before the daily school routine began. Or, in *Commonwealth v Introvigne*,<sup>13</sup> Murphy J found that the plaintiff’s injuries, which occurred when part of a flagpole from which he had been swinging collapsed on him, were caused by an inadequate system of supervision, which failed to provide for sufficient staff to exercise proper supervision over the playground as well as a failure to ensure that the system was carried out. And in *Shaw v Commonwealth of Australia*<sup>14</sup> injury occurred through failure of teachers to exercise reasonable supervision of pupils who were using a trampoline.

The duty to take reasonable care to protect pupils from reasonably foreseeable risks of injury exists at least while they are on school premises<sup>15</sup> during school hours.<sup>16</sup> It may even extend to injuries caused during school hours but which take place beyond school premises, such as those on a school outing.<sup>17</sup> Most importantly, perhaps, in *Angelo Lepore v State of New South Wales*<sup>18</sup> the court held that a school authority’s duty to take reasonable care to ensure the safety of a pupil extends to protecting the pupil from physical or sexual abuse at the hands of an employee teacher where due care would have avoided it.

## **Breach of Duty**

Once it is established that a duty exists on the facts, it is established in school cases simply by demonstrating that a plaintiff was a pupil of the school authority in question, it must be established that the duty was breached. In Australian law, the question of breach is always established by first determining the standard of care which the duty imposes and then asking whether the defendant met that standard.

The standard is established by asking ‘what would the reasonable person have done in the defendant’s circumstances?’ This exercise requires a court to compare what a defendant actually did with what the fictional reasonable teacher or school authority would have done in those same circumstances. This question, which has as its aim the imposition upon the defendant of a legal, objective, standard of conduct, is answered by recourse to the ‘calculus of negligence’. The calculus establishes the standard, which is then compared to the actual conduct of the defendant.

In *Wyong Shire Council v Shirt*,<sup>19</sup> Mason J enunciated the calculus of negligence. He explained that in considering the response of the reasonable person to a given risk, a trier of fact would need to consider ‘the magnitude of the risk and the degree of probability of its occurrence, along with the expense, difficulty and inconvenience in taking alleviating action and any other

conflicting responsibilities the defendant may have'.<sup>20</sup> The court, in order to set the standard of care, must balance these factors, and in so doing, it determines the way in which the reasonable person would have acted in the circumstances. If, for instance, there is a greater likelihood of harm, or there is a risk of serious injury associated with a given situation, then the standard required of the reasonable person also increases. Thus, if the risk is very great, but the cost of prevention low, then it is normally considered to be the case that the reasonable person would incur the cost to prevent the risk.<sup>21</sup> But in the extreme case, a risk of serious injury may be so great that any practical precautions are impossible, in which case the only course open to the reasonable person may be to cease the activity altogether.<sup>22</sup>

Having balanced the elements enunciated in *Wyong*, the court came up with the standard of care. While this process strives for objectivity, true objectivity is never possible in matters involving a court's discretion, no matter how much the law pays lip service to objectivity. Yet notwithstanding its attempt at objectivity, the law itself allows, in certain instances, a level of subjectivity to creep into the process of determining the standard of care. Thus, in some cases, it may be possible to demonstrate that a defendant's actual knowledge, skill, reasonable anticipation, the circumstances of a plaintiff, or foreseeable negligence by the latter or even third parties may be taken into account by a court in determining the standard of care.<sup>23</sup> Two such circumstances are prominent in the school context.

First, since schools are obviously rife with the potential for negligence on the part of other pupils, knowledge of this may be taken into account in setting the standard. Consider *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman*,<sup>24</sup> in which a primary school student suffered a severe injury to his eye when high school students from another school threw rocks and sticks at him while he was climbing a tree at a bus stop after school. He was not outside his school, although the injury occurred shortly after school hours and he was on his way home from school. The New South Wales Court of Appeal found that in the circumstances, a reasonable person would have provided the supervision necessary to prevent this injury. Thus, the court decided that the school board breached its duty in failing to provide such supervision. At the same time, the court emphasised that taking into account any subjective factor depends always on the circumstances; whether the obligation of the school authority or teacher to do things for the safety of a pupil depends upon the circumstances, which include the time, place and anything else in relation to which it might be suggested that precautions should be taken, such as the actions of other pupils, even those not students of the plaintiff's school.

A second significant circumstance that may expand the precautions that a reasonable teacher or school authority would take is that of a student who has a physical or intellectual incapacity.<sup>25</sup> In such a case, a court may take into account a defendant's actual knowledge and the circumstances of a plaintiff in determining the standard.

### **Damage: Causation and Remoteness**

It is not enough for a plaintiff to establish that he or she was owed a duty of care and that was breached by a defendant's negligence. A plaintiff must also demonstrate that there was damage which was caused by and was not too remote from the defendant's negligence. In the school context, damage usually comes in the form of personal injury, and less frequently property damage. Let us consider the two sub-elements of damage, causation and remoteness, in turn.

#### **Causation**

A plaintiff's cause of action in negligence will succeed only if it can be proved, on the balance of probabilities, that a defendant's negligence caused the plaintiff's damage or injury.<sup>26</sup> The ultimate

onus of proof always rests on the plaintiff to make this causal connection. Causation can be further divided into two parts: factual causation and attributive causation.

The factual sub-element of causation does not ask the question ‘what was the cause?’, but rather ‘was the defendant’s act the (or a) cause?’<sup>27</sup> Very often, in personal injury cases, unless a defendant actually raises some evidence in relation to the factual connection, this question will be resolved, silently, in the plaintiff’s favour. For a very long time Australian law used the ‘but for’ test as the touchstone of proving the causal connection between the defendant’s negligence and a plaintiff’s damage: would the plaintiff have suffered the injuries or damage complained of ‘but for’ the defendant’s negligence. For a number of reasons, none of which need be addressed here, this test produced problems. As such, more recently, the High Court has rejected the ‘but for’ test and replaced it with the ‘common sense test’.<sup>28</sup> This test posits that common sense must be used in assessing the issue of factual causation, especially where there is more than one causal factor that may have contributed to the injury.

In *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman*,<sup>29</sup> for instance, the court found a causal connection between the failure to properly supervise pupils, including the plaintiff and the injury to the plaintiff’s eye. This causal connection existed as a matter of common sense despite the other factors also operated to produce the injury, such as the involvement of high school students from other schools, the fact that the incident took place off school premises and that it was, technically, outside of school hours. Attributive causation, on the other hand, is principally concerned with those instances in which there are a number of surrounding circumstances that have also contributed to a plaintiff’s injury and must be determined, as a matter of law, as whether a defendant’s negligence was one of the factors that actually contributed to the injury or damage. This sub-element is most important because it allows a court to determine whether a plaintiff’s loss is attributed to the defendant.<sup>30</sup>

To illustrate the focus of attributive causation, consider this scenario: a pupil is injured playing rugby in a school match. It can be demonstrated that improper coaching led to the pupil carrying the ball in such a way that when contact is made with the ground, a neck injury may occur. The player suffers a neck injury while carrying the ball and making contact with the ground. The improper coaching is no doubt a contributing factor in the injury suffered by the player on the field. Factually, the causal connection is made. But, is the improper training also the cause of subsequent injuries suffered by the player as a result of further tackles immediately after contacting the ground, or more importantly, further injuries suffered much later as a result of a doctor’s negligent treatment? Such questions are the province of attributive causation.

## **B. Remoteness of Damage**

In the vernacular of Australian negligence law, a defendant is only liable for those injuries suffered by a plaintiff which are caused by the former’s negligence and are not too remote. The test of remoteness is foreseeability of consequences.<sup>31</sup> How is the test applied? Quite simply: a defendant is only responsible for foreseeable, not direct, consequences, which has been taken to mean those consequences which a reasonable person would describe as ‘real’ (even if ‘remote’) rather than ‘far-fetched’.<sup>32</sup> What must be foreseeable is injury or damage which is of the same type or kind as that suffered,<sup>33</sup> rather than the exact extent<sup>34</sup> or manner of occurrence<sup>35</sup> of the injury suffered. The courts take a broad approach to the question of remoteness and the type or kind of injury.<sup>36</sup> Hence, in the example of the rugby player, if the foreseeable type of injury was to the neck, and a neck injury occurs, it matters not that the injury was suffered by way of contacting the ground after a tackle or in making a try, nor that the foreseeable injury was neck strain and the

injury suffered was a broken neck. The defendant is liable for the neck injuries suffered in each of these scenarios.

## **Defenses**

Once a plaintiff has established each of the elements of negligence, he or she is entitled to be compensated for the injury or damage. Still, having been found to have committed negligence for which the law will allow recovery, the defendant may raise one or more defenses which allow an evasion of liability, either fully or partially, for the negligence which caused the injury or damage. The two main defenses available to any defendant in an Australian negligence claim are contributory negligence and *volenti non fit injuria* or assumption of risk.<sup>37</sup>

Before turning to the two defenses, it is important to make an important point about Australian law in this regard. While many Australian schools are state funded and thus potential branches of the government, or the Crown, there is no defense of Crown immunity that protects schools, or the Crown generally, from liability in a negligence or any other tort suit. It was once the law that the Crown enjoyed immunity from being named as a party to a lawsuit in one of its own courts, thus protecting its entities, such as schools, from liability in tort. In contemporary Australian law, legislation ensures that the Crown in right of the Commonwealth,<sup>38</sup> the States,<sup>39</sup> and the internal territories<sup>40</sup> are subject to the same liabilities in tort as any other legal person. Thus, not only are teachers and school authorities personally liable for their negligence, but a school authority, state or private, generally may also be liable by way of vicarious liability.<sup>41</sup>

### **A. Contributory Negligence**

Contributory negligence is not, properly speaking, a defence. It is, rather, a means of reducing the damages payable by the defendant to a plaintiff for injury or damage suffered by the former as a result of the latter's negligence. It operates when a plaintiff has failed to take reasonable precautions against foreseeable risks of injury. Unlike the tort of negligence, it is a failure to take care in relation to one's own safety rather than a breach of duty.<sup>42</sup> This in no way excuses what was done by a defendant; it merely recognises that it would be unfair to hold a defendant fully liable for the loss suffered by a plaintiff, when the latter was also in some way responsible for the injury suffered. Nonetheless, contributory negligence is always dealt with by the law of torts as though it were a defence.

The concept of contributory negligence, and its ameliorating effect on damages, stems from the possibility of multiple causation. When there is more than one cause of an injury or damage, and when those causes may be defendant- and plaintiff-initiated, it would be unjust to single out only one of those causes as being the operative cause. As to establishing liability, this is the work of causation, which can and does recognise more than one cause as being relevant to the injury or damage suffered. If that is the case with liability, then it should also be relevant in the assessment of damages, and that is the work of contributory negligence.

The operation of contributory negligence in a negligence claim has a long and complex history, none of which is relevant here.<sup>43</sup> In contemporary Australian law, its operation is very simple. Every State and Territory has enacted 'apportionment legislation' which allows the court to apportion damages based upon the contributory negligence of the plaintiff, whether the plaintiff was 1 per cent or 99 per cent to blame. The relevant provision of most State and Territory legislation typically reads: 'damages shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage'.<sup>44</sup> A defendant must plead and prove the following elements before the defence of contributory negligence will operate to apportion damages: (i) that the injury was within the general class of perils to which



the plaintiff was exposed by her or his own negligent conduct; (ii) that the plaintiff's negligence contributed to the injury or damage suffered; and (iii) that the plaintiff fell below the standard of care which was expected of a reasonable person in the plaintiff's circumstances.<sup>45</sup> It is in relation to this final element that the school context raises an interesting difference from the standard negligence claim.

Most school negligence claims, obviously, involve a young plaintiff. The question that arises is whether a young plaintiff must be expected to exercise the same care that an adult might in relation to their safety. While there is no doubt that even a very young child is capable of contributory negligence, in Australia, age is a factor which is taken into account in determining whether the standard has been met. Aside from age, though, the same objective approach is used to set the standard of care for the plaintiff as is used for the defendant. In practical terms this means that a child is expected to demonstrate that degree of care for its own safety as could reasonably be expected of a child of similar age, intelligence and experience.<sup>46</sup> In *Shaw v Commonwealth of Australia*,<sup>47</sup> for instance, the Northern Territory Supreme Court held that, in the circumstances, the defendant had not proved that the plaintiff was guilty of contributory negligence in using a trampoline. The court held that the plaintiff had exercised in the circumstances the care for her own safety reasonably to be expected of a child of her age, intelligence and experience with trampolines.

### **B. *Volenti Non Fit Injuria* or Assumption of Risk**

*Volenti non fit injuria* or assumption of risk is a complete defence to an action in negligence. Where this is made out, it exonerates a defendant from any liability which might otherwise have been ascribed due to the negligence. Yet, because it is a complete defence, the courts have restricted its scope quite dramatically so that contributory negligence is used much more frequently in order to allow the plaintiff some recovery in damages. Thus, while contributory negligence applies where a plaintiff ought to have known of the risk but was not actually aware of it, assumption only applies if the plaintiff actually knew of the risk.<sup>48</sup>

It is, therefore, the notion of 'actual knowledge' on which the success of this defence turns, and it is in relation to this that the courts have most restricted its operation. A defendant is required to demonstrate that the plaintiff both knew the facts constituting the danger<sup>49</sup> and fully appreciated the danger inherent in them.<sup>50</sup> Moreover, it must be shown that the plaintiff not only had this knowledge, but freely accepted the very risk which eventuated.<sup>51</sup> In other words, a plaintiff must essentially exonerate the defendant in advance for the injury or damage which was suffered.<sup>52</sup> Thus, in the case of the rugby playing student, the risk must have been known to the plaintiff and there must have been a free acceptance of that risk in advance for this defence to protect the teachers or school authority.

## **The United States**

A major challenge confronting educators, whether teachers or administrators, in public or non-public schools, regardless of where they work, is how to maintain a safe learning environment for students. Whether students are sitting in class, playing in a school yard, or participating in extracurricular activities, educators run the risk of liability for injuries suffered by children if they breach their legal duty to protect the youngsters in their care from unreasonable risks of harm. The virtual impossibility of insulating educators and their school systems from all liability notwithstanding, especially in the highly litigious atmosphere that pervades much of the United States, awareness of the principles constituting the legal duty to supervise students properly

and the defenses to the tort of negligence can go a long way toward protecting a school and its personnel. In order to provide professionals in jurisdictions other than the United States with a basic understanding of the legal responsibilities that American educators face when supervising students, this paper is divided into two major sections. The first part provides an overview of the elements of negligence that an injured party must be able to prove in order to hold an educator or school system legally accountable. The second section reviews the basic defenses to negligence: immunity, comparative/ contributory negligence, and assumption of risk.

## **Elements of Negligence**

The four elements of negligence are duty and the related principle of foreseeability, breach, injury, and causation. Insofar as liability often depend upon the facts in a given situation, when a mishap occurs it is imperative that educators recognise how crucial it is to record all of the events that took place as quickly as possible. If, and when, an accident does take place, administrators should do all that they can to ensure that any and all staff members involved in the incident file an accident report before leaving school that day. Given the fact-specific nature of negligence, the practice of filling a report out immediately cannot be over stressed before entering into a substantive discussion of the topic because doing so can ensure that the events are still fresh in an individual's mind and can be recorded more accurately. The contents of an accident report, even though not always dispositive, can play a major role in determining a liability for an injury since they can assist in demonstrating that school officials acted reasonably in response to the incident.

## **Duty**

An old adage in the law of negligence maintains 'no relationship, no duty'. In other words, unless one person has a legal relationship to another (and moral considerations aside), there is no legal duty to help a stranger. As such, it is important to recognise that an educator who is acting within the scope of his or her duties whether in the classroom, at another school in the system, or out of the building or district at a professional development workshop, or as part of an extracurricular activity has a duty to assist all children in the group even if the individual teacher does not know a particular child personally. This duty arises based on the educator's legal relationship with the school district as a whole and is not limited to children (or others) from the building where the teacher works. For example, a kindergarten teacher who is in the district's high school on official business cannot walk by an otherwise empty classroom where two large high school students are fighting and be thankful that he or she does not teach at that level. As is explored below, the teacher has a duty to do something.

Once the law recognises the existence of a legal relationship, an educator has the duty to anticipate reasonably foreseeable injuries or risks and take reasonable steps to try to protect students from harm.<sup>53</sup> A case from Maryland, reached an interesting result on the issue of duty where a sixteen-year-old female high school football player suffered a ruptured spleen and other internal injuries when she was tackled cleanly by a player from the other team at a practice scrimmage.<sup>54</sup> An appellate court expressed its concern over the seriousness of the young woman's injuries but affirmed that the board did not have a duty to warn the student or her mother of the obvious risks posed by her voluntary participation in interscholastic football because the risk of injury was normal and obvious.

A highly flexible concept that varies based on the age and physical condition of students as well as the degree of danger inherent in a situation, this duty does not expect teachers to foresee all harm that might befall children. Rather, educators are responsible for only those mishaps that



can reasonably be anticipated or of which they are actually aware. In one case from New York, the parents of a sixth grader who was injured when a classmate pulled his chair out from under him as he went to sit down unsuccessfully sued the school system.<sup>55</sup> The court ruled that since the educators involved had no reason to expect that the second student would pull the chair away, this was an injury that the school could not have realistically anticipated or prevented. However, if the student who pulled the chair out had done so previously, or others had already done so on other occasions, then the school system would have been on notice and may have been held accountable. Aware of the possible risk of injury, many school systems have moved away from individual chairs in cafeterias and have purchased tables with fold up seating that is attached to the body of the table.

In light of the move toward the full inclusion of students with disabilities, educators should be aware that the courts typically have imposed a higher duty of care on teachers of children with special needs. For example, if a child is wheelchair bound, then teachers and librarians will have to make sure that books and other objects are placed within a child's reach. Educators, therefore, should be especially vigilant to make school buildings more readily accessible to all students.<sup>56</sup> Thus, while foreseeability requires some thought, it should not impose any significant increase in the level of preparation that most educators already apply.

## **Breach**

Two important considerations must be taken into account when inquiring into whether an educator has acted appropriately or has breached his or her duty of care. The first relates to how the educator, whether teacher, administrator, or other personnel, has performed, or not performed, his or her duty. More specifically, an educator can breach his duty in one of three ways. First, as in the example of the teacher who walked by a classroom where two students were fighting but did not stop, an educator can breach her duty by not acting when she has a duty to act (legally this is referred to as nonfeasance). Even though there is no obligation that a teacher place herself or others at risk of injury, the teacher had a responsibility to do something reasonable under the circumstances. At the very least, the teacher should not have kept walking down the hall but could have ordered the students to stop fighting, could have called for help, or could have sent for assistance. A second way of breaching a duty takes place when a teacher acts improperly or erroneously; this is known as misfeasance. As an alternative to the kindergarten teacher with little or no experience dealing with large students who were fighting, imagine a situation where a high school football coach was visiting an elementary school. If the coach happened upon two small second graders in the hallway who were arguing and started pushing them apart in the same way as he might separate two of his players, he risks liability for misfeasance. Admittedly, an educator can use reasonable force to defend himself or other from harm, but, under these circumstances, the coach should have used techniques better suited to dealing with second graders. Third, a teacher who acts with an illegal or improper motive that is beyond the scope of his employment has engaged in malfeasance and places himself at risk.

Unfortunately, malfeasance has reared its ugly head in the significant number cases of sexual harassment and or abuse of students by school personnel that have been litigated in recent years. Educator misbehavior of this type can also be considered an intentional tort against the student (or other individual) and negligent supervision on the part of the school system if it had knowledge of the teacher's behavior and failed to take corrective action.<sup>57</sup>

The second major consideration under breach is the appropriate standard of care that educators must follow. In determining whether an individual has applied the correct degree of

care, the courts have adopted a standard of reasonableness. A court typically will instruct the jury to consider an educator's behavior in light of the legal fiction known as the reasonable person, also known as the reasonably prudent person. Although the courts have ordinarily stopped short of establishing a clear hierarchy, based on education and years of experience working with children, a reasonable teacher is likely to be held to a higher standard of care than a reasonable person but not to the same level as a reasonable parent. That is, the courts have tried to create an objective standard that holds a teacher accountable to perform at the same level of care that a reasonably prudent professional of similar education and background would or should have acted. This degree of care is ordinarily based on the equivalent age, training, education, experience, maturity, and other relevant characteristics for an educator. Under this standard, a first year teacher may not be held to the same level of expertise as a colleague with ten years of experience.

Deciding which standard applies in a school setting was illustrated as one of two major points in a well known case from New York.<sup>58</sup> A star high school football player who was being considered for an athletic scholarship to college broke his neck while correctly executing a block and the coach appealed a jury verdict that found him liable for the student's injury. The state's high court reversed in favor of the coach when it found that he should not have been held to the same standard of care as a reasonably prudent parent. Instead, the court followed the general rule and held that since the student-athlete voluntarily participated in the game, the coach satisfied the less demanding ordinarily reasonable care standard. However, bearing in mind that the courts tend to impose a greater standard of care based on a child's age and physical condition, a school system is typically expected to provide closer supervision for younger and disabled students.

Even where teachers have liability insurance, either as a benefit of membership in a professional association or through individual policies, to cover themselves for acts of negligence, most companies void the coverage of educators who act beyond the scope of their legal authority. Whether a school would be liable for a teacher's malfeasance would hinge largely upon whether the educator's actions were foreseeable. Certainly, an educator with a history of problems supervising students places a school system at greater risk of liability such that administrators should more closely critically evaluate such an individual.

## **Injury**

In order for an aggrieved party to prevail,<sup>59</sup> an injury must be one for which compensation can be awarded. This is especially crucial in light of the fact that most, if not all, attorneys who deal with the negligence work on a contingency fee basis. Put another way, an attorney who represents a client in a negligence suit gets paid, if at all, out of the proceeds of a jury award or a settlement agreement. Consequently, for, for example, a student who was running through a school cafeteria fell on milk that had been spilled on the cafeteria floor only moments earlier, three factors need to be examined at this point. The first question is whether the school had a duty to keep the floor safe and clean. Assuming the obvious, that the school had such a duty, the related question of foreseeability comes into play. For the sake of discussion (and this is a big assumption), assume that the school should have foreseen this incident and should have had it cleaned up immediately. Second, the issue of the school's duty and possible breach must be answered. The third concern is the nature of the child's injuries. If the child's only 'injury' was a wet pair of pants, then it is highly unlikely that his claim will proceed. However, if the child broke his leg upon falling, then there is a greater likelihood that this may be deemed an injury for which compensation can be awarded.

## **Causation**

The final element in establishing liability for negligence is that school personnel must be the legal, or proximate cause, of the injury brought about by the breach. In other words, imagine a situation developing as a temporal sequence of events. The last person or persons in a chain of events who could have taken steps to prevent an injury from occurring is typically considered the legal cause.

To continue the example of the spilled milk, liability issues for the school and other personnel aside, consider a teacher who was standing at the entrance to the cafeteria and urged the student to run to get in line. If the student fell, then the teacher is likely to share in liability as the proximate cause of the child's injury. Conversely, if the same teacher had warned the child and the youngster obeyed, took two steps, and again began to run, then unless the child is known for such behavior, then the teacher is not likely to be held accountable for the student's injury.

## **Defenses**

Even if an injured party has established that the elements of negligence are present, educators and school systems have three primary defenses available to limit or eliminate liability. The defenses recognise that even though schools are charged with the duty of caring for children, they cannot be held accountable for every conceivable harm that befalls students during the academic day.

## **Immunity**

Perhaps the most frequently applied defense used by school systems has been governmental (also commonly referred to as statutory) immunity. Immunity is based on the common law principle, now supplemented widely by various statutes dealing with such aspects as recreational<sup>60</sup> and discretionary function<sup>61</sup> immunity laws that the government, in and through its various branches and departments such as school boards, cannot be liable for the tortious acts of its officers or employees. In recent years a growing number of jurisdictions have greatly reduced or eliminated the scope of both governmental and charitable immunity.

## **Contributory/Comparative Negligence**

Both contributory and comparative negligence are promised upon a person's having played a part in causing his or her injury. These similar sounding defenses, which apply in an almost equal number of jurisdictions, produce very different results. Under contributory negligence, a party whose actions led to the cause of his or her injury is precluded from recovering for the harm.<sup>62</sup> Yet, bearing in mind that because many children are injured in accidents at school, the courts do not hold students to the same standard of care as adults. Rather, the courts take a child's age and physical condition into account when a defense of comparative negligence is raised. As a general rule, courts have held that children under the age of seven are incapable of negligence concerning their own behavior while those over the age of fourteen may be accountable on a case by case basis. A case from Oklahoma illustrated the special problems posed by children between the ages of seven and fourteen.<sup>63</sup> The mother of a ten-year old child who was struck in the eye while voluntarily participating in a game of field hockey appealed after a school district successfully asserted the defense of contributory negligence. The court concluded that the child was not capable of contributory negligence by playing field hockey unless he appreciated the danger that his borderline hemophilia presented. The case was remanded for trial and there are no further recorded references to its outcome.

In recent years a growing number of jurisdictions have moved toward comparative negligence wherein the court directs a jury to apportion fault between the parties. As such, an

injured party's award may be reduced by the degree to which he or she played a part in causing the injury. An example of comparative negligence occurred in a case from New York City, where a jury found that a pedestrian who fractured his ankle upon tripping and falling on a depression on the sidewalk in front of a public school was forty percent at fault.<sup>64</sup> The court affirmed that based on the pedestrian's culpable conduct, the city was liable for only sixty percent of his damages award.

### **Assumption of Risk**

Assumption of risk, which is also based on comparative fault, can reduce an injured party's recovery in proportion to the degree to which his or her culpable conduct contributed to an accident if one voluntarily exposed himself or herself to a known and appreciated risk of harm.

Insofar as assumption of risk is a far-reaching defense in sports cases, it is worth considering its application in specific examples. For example, an appellate court in New York affirmed that a cheerleader who was injured during practice could not recover from her school board since she assumed the risks of her sport and was practicing voluntarily under the supervision of her coach.<sup>65</sup> Another appellate court in New York agreed that a board could not be liable for injuries that an experienced high school varsity softball player sustained when she collided with a chain link fencing while chasing a fly ball.<sup>66</sup> The court acknowledged that since the player fully assumed and appreciated the risks inherent in playing softball, and the condition of the fence was open and obvious, there was no issue as to whether the fence unreasonably increased her risk of injury. Other courts reached similar results in such sports as baseball,<sup>67</sup> basketball,<sup>68</sup> gymnastics,<sup>69</sup> swimming,<sup>70</sup> and wrestling.<sup>71</sup>

### **Canada**

Insofar as Canada, Australia, and the United States share a common law heritage by virtue of their British colonial origins, it is not surprising that areas of the law governed more by case law than statute, such as tort liability, negligence in particular, presents considerable similarities across the three countries. In Canada, save in Quebec whose civil law is largely codified according to its own jurisprudential antecedents, namely, the Code Napoléon, the law of negligence is essentially composed of a matrix of court decisions. This is not to say that no provincial legislation has been enacted touching issues of liability for negligence. In fact, provincial statutes routinely govern related matters of limitation periods, joint liability, and occupiers' liability, to name a few, as well as providing duties that sometimes inform the application of both the duty of care and standard of care. While there is no general doctrine of sovereign immunity in Canada, some provincial legislation also insulates school boards against liability for certain kinds of claims. Saskatchewan's, for example, precludes claims against teachers and boards for alleged injury arising out of innovative practice, and Ontario legislation bars claims based solely on allegedly negligent board policies. Other than that, Canadian negligence jurisprudence generally does not view breach of statutory duty as particularly significant, no damages normally flow from such a breach in the absence of explicit statutory language to that effect, something that is rarely seen.<sup>72</sup>

This section of the article discusses the law of negligence as applied to schooling in Canada, paying most attention to the usual tort headings of duty of care, standard of care, and breach of duty, as well as the defences commonly associated with school negligence cases: *volenti non fit injuria* (voluntary assumption of risk) and contributory negligence. Some attention will also be paid to vicarious liability of school boards for their employees' wrongdoing.<sup>73</sup>

## Duty of Care

### In General

As has been well explained by now, an action in negligence invariably involves several components: the existence of a duty of care recognised by law; breach of this duty of care by failure to act in accordance with the required standard of care; injury caused in fact by the breach, and which is not too remote to warrant compensation.

The existence of a legal duty of care owed by educators to their students has not been much of an issue in Canadian law for more than a century, ever since Lord Esher's celebrated dictum in *Williams v. Eady (Williams)*.<sup>74</sup> In *Williams*, a schoolmaster was liable to a student who was injured by the explosion of a bottle of phosphorus he had clandestinely retrieved from a cupboard. That school authorities would be held to a duty of care toward their charges is hardly a remarkable application of the 'good neighbour principle' stated in *Donoghue v. Stevenson*:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.<sup>75</sup>

Having arisen from the British common law doctrine of *in loco parentis* in an era when schooling was often carried out in residential settings, requiring that school masters, indeed, acted as surrogate parents, the modern teacher-student relationship is more a creature of teachers' statutory role as instructor, mentor, disciplinarian, and general supervisor. In either case, though, the close proximity of teachers and students for seven hours a day for some two hundred days a year, in a variety of contexts, easily satisfies the reasonable foreseeability test that forms the essence of the rule in *Donoghue v. Stevenson*.

### When and Where?

What is more difficult is discerning the spatial and temporal limits of educators' duty of care. Absent a clear statutory definition of when and where teachers and school boards owe students a duty of care, courts are left to struggle with cases of injuries occurring on school premises, before or after school, and those occurring off school property.<sup>76</sup>

The common law surrounding liability for before and after-school accidents is, to say the least, uneven. Barrell,<sup>77</sup> for one, argued that opening school grounds and buildings prior to the start of the official school day, as perhaps prescribed in a statute or regulation,<sup>78</sup> should be viewed as a convenience and privilege afforded student and parents. As such, it would be unfair for courts to transform the privilege into a right by imposing on boards a legal duty of care toward early arrivers. *Mays v. Essex County Council (Mays)*<sup>79</sup> is one case that supports Barrell's argument. In *Mays*, the plaintiff student arrived at school before it was scheduled to open and split his head open while playing unsupervised in the yard. Although school did not open until 9:00 a.m. the playground was opened at 8:00 a.m. and students habitually congregated there at 8:30 a.m. The principal had notified parents that they should not send their children to school early because of the lack of supervision. The court found no liability under the circumstances.

There are other ways of looking at the issue. If emphasis is placed on the acquiescence by a school authority in the practice of early arrival, then it seems reasonable enough to craft a rule

requiring the provision of reasonable supervision of the early arrivers, even before the start of the official school day.<sup>80</sup> In a society where, more often than not, both parents work, and begin their jobs well before school starts, it is not an inapposite rule. A principal objection, though, is that liability for such supervision can be avoided simply by sending clear notice to parents that no supervision is provided prior to a certain time and that students must not arrive before then. If the parents persist in dropping children off before that time, it will be their fault, not the school's—if any harm befalls them. While attractive on its face, this argument is hardly iron-clad. There is a common-law rule, dating back to 1933, that would preclude the school's excusing, in whole or in part, its own negligence because of the contributory negligence of a parent.<sup>81</sup>

The courts have generally appeared to side with school authorities in cases involving injury after dismissal, even on school premises.<sup>82</sup> An Ontario case<sup>83</sup> found the school authorities not liable when a student's eye was injured during a snowball fight in the school yard after school. The court held that it was the board's policy that students leave the school premises after dismissal and it was the students' duty to comply with the policy. The school's supervisory duty was limited to patrolling the halls after school and to attending to the children who were waiting for school buses. The judge also noted that parents of students who walk to and from school must consider them responsible enough to see to their own safety.

In order to escape liability for supervising early-arriving and late-departing students school authorities need to ensure, foremost, that they are neither acquiescing nor appearing to do so in the practice of early arrival or late departure. That means both clear policies, properly communicated, establishing arrival and departure times and on-going monitoring to ensure compliance. Non-compliance presumably would call first for discussion with the parents; beyond that, a school authority may well need to consider treating early arrivers (and late departers) as trespassers, enabling them to enlist the aid of the police and/or child welfare agencies, especially in the case of very young children who, in essence, are being left unsupervised.

School officials need to be aware that unplanned early school leaving, whether due to snowstorms or other emergencies or reasons, that frustrate routine parental child-care arrangements, does not terminate their duty of care for students. This is especially true where the timing of dismissal is crucial to the chain of supervision agreed upon by parents and schools.<sup>84</sup> Such contingencies must be, and thankfully usually are, provided for by policy protocols designed to ensure proper supervision of children who are unforeseeably released early.

### **Standard of Care**

While *Williams* is well-known for its recognition of a duty of care on the part of school authorities, it is probably even better known for its establishment of the standard of care to which teachers have been held. Lord Esher wrote that a 'schoolmaster was bound to take such care of his boys as a careful father would take of his boys, and there could not be a better definition of the duty of a schoolmaster'.<sup>85</sup> Variouslly called the careful parent, prudent parent, or reasonable parent rule, this standard has stood the test of time. Despite criticism of its aptness in the modern school context since, after all, not many parents supervise 25-30 children at the same time, in activities ranging from gymnastics to woodworking, the rule still appears to be the gold standard in school negligence cases in Canadian courts. Hoyano<sup>86</sup> and others have argued that given the modern 'professional' stature of teachers, as persons trained in pedagogy and a myriad of technical and safety skills, it makes more sense to hold them to a professionally-based rather than parentally-based standard of care. So, instead of asking whether a careful parent would have reasonably foreseen an accident and injury, or have acted a certain way, a court should be asking, instead,



whether a reasonably competent instructor in the field would have foreseen the injury or acted the way the teacher acted. Such a test for assessing teachers' negligence is consistent with what Fleming has to say about the standard of care expected of professionals: '[t]hose who undertake work calling for special skill must not only exercise reasonable care but measure up to the standard of proficiency that can be expected from persons of such profession'.<sup>87</sup>

Despite the obvious appeal of these arguments, courts cling to the careful parent rule,<sup>88</sup> with some paying lip service to its critics by acknowledging the problem of the number of children under supervision and thus implying that the standard should probably be restated as the 'careful parent of a large family test!'<sup>89</sup> In recognition of the deficiencies of the careful parent test in the face of the growing relevance of professional knowledge, training, skill, and experience in many cases, the Supreme Court of Canada has forged an awkward amalgam of the careful parent and competent instructor tests rather than abandon the careful parent test altogether. Thus, in *Myers v. Peel County Board of Education*,<sup>90</sup> Justice McIntyre set forth this qualified careful parent test as follows:

The standard of care to be exercised by school authorities in providing for the supervision and protection of students for whom they are responsible is that of the careful or prudent parent, described in *Williams v. Eady* ... It has, no doubt, become qualified in modern times because of the greater variety of activities conducted in schools, with probably larger groups of students using more complicated and more dangerous equipment than formerly; ... but with the qualification expressed in the *McKay* case and noted by Carrothers J.A. in *Thornton*, supra, it remains the appropriate standard for such cases. It is not, however, a standard that can be applied in the same manner and to the same extent in every case. Its application will vary from case to case and will depend upon the number of students being supervised at any given time, the nature of the exercise or activity in progress, the age and degree of skill and training which the students may have received in connection with such activity, the nature and condition of the equipment in use at the time, the competency and capacity of the students involved, and a host of other matters which may be widely varied but which, in a given case, may affect the application of the prudent-parent standard to the conduct of the school authority in the circumstances.<sup>91</sup>

This standard of care has been followed in many later cases, including ones by the Alberta<sup>92</sup> and Ontario<sup>93</sup> Courts of Appeal. Yet, it is hard to understand why the courts would create and adhere to such a standard. If the 'reasonable man' test is a legal fiction, as it indeed has been described, the 'modified prudent parent' presents an even more unlikely legal fiction as it melds the qualities of at least *two* ideal personages. Surely, the courts should move the whole way toward abandoning the parental model and cast the standard of care according to the attributes to be expected of a teacher *qua* professional.<sup>94</sup>

### **Breach of Duty: Applying the Standard of Care**

While the appropriateness of the competing standards of care makes for interesting academic debate and speculation, what is more to the point are the factual criteria the courts ordinarily apply in determining whether the duty of care was breached. After examining school negligence cases, Thomas concluded that the following circumstances are routinely considered by the courts in assessing whether a breach occurred: a students' age; the nature of the activity and whether it inherently dangerous or contained only an element of danger; the amount of instruction

given students; the students' general awareness of the risks; foreseeability of risk; and previous accidents under similar circumstances.<sup>95</sup>

*Thornton v. Board of School Trustees of School District No. 57 (Thornton)*<sup>96</sup> provides a good illustration of how such factors figure into a Canadian court's finding of liability. In *Thornton*, the teacher was supervising three groups of Grade 10 students in the gymnasium: one lifting weights, a second playing floor hockey and a third doing gymnastics. The 'gymnasts', who were positioned on the stage, were attempting to complete front flips or somersaults by running and jumping onto a springboard which propelled them forward onto a thick foam mat. During these activities, the teacher, who was filling out report cards, 'positioned himself at a desk on one side, and to the front of the stage, angled in such a fashion that ... [b]y looking right and slightly over his right shoulder behind him he could observe the gymnasts'.<sup>97</sup> Since they were having difficulty obtaining the elevation necessary to complete their front flips, the students received permission to add a box horse, from which they jumped onto the springboard for extra momentum. The fact that many of the boys were not completing a full rotation and landing on their feet, but instead were landing awkwardly on their backs, went unnoticed by the teacher until one boy approached him complaining about having landed on his wrist on the wooden stage floor, outside the perimeter of the matting. The teacher responded by advising the student to run his wrist (later found to have been fractured) under the cold water tap and to tell the group to place a series of hard, compressed add-a-mats around the periphery to extend the area of the matting. Soon thereafter the plaintiff Thornton completed a flip but overshot the foam, landing head-first on the add-a-mats and breaking his neck, which resulted in total or partial paralysis to all four of his limbs. In upholding liability and awarding damages of approximately \$650,000 the British Columbia Court of Appeal<sup>98</sup> applied the following four-point test mirroring the criteria reported by Thomas: (i) was the activity suited to the student's age and condition, mentally and physically? (ii) was the student progressively trained and coached to do the activity properly and avoid the danger? (iii) was the equipment adequate and suitably arranged? (iv) having regard to its inherently dangerous nature, was the activity properly supervised?<sup>99</sup>

In *Thornton* the students were neither progressively trained nor even coached to avoid injury. In fact, they were novice, unaccomplished 'gymnasts', evidenced by the necessity of their using a springboard and box horse to aid their completion of the somersaults. Although the equipment was in sound shape and not dangerous, the configuration in which the students placed it, with the teacher's acquiescence, was inherently dangerous.<sup>100</sup> Given the inherently dangerous nature of the activity, the 'casual supervision' provided by the teacher amounted to negligence under the careful parent and the competent instructor tests. The court observed that a prudent parent would have investigated more thoroughly why the first boy injured his wrist and have taken more reasonable precautions to avoid further injuries or stopped the activity altogether. In other words, the 'prior occurrence' heightened the reasonable foreseeability of Thornton's injury. Yet, the teacher had, at worst, ignored the warning and, at best, taken inadequate measures by adding compressed matting not designed to absorb the type of shock that Thornton's body suffered, thus implicating the competent instructor (here, of physical education) standard.<sup>101</sup>

The '*Thornton* criteria' were applied by an Alberta trial court in *MacCabe v. Westlock Roman Catholic Separate School District No. 110*,<sup>102</sup> a case that was remarkably similar. In *MacCabe*, a bright, active 16-year-old girl suffered a serious injury while attempting a 'partial back salto' after jumping off a box horse onto a crash mat. She under-rotated, landed on her neck rather than her stomach, and suffered a spinal cord injury that left her a quadriplegic. In finding the teacher

negligent, the trial judge drew several conclusions, summarised as follows by the Alberta Court of Appeal:

- (a) The level of activities being performed by the students at the box horse station, particularly a spread eagle and a swan dive from a springboard over a full height box horse to a crash mat, was inappropriate given the students' level of experience and training ...
- (b) [The teacher] failed to ensure proper progressions were learned by the students for all of the moves they were attempting to complete. As such, MacCabe could not have known she should have learned an entire series of progressions before attempting the back salto off the box horse ...
- (c) The configuration of the box horse at full height and the crash mat were inappropriate for a high school gymnastics class and no appropriate warnings about this 'inherently dangerous' configuration were given by [the teacher] to the class ... Therefore, the injury to MacCabe could have been avoided had the configuration been different or if adequate warnings had been provided ...
- (d) Having spent his time principally at the high bar station, [the teacher] did not adequately supervise the other students in the class. He should have been aware the students in the class were competitive with each other and were prone to performing inherently dangerous activities, particularly, because their grad would be in part dependent on 'creativity'. With the knowledge of these circumstances, [the teacher] did not adequately supervise the students in the gym class.<sup>103</sup>

The courts' patent concern in these cases with the attributes of victims of school accidents suggests that a higher standard of care may be required when supervising physically or mentally challenged pupils. In *Eaton v. Lasuta (Eaton)*<sup>104</sup> a tall and gangling girl fell and broke her leg while carrying a much heavier girl during a piggy-back race. The court concluded that the girl's awkwardness had not constituted a disability but implied that, if it had, a higher standard of care would have applied. This implied higher standard of was utilised by a Saskatchewan court to find liability where an obese boy was required to make a seven-foot vertical jump, despite having expressed his wishes not to do so. The court noted the teacher should have foreseen the injury to a student such as the plaintiff and exercised greater care. The Supreme Court of Canada also agreed that teachers must take into careful consideration the special attributes, capabilities and handicaps of all their students in assigning activities, giving instructions and carrying out supervision. In *Dziwenka v. R.*<sup>105</sup> the Supreme Court upheld a trial court's imposition of a stricter standard of care on a teacher supervising a hearing-impaired student using a table saw, because one cannot warn such a student as rapidly as other students about imminent danger.<sup>106</sup>

Thus, teachers must clearly tailor their activities, instructions, prior training and site supervision to the mix of experience and abilities, physical and intellectual, represented by all their students. This has represented an increasingly daunting challenge since special education and human rights provisions have combined to integrate children with a variety of mental, physical and behavioral exceptionalities into regular classrooms.

Apart from singling out student disabilities as a critical factor in establishing whether the standard of care was met, the Supreme Court of Canada commented on the mischievous

nature of pupils in general, a factor that it identified as affecting teachers' ability to rely on prior instructions and warnings as a defense to allegedly negligent supervision. In *Myers v. Peel County Board of Education*<sup>107</sup> a fifteen-year-old student suffered a serious spinal cord injury in a failed attempt to complete a reverse straddle dismount from the rings. Although the students had been instructed clearly about the purpose of spotters and warned not to attempt any gymnastics manoeuvres without a spotter, Myers had performed his dismount after his spotter had left his station. The court discounted the importance of the prior instructions and warning given the students, emphasising instead the fact that the teacher had permitted Myers to practice such an inherently dangerous activity as gymnastics in a part of the gym that was out of the teacher's line of sight. Justice McIntyre stated that the teacher should have anticipated reckless behaviour from at least some of the young boys sent off by themselves to work on gymnastic equipment. The evidence revealed that it was a recurring problem to keep students from attempting gymnastic exercises without spotters and *the proclivity of young boys of high school age to act recklessly in disregard, if not in actual defiance, of authority is ... well known*.<sup>108</sup>

Similarly, in *Kowalchuk v. Middlesex County Board of Education*, despite having ordered students to stay off a high jump mat on which they were playing a potentially dangerous game, a teacher was found liable when a student broke his arm after falling awkwardly. The trial court held that teachers must 'take into account the unpredictable and adventuresome nature of young people in finding ways to entertain themselves including those involving risks'.<sup>109</sup>

This paternalistic policy stance is undoubtedly viewed with some distaste by those who would prefer to see courts impose a greater measure of self-discipline and responsibility on students regarding their own safety.<sup>110</sup> At the very least, as MacKay and Dickinson point out, there is a dynamic tension between accountability for children's safety and accountability for their education and overall development. Teachers face the constant challenge of striking a reasonable balance between protecting students and giving them enough rein to develop their independence and sense of risk-taking.<sup>111</sup>

## General Defenses

For the purposes of applying the standard of care, while Canadian courts emphasise the foreseeability of mischievous and disobedient conduct by children this is not to suggest an entirely paternalistic doctrine that admits of no opportunity to place at least some responsibility on them for their own safety. The doctrines of voluntary assumption of risk and contributory negligence are both available to teachers and school boards as potential defenses in negligence suits. If the former is more a theoretical than effective defense, the latter is frequently successful in reducing the amount of damages awarded a plaintiff who contributed to his or her injuries.

### (a) Voluntary Assumption of Risk

Voluntary assumption of risk, sometimes called *volenti* as a shortened form of *volenti non fit injuria*, is a tort concept based on the premise that plaintiffs who consent to the conduct causing them harm are not entitled to be compensated for that harm. In this respect voluntary assumption of risk operates as a complete defense to negligence. Assumption of risk may be either explicit, for example by express agreement, or implied, based on a plaintiff's conduct. Under Canadian contract law, it is likely be impossible to bind minors to express agreements under which they purport to waive their right to be compensated for negligently inflicted harm.<sup>112</sup> Nor, it seems, can parents waive such rights on their behalf.<sup>113</sup>

It is also not particularly easy to persuade a Canadian court that a plaintiff's conduct evidenced that he or she had assumed the risk of injury. The Supreme Court of Canada has limited

the effectiveness of implied consent as a defense by holding that not only must a defendant show that the physical risks were voluntarily assumed by the plaintiff, but also that the plaintiff understood that he or she was accepting *legal* responsibility for any loss that might occur.<sup>114</sup> The doctrine is thus difficult enough to apply in general, given the second criterion, but practically useless as a defense against children whom one would not reasonably expect to even think about legal liability, let alone understand the implications of waiving it.<sup>115</sup>

### **(b) Contributory Negligence**

It is hard to know just how much courts are disinclined, as a matter of judicial realism, to reject voluntary assumption of risk because it bars any recovery whatsoever if successfully applied. Contributory negligence arguably offers a more equitable doctrine as it permits the court to apportion fault between defendant and plaintiff.<sup>116</sup> As its name suggests, contributory negligence is purely a tort concept based on fault and not surprisingly, therefore, it mirrors the constituent elements of negligence in general. Hence, the relevant consideration is whether a plaintiff, having regard to his or her attributes, should have reasonably foreseen injury and/or whether he or she took reasonable steps to avoid it. Insofar as it is fault-based, the doctrine poses particular difficulties in the case of very young plaintiffs. For years under Canadian law, the so-called ‘rule of seven’ precluded a child younger than seven years old from being ruled negligent.<sup>117</sup> However, in 1956 in *McEllistrum v. Etches* the Supreme Court of Canada discarded the rule in favor of a more open-ended analysis that provides that ‘where the [child’s] age is not such as to make a discussion of contributory negligence absurd, it is a question for the jury in each case, whether the infant exercised the care to be expected from a child of like age, intelligence and experience’.<sup>118</sup>

The rule in *McEllistrum v. Etches* has been used to both accept and deny contributory negligence on the part of very young plaintiffs. In one case<sup>119</sup> an eight-year-old with a mental age of three was not found contributorily negligent while, in another, the British Columbia Court of Appeal held that a six-year-old was fifty per cent responsible for being hurt after running in front of a car despite warnings from his parents and the school about road safety.<sup>120</sup>

Canadian courts appear to be equally ambivalent when it comes to visiting contributory negligence on adolescents. For example, in *Myers*, discussed above, the fifteen-year-old plaintiff was found twenty per cent responsible for having ignored safety instructions by attempting a straddle dismount from the rings without a spotter. And, in *MacCabe* the plaintiff was found twenty-five per cent responsible because, as the Alberta Court of Appeal put it, she was a reasonable person; was an intelligent and fit 16-year-old who considered herself an athletic person; had some gymnastic experience, and knew the difficulty of some gymnastic moves and that she had her own limits<sup>121</sup> Moreover, she had been aware of the risk of harm, evidenced especially by her hesitation and nervous appearance before attempting the manoeuvre. While the Court of Appeal concurred with the trial judge that the teacher had been negligent in a number of ways, for example by encouraging the students to be creative without giving clear instructions and prohibitions, his negligence did not eliminate the plaintiff’s responsibility to see to her own safety. Nor was she compelled by the circumstances to ignore the risk that she had foreseen.

The Court of Appeal distinguished the situation in *MacCabe* from that in *Thornton*, where no contributory negligence had been found. Yet, one might be tempted to say that there were more similarities than differences between the two cases. Nevertheless, the *Thornton* court seemed to emphasise the difference between what they termed ‘ambiguous instructions to be creative’ (*MacCabe*) and ‘active encouragement’.



Consider also *James v. River East, School Division No. 9*,<sup>122</sup> where despite ignoring written instructions to wear goggles (although her teacher admittedly had not enforced the instructions on the day of the accident), an ‘above average’ eighteen-year-old student who was injured when a mixture she was heating exploded in her face was found not to have been at all contributorily negligent. In *Dziwenka v. R.*,<sup>123</sup> though, the Supreme Court of Canada reinstated a finding of forty per cent contributory negligence on the part of a deaf-mute student who, in a ‘moment of inattention’, suffered amputation of his fingers in an accident on an unguarded table saw. The court found that, despite his disability the plaintiff was an intelligent boy who was clearly capable of understanding safety instructions. It may be understating the case to say that rulings on contributory negligence, including the apportionment of fault where it is found, represent the least predictable component of the judicial task in negligence cases.

### **Vicarious Liability**

There is little doubt that the issue that most consumes the interest of both student-plaintiffs and defendant teachers is the question of who pays any damages that may be awarded. Plaintiffs want assurance that their ‘paper judgments’ can ultimately be enforced against a party with deep enough pockets to satisfy them in full, and teachers need to be assured that the financial futures of themselves and their families will not be devastated by the burden of a huge award of damages. In almost all instances where teachers are found negligent by Canadian courts the common law doctrine of vicarious liability results in the joint liability of the school boards who employ them. Although, under provincial negligence legislation, the liability of both teacher and board is routinely considered to be joint and several, meaning that each is independently liable for satisfying the entire amount of the judgment, since the plaintiff is entitled to be paid the damages only once, it is the school boards’ insurers who almost invariably pay the awards. Although, as a matter of law, employing school boards may be entitled to seek indemnity or contribution from negligent teachers, the remedies are rarely sought in school negligence cases.

Vicarious liability is a form of automatic or no-fault liability on the part of the employer; nevertheless, it is still necessary that two essential elements be proven. First, the tortfeasor must have been engaged as an ‘employee’ at the time of the negligent acts: school boards are not vicariously responsible for the torts of ‘contractors’. The distinction is rarely germane in cases involving teachers since, in Canada at least, the terms of their engagement practically always satisfy the common law criteria defining employment status.<sup>124</sup> Second, the tortious acts must have been committed by the employee within the ‘ordinary course or scope’ of the employer’s business, and not while the employee was off on a frolic of his or her own. Although it is possible to think of instances where one might conclude, as a matter of law, that a negligent teacher was acting outside the scope of his employment, such cases are rare in Canadian law,<sup>125</sup> perhaps due in no small part to courts’ awareness that refusal to impose vicarious liability could well frustrate the chances of a plaintiff’s ever recovering the damages awarded. Moreover, with the ever-expanding catchment of school board duties, it seems an easier and easier task to link a teacher’s conduct to the school board’s mission.

In sum, it is no secret that the law has been described as one of society’s most conservative institutions. Some areas of it, however, are more conservative than others and Canadian school negligence cases are among them. Although Canadian courts, from time to time, have displayed some interest in abandoning the traditional test for teacher negligence, the careful parent standard of care, in favor of a more modern and relevant professional standard, they have in the final analysis clung to the century-old test developed in *Williams*. Their only real acknowledgment of its limitations, essentially its failure to take into account the modern context of schooling,



has been in the form of a tortious unified test that attempts to meld parental and professional characteristics into a hybrid of two ideal personages. Bearing in mind that the four likely best-known Canadian school negligence cases, *McKay*, *Thornton*, *Myers*, and *MacCabe*, all involved athletic activities, specifically gymnastics, and the testimony of expert witnesses on an array of matters touching appropriate skill-teaching methods, safety precautions and professional judgment, it remains puzzling why the courts (the Supreme Court included) refuse to adopt outright an exclusively professional standard of care.

Similarly, courts have been slow to turn away from the general philosophy of paternalism established in *Williams*. Teachers continue to be expected to anticipate reckless and even defiant behavior, meaning that it is dangerous to assume that written and even verbal orders and instructions and warnings will present a reliable defense should injury occur. Careful and occasionally even very close supervision and enforcement of rules and directions are necessary. And this is only right: after all, whether acting as a surrogate parent or as an expert representative of the state, the teacher is the adult, the one with the experience, knowledge, skill and, most important, the judgement that are expected to safeguard children from harm.

Negligence cases are often difficult; they are highly fact-dependent and hence usually admitting of little precision and predictability. They exist at the seams between legal rules, giving judges considerable leeway in using what Fleming calls ‘practical politics’<sup>126</sup> to decide what is just under the circumstances, as the variability of the Canadian decisions attests.

## **Analysis**

Given that the tort systems of Australia, the United States, and Canada are based on British common law, it is not startling that one should find more commonalities than differences in all three countries. The concept of negligence itself, in each country, relies on a familiar formula or variation thereof, duty of care, breach of a standard of care, causal relationship between breach and injury leading to damages. In all three countries the duty of care typically involves a general legal duty to protect students during classes and school activities, whether on or off the school grounds. The duty also extends to protecting students from the intentional wrongful acts of third parties, including other students who might bully or otherwise harm them, or even school employees, such as teachers, bus drivers or janitors, who might sexually abuse them.

Again not surprisingly, the test adopted for the standard of care expected of educators is an objective one: what a reasonable person would have reasonably anticipated and then done or not done under like circumstances. In education, the legal fiction embodied in the reasonable person is alternatively termed the ‘careful parent’ or the ‘prudent parent’. In some instances professional attributes are imported into the test so that the operative question becomes what a reasonable person of like expertise and experience would have done, thus setting up a standard of care akin to the professionally based standard familiar in other professional negligence cases, such as medical malpractice. In Canada, however, the courts’ reluctance to abandon the careful- parent test has resulted in a third test that represents a contextually-specific one comprising an amalgam of the attributes of the careful parent and the reasonable or competent teacher or instructor.

The common law heritage shared by the three countries and, hence, the persuasive nature of the rulings of each other’s courts in school negligence cases, have guaranteed the judicial use of a common array of factors in the analysis of breach of duty in such cases: the nature of the activity and its inherent versus potential risk; the age, intelligence, experience and prior instruction of the student-victim; the generally approved practice for the activity; the degree of skill, training and experience of the teacher; and, the previous occurrence of like mishaps, and so on. It is clear in

all three countries that students with special needs attract a higher degree of attention, care and supervision than so-called regular students.

The countries also share common defenses to claims of negligence. Yet, in the United States, the almost complete defense of governmental immunity, which is based on the common law doctrine of sovereign immunity, is invoked frequently by school boards to forestall negligence claims for liability for the wrongdoing of government employees. Canada has no general doctrine of sovereign immunity of this nature although some provinces' school acts do insulate school boards from certain types of liability for negligence. In Australia, while the doctrine of Crown immunity once shielded government schools (although not, of course, private ones) from tort liability, that defense has been largely eroded by legislation in the States and Territories.

In all three countries the defense of consent, variously termed *volenti non fit injuria*, *volenti*, or assumption of risk, applies to vitiate liability in cases where the plaintiff voluntarily assumed the risk of the activity in which he or she was injured. While in Canada and Australia voluntary assumption of risk acts as a complete defense to a claim in negligence, in the United States it is more often treated as a comparative fault concept, thus reducing an award of damages in proportion to the degree to which the plaintiff played a part in the injury. What is clear in all variations of the defense is that there must be evidence that a plaintiff acted voluntarily (sometimes a problem in the case of children) and in full knowledge of the physical and legal implications of assuming the risk of harm. Moreover, this is further complicated by virtue of the fact that both of these evidentiary requirements can prove daunting in cases where child-plaintiffs are injured.

The 'defense' of contributory negligence is not a defense in its true sense in either Canada or Australia. The original common law rule that any fault on the part of a plaintiff defeated his recovery altogether has been supplanted by legislation providing a means for the courts to apportion fault between plaintiffs and defendants and then to reduce any award of damages proportionately in accordance with the blame attached to the plaintiff. In the United States, a finding of contributory negligence, which traces its origins back almost two centuries,<sup>127</sup> by a plaintiff still has the harsh common-law consequence of no liability on the part of the defendant(s). Not surprisingly, many American jurisdictions have adopted a model of comparative negligence, similar to Canada's and Australia's modern conceptions of contributory negligence, allowing for the more equitable practice of apportioning fault with an accompanying *pro rata* apportionment of responsibility for damages.

## Conclusion

The niceties of doctrinal differences aside, it is fair to say that tort law in Australia, the United States, and Canada, all three countries is a well-used vehicle of legal accountability for what goes on the schools. It affords the judiciary the means to do the only thing that can be done in many cases to restore a victim to his or her quality of life prior to a serious, debilitating injury, awarding a sum of money by way of damages. While money is a poor proxy for the ability to see, walk, think, or do any of the other things we take for granted in our lives, but it is the only one we have. While philosophical variations might exist among and within the countries' judiciaries regarding the degree to which young persons themselves should be held responsible for their own well-being, it is nevertheless agreed that educators will be expected to afford their charges a high level of consideration and care.

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## Endnotes

1. See eg John G Fleming, *The Law of Torts* (9th ed, 1998), 115-6.
2. *Donoghue v Stevenson* [1932] AC 562, 580 (Lord Atkin).
3. The refinements imposed on the duty element relate more to those instances in which a general duty does not apply, such as in the case of pure economic loss or negligent misstatement. In those cases, Australian courts have followed a circuitous course with the concept of ‘proximity’. Since such ‘novel duty categories’ do not arise in the case of school authorities or teachers, this article does not address the issue, but for an overview see Francis Trindade and Peter Cane, *The Law of Torts in Australia* (3rd ed, 1999), 341-57, and RP Balkin and JLR Davis, *Law of Torts* (2nd ed, 1996), 201-8. See most recently *Perre v Apand Pty Ltd* (1999) 198 CLR 180 and *Agar v Hyde* (2000) 201 CLR 552.
4. *Geyer v Downs* (1977) 138 CLR 91.
5. *Richards v State of Victoria* [1969] VR 136, 140; *Warren v Haines* (1986) Aust Torts Reports 80-014, 67,633 (Carruthers J); Francis Trindade and Peter Cane, *The Law of Torts in Australia* (3rd ed, 1999), 405-8 and 409-11.
6. RP Balkin and JLR Davis, *Law of Torts* (2nd ed, 1996), 213.
7. *Richards v State of Victoria* [1969] VR 136, 138-9 (Winneke CJ).
8. *Commonwealth v Introvigne* (1982) 150 CLR 258. See also *Watson v Haines* (1987) Aust Torts Reports 80-094.
9. *Watson v Haines* (1987) Aust Torts Reports 80-094.
10. *Kretschmar v The State of Queensland* (1989) Aust Torts Reports 80-272, 68,894 (Derrington J). See also *Richards v State of Victoria* [1969] VR 136, 138 and 141 (Winneke CJ); *Harvey v Pennell* (1986) 43 SASR 221, 229 (Matheson J); *H v Pennell & State of SA* (1987) 46 SASR 158, 181 (Olsson J).
11. RP Balkin and JLR Davis, *Law of Torts* (2nd ed, 1996), 214.
12. *Geyer v Downs* (1977) 138 CLR 91.
13. *Commonwealth v Introvigne* (1982) 150 CLR 258, 275 (Murphy J).
14. *Shaw v Commonwealth of Australia* (1992) 110 FLR 379.
15. *Warren v Haines* (1986) Aust Torts Reports 80-014, 67,633 (Carruthers J).
16. RP Balkin and JLR Davis, *Law of Torts* (2nd ed, 1996), 214.
17. RP Balkin and JLR Davis, *Law of Torts* (2nd ed, 1996), 214, n 117.
18. *Angelo Lepore v State of New South Wales* [2001] NSWCA 112 (23 April 2001).
19. *Wyong Shire Council v Shirt* (1980) 146 CLR 40.
20. *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47 (Mason J).
21. *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202.
22. *Latimer v AEC Ltd* [1952] 2 QB 701. See also RP Balkin and JLR Davis, *Law of Torts* (2nd ed, 1996), 261-2.

23. RP Balkin and JLR Davis, *Law of Torts* (2nd ed, 1996), 266-7 and 272-80.
24. *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* (1996) Aust Torts Reports 81-399.
25. *Kretschmar v The State of Queensland* (1989) Aust Tort Reports 80-272.
26. Francis Trindade and Peter Cane, *The Law of Torts in Australia* (3rd ed, 1999), 474.
27. Francis Trindade and Peter Cane, *The Law of Torts in Australia* (3rd ed, 1999), 486-7.
28. *March v E & H Stramare Pty Ltd* (1991) 171 CLR 506.
29. (1996) Aust Torts Reports 81-399.
30. See Francis Trindade and Peter Cane, *The Law of Torts in Australia* (3rd ed, 1999), 484-92.
31. *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd, The Wagon Mound (No 1)* [1961] AC 388. An English Privy Council decision, the *Wagon Mound (No 1)*, along with the subsequent Privy Council decision in *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd, The Wagon Mound (No 2)* [1967] 1 AC 617, remains the classic statement in Australian law of the test for remoteness.
32. *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd, The Wagon Mound (No 2)* [1967] 1 AC 617.
33. *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd, The Wagon Mound (No 1)* [1961] AC 388; *Chapman v Hearse* (1961) 106 CLR 112.
34. *Smith v Leech Brain & Co Ltd* [1952] 2 QB 405; *Stephenson v Waite Tileman* [1973] 1 NZLR 152.
35. *Hughes v Lord Advocate* [1963] 2 QB 405; *Doughty v Turner Manufacturing Co Ltd* [1964] 1 QB 518.
36. Francis Trindade and Peter Cane, *The Law of Torts in Australia* (3rd ed, 1999), 497-8.
37. There are also defences known as illegality or joint illegal enterprise and exclusion of liability, but these are not dealt with here as they are not commonly resorted to in the schools context.
38. Judiciary Act 1903 (Cth), s 64.
39. Crown Proceedings Act 1988 (NSW); Crown Proceedings Act 1980 (Qld); Crown Proceedings Act 1992 (SA); Crown Proceedings Act 1993 (Tas); Crown Proceedings Act 1958 (Vic); Crown Suits Act 1947 (WA).
40. Crown Proceedings Act 1992 (ACT); Crown Proceedings Act 1993 (NT).
41. Judiciary Act 1903 (Cth), s 64; Crown Proceedings Act 1988 (NSW), s 5; Crown Proceedings Act 1980 (Qld), sub-s 9(2); Crown Proceedings Act 1992 (SA), sub-s 5(1); Crown Proceedings Act 1993 (Tas), sub-s 5(1); Crown Proceedings Act 1958 (Vic), sub-s 23(1)(b); Crown Suits Act 1947 (WA), s 5; Crown Proceedings Act 1992 (ACT), sub-s 5(1); Crown Proceedings Act (NT), sub-s 5(1). And see *Western Australia v Bond Corp* (1991) 5 WAR 40; RP Balkin and JLR Davis, *Law of Torts* (2nd ed, 1996), 769, 822-3.
42. Francis Trindade and Peter Cane, *The Law of Torts in Australia* (3rd ed, 1999), 564.
43. For this history see CD Baker, *Introduction to Tort* (2nd ed, 1996), 237-41; Francis Trindade and Peter Cane, *The Law of Torts in Australia* (3rd ed, 1999), 562-7; John G Fleming, *The Law of Torts* (9th ed, 1998), 302-5.

44. Law Reform (Miscellaneous Provisions) Act 1965 (NSW), Part 3; Wrongs Act 1958 (Vic), s 26; Law Reform Act 1995 (Qld), Part 3; Wrongs Act 1936 (SA), s 27A; Law Reform (Contributory Negligence and Tortfeasors Contribution) Act 1947 (WA), s 4; Tortfeasors and Contributory Negligence Act 1954 (Tas), s 4; Law Reform (Miscellaneous Provisions) Act 1955 (ACT), s 15; Law Reform (Miscellaneous Provisions) Act (NT), Part 5.
45. RP Balkin and JLR Davis, *Law of Torts* (2nd ed, 1996), 769, 331-46.
46. *McHale v Watson* (1966) 115 CLR 199.
47. *Shaw v Commonwealth of Australia* (1992) 110 FLR 379.
48. Francis Trindade and Peter Cane, *The Law of Torts in Australia* (3rd ed, 1999), 571.
49. *O'Shea v The Permanent Trustee Company of New South Wales Limited* [1971] Qd R 1.
50. *Beck v Mercantile Mutual Insurance Company* [1961] SASR 311.
51. *Tingle v JB Hinz & Sons* [1970] Qd R 108.
52. Francis Trindade and Peter Cane, *The Law of Torts in Australia* (3rd ed, 1999), 572.
53. For a case on foreseeability, see e.g., *Allison v. Field Local Sch. Dist.*, 553 N.E. 2d 1383 (Ohio Ct. App. 1990) (finding that a school board was not liable for injuries sustained by a first grade student who was struck in the eye by a dirt-ball thrown by a fourth grader as the action of the older child was not foreseeable); *Duncan v. Hampton County Sch. Dist. #2*, 517 S.E.2d 449 (S.C. Ct. App. 1999) (holding a board liable for gross negligence where a classmate sexually assaulted a female student with a mental disability where school officials were aware of another sexual incident that had occurred two weeks earlier).
54. *Hammond v. Board of Educ. of Carroll County*, 639 A.2d (Md. Ct. Spec. App. 1994).
55. *Tomlinson v. Board of Educ. of Elmira*, 583 N.Y.S.2d 664 (N.Y. App. Div. 1992).
56. *Lewis v. Independent Sch. Dist. No. 10 of Pottawatomie County*, 808 P.2d 710 (Okl. Ct. App. 1991).
57. For such a case, see, e.g., *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (holding that a school board was not liable under Title IX for a male teacher's sexual harassment of a female student where officials did not have actual notice of his misbehavior and failed to take corrective action).
58. *Benitez v. New York City Bd. of Educ.*, 543 N.Y.S.2d 29 (N.Y. 1989).
59. Typically, in an American negligence action, the plaintiff sues the person who was supervising (or who failed to supervise) the scene as well as a variety of administrators and the school board generally under the principle of respondeat superior. If the defendants are found to be liable, under the principle of joint and several liability, the plaintiff seeks to recover from that party among the defendants, usually the school system and/ or its insurer, with the greatest resources. Assuming that a teacher or staff member was not covered by indemnification or some form of insurance, then the school would have to seek to recover its share of damages from the educator.
60. See, e.g., *Auman v. School Dist. of Stanley-Boyd*, 635 N.W.2d 762 (Wis.2001).
61. See, e.g., *Arteman v. Clinton Community Unit Sch. Dist.*, 763 N.E.2d 756 (Ill.2002).
62. *Daniel v. City of Morganton*, 479 S.E.2d 263 (N.C. Ct. App.1997).
63. *Lewis v. Independent Sch. Dist. No. 10 of Pottawatomie County*, 808 P.2d 710 (Okl. Ct. App. 1991). See also *Bell v. Ayio*, 731 So. 2d 893 (La. Ct. App. 1998) (holding a school bus

driver who removed two students from a bus after one threatened the other with physical violence, fifteen percent liable for the injuries that the victim subsequently sustained while finding the attacking student liable for the remaining eighty-five percent).

64. *Giraldez v. City of New York*, 625 N.Y.S.2d 517 (N.Y. App. Div. 1995).
65. *Fisher v. Syosset Cent. Sch. Dist.*, 694 N.Y.S.2d 691 (N.Y. App. Div.1999).
66. *Schoppman v. Plainedge Union Free Sch. Dist.*, 746 N.Y.S.2d 325 (N.Y. App. Div. 2002).
67. *Yanero v. Davis*, 65 S.W.3d 510 (Ky.2001).
68. *Milea v. Our Lady of Miracles*, 736 N.Y.S.2d 84 (N.Y. App. Div. 2002).
69. *Weber v. William Floyd Sch. Dist.*, 707 N.Y.S.2d 231 (N.Y. App. Div. 2000).
70. *Kahn v. East Side Union High Sch. Dist.*, 117 Cal.Rptr.2d 356 (Cal. Ct. App.2002).
71. *Lilley v. Elk Grove Unified Sch. Dist.*, 80 Cal.Rptr.2d 638 (Cal. Ct. App.1998).
- 72A. Wayne MacKay and Gregory M. Dickinson, *Beyond the Careful Parent: Tort Liability in Education* (Toronto: Emond Montgomery, 1998) at 51-52, 110-111.
73. This section will deal with vicarious liability for negligent acts of employees. Interesting but vexing issues arise around the question of when boards will be vicariously responsible for teachers' *intentional* torts, especially sexual abuse. While this topic will not be discussed here, readers interested in recent developments in Canadian law on these issues are invited to see: Greg M. Dickinson, 'Precedent or Public Policy? Supreme Court Divided on Rules for Vicarious Liability for Sexual Abuse by Employees of Non-Profit Organizations' (1999-00) 10 *Education & Law Journal* 137; Greg M. Dickinson, 'School Board Liability for Sexual Misconduct of Employees: A Losing Cause?' (2001-2) 11 *Education & Law Journal* 367; Greg M. Dickinson, 'Fault, No-Fault and Fiduciary Duty: School Boards' Liability for Employee Torts'. In W. Foster (Ed.), *Focusing on the Future: Seeking Legal and Policy Solutions in Education* (Chateauguay, Que.: LISBRO, 2000); and, Greg M. Dickinson, 'Teachers, Trust and the Law: The Matter of Sexual Misconduct' (2001) 32 (No. 1) *Orbit* 15.
74. (1894), 10 T.L.R. 41 (C.A.).
75. [1932] A.C. 562, 147 L.T. 281, 48 T.L.R. 494 at 580 (A.C.).
76. Accidents during school-sponsored or -approved excursions offer few problems as such trips can normally be viewed as extensions of the school day or premises, thus requiring supervision. Even if there were no duty to supervise, the assumption by the board of responsibility for supervising such 'out-of-school' excursions or events would certainly entail the obligation of carrying out such supervision in a non-negligent fashion.
77. G.R. Barrell, *Teachers and the Law* (London: Methuen, 1978) at 303-306.
78. In Ontario, e.g., Regulation 298, R.R.O. 1990, section 3(7) provides that boards may establish the times when their buildings and playgrounds will be open to pupils each day but they must be open at least fifteen minutes before classes begin and for fifteen minutes after classes end.
79. (October 11, 1975), *The Times* (London), cited in *supra* note 6 at 406.
80. See *Titus v. Lindberg* 38 A.L.R. 3d 818 (NJ SC 1967). In this case, because students were expected to arrive early the court held that the principal's duty to put in place rules of behaviour and supervision arose before classes began.



81. Fleming describes such imputed negligence that ‘visits the sins of fathers on their offspring’ as barbarous: John G. Fleming, *The Law of Torts*, 7<sup>th</sup> ed. (Sydney: The Law Book Company, 1987) at 263-264. Such a rule, in any event, is no longer tenable in many jurisdictions because of the legislated recognition that a child has a legal personality separate from his or her parents. This is not to say, however, that a board that was found liable could not bring third party proceedings against the parents for indemnity or contribution.
82. See, e.g., *Bourgeault v. Board of Education of St. Paul’s Roman Catholic Sch. Dist. No. 20* (1977), 82 D.L.R. (3d) 701 (Sask. Q.B.) and *Dao v. Sabatino and Board of School Trustees (Vancouver)* (1993), 16 C.C.L.T. (2d) 235 (B.C. S.C.), although in *Dao* the court found it unnecessary to rule on the difficult issue of whether a duty was owed, having found, in any event, that the board had acted reasonably in the safety steps it had taken in regard to the infant plaintiff who had run in front of a car while walking home.
83. See *Mainville v. Ottawa Bd. of Educ.* (1990), 75 O.R. (2d) 315 (Prov. Ct.–Civ. Div.). The reasoning in this case has been criticised: see Greg M. Dickinson, “Lost in Time and Space: Attempting to Draw the Lines Around School Board Duty of Care (1992-93) 4 *Education & Law Journal* 100. Surely it makes little sense for a school’s duty of care to be circumscribed strictly according to official school times or the perimeters of school board premises. Such an approach would entitle school authorities to stand by idly as a student was imperilled two minutes after the official school day ended or two feet beyond the property boundary of the school, assuming that anyone even knew precisely where it was. A more sensible test would take into consideration all the facts of a case, the general spatial and temporal proximity of the situation to the school grounds and day, respectively, and the extent to which the events, and the actors involved in them, were within the sphere of influence or control of the school. Such a test is used to justify the imposition of punishment against students who offend just off school property (sometimes even at home by using the Internet to deride teachers: see E. Roher, “Problems.Com: The Internet and Schools (May 2002) 12.1 *Education & Law Journal* 53) or after the school day has ended. Obversely, it seems reasonable to apply the test also to duty of care.
84. See *Barnes v. Hampshire County Council*, [1969] 3 All E.R. 746 (H.L.).
85. *Supra* note 74 at 42.
86. L.C.H. Hoyano, ‘The Prudent Parent: The Elusive Standard of Care’ (1984) *University of British Columbia Law Review* 18.
87. *Supra* note 81 at 99.
88. Although the competent instructor test was applied by the British Columbia courts in *Thornton v. Board of Sch. Trustees of Sch. Dist. No. 57* (1975), 57 D.L.R. (3d) 438 (B.C.S.C.), (1976) 73 D.L.R. (3d) 35 (B.C.C.A.), on appeal the Supreme Court of Canada was reticent to abandon the careful parent test, holding that the teacher was negligent on either standard: (1978), 83 D.L.R. (3d) 480 (S.C.C.). See also *McKay v. Board of Govan Sch. Unit No. 29 of Saskatchewan* (1968), 68 D.L.R. (2d) 519 (S.C.C.).
89. See *McKay v. Board of Govan School Unit No. 29 of Saskatchewan*, *ibid.* at 523 and *Ricketts v. Erith Borough Council*, [1943] 2 All E.R. 629 at 631 (K.B.).
90. [1981] 2 S.C.R. 2.
91. *Ibid.* at 32.
92. *MacCabe v. Westlock Roman Catholic Sep. Sch. Dist. No. 110 (MacCabe)*, [2001] A.J. No.

1278 (Alta. C.A.).

93. *Thomas v. Board of Educ. of the City of Hamilton* (1994), 20 O.R. (3d) 598 (Ont. C.A.).
94. That professional knowledge, experience, training and judgment comprise what many school negligence cases are about is illustrated well in *MacCabe*, *supra* note 92 at ¶ 29-51, where no fewer than five expert witnesses testified about whether the defendant's instructions, curriculum, and supervision, among other things, were acceptable. The testimony was obviously not focused on parental qualities but rather solely on the professional behavior expected of the teacher.
95. A.M. Thomas, *Accidents Will Happen: An Inquiry into the Legal Liability of Teachers and School Boards* (Toronto: OISE Press, 1976) at 42.
96. 57 D.L.R. (3d) 438 (B.C.S.C.), (1976) 73 D.L.R. (3d) 35 (B.C.C.A.),
97. *Ibid.* at 440 (57 D.L.R.).
98. The Court of Appeal reduced the trial judge's award of 1.5 million dollars, but on further appeal the Supreme Court of Canada increased the award to slightly more than \$850, 000.
99. (1976), 73 D.L.R. (3d) 35 at 36 (B.C.C.A.).
100. This case illustrates a common theme in school accidents: a teacher's acquiescence in or failure to recognise students' unintended and potentially dangerous use of otherwise benign equipment. Students' inventiveness coupled with their almost single-minded motivation to have fun, is a dangerous combination. Thus in *Kowalchuk v. Middlesex County Board of Education* [1991] O.J. no. 1122 (Gen. Div.), *aff'd.* [1994] O.J. no. 1103 (C.A.) a student was injured by being propelled off a thick mat after a heavier student had run and jumped on the other end of the mat, setting up a wave motion that projected the much lighter victim high in the air. These students had hardly arranged this activity as a physics experiment to prove the equation for momentum! And, in another case, students awaiting a volleyball practice stretched the net low enough to vault over, in a kind of perverse high jumping competition, resulting in one student's catching his foot in the net and falling awkwardly and breaking his neck, although in this case the New York court found the victim had voluntarily assumed the risk of injury in participating in the activity: *Barretto v. City of New York*, 665 N.Y.S.2d (N.Y. App. Div. 1997).
101. See also *Myers v. Peel County Bd. of Educ.* (1981), 17 C.C.L.T. 269 (S.C.C.) where a student suffered a serious neck injury after falling from the rings onto hard matting. An expert witness testified that the type of matting used was not according to approved general practice that would be expected of a competent physical education instructor.
102. *Supra* note 92.
103. *Ibid.* at ¶ 16.
104. (1977), 2 C.C.L.T. 38 (B.C.S.C.).
105. *Dziwenka v. Regina* (10 April 1969) (unreported) (Alta. S.C.—Trial Div.), *rev'd.* (1970), 16 D.L.R. (3d) 190 (Alta. S.C.—App. Div.), *rev'd.* [1972] S.C.R. 419 (S.C.C.).
106. *Ibid.* at 194 (D.L.R.).
107. *Supra* note 101.
108. *Ibid.* at 282. Emphasis added.
109. *Ibid.* at 8 ([1991] O.J.).

110. See, for example, W.H. Giles, *Schools and Students* (Toronto: Carswell, 1988), arguing that ‘the courts must not be ignorant and overprotective, and at once make an ass of the law, and destroy the schools. We must remember that children need to grow, and teachers need to let them grow. Teachers are not negligent when they do what is necessary in order to enable the children to grow’ (at 100-101).
111. *Supra* note 72 at 16-17.
112. Again, however, one might question the perpetuation of this paternalistic approach in a contemporary society such as Ontario, Canada which has enacted legislation regarding medical consent that provides that there is no lower age limit for providing such consent but that the decision about capacity to consent is based on the subjective test of whether the individual appears able to understand the nature of what he or she is being asked to agree to. See the *Health Care Consent Act*, S.O. 1996, c. 2, Schedule A, s. 4.
113. See *Carey v. Freeman*, [1938] 4 D.L.R. 678 (C.A.) where the Ontario Court of Appeal held that a defendant in a negligence suit could not rely on a release of claim executed on an infant’s behalf by a parent with the advice of counsel. The practice of settling claims by infants through their parents was disapproved by the court. The court’s policy stance would seem surely to apply also to waivers sought in advance of litigation.
114. *Car and General Insurance Company and Seymour v. Maloney*, [1956] S.C.R. 322.
115. See *Thomas v. Board of Education of the City of Hamilton supra*, note 93 at 619.
116. In many Canadian provinces statutes provide that, if degree of fault cannot be established by the court, liability is to be apportioned in accordance with the statutory requirements, in some cases equally between plaintiff and defendant. See, e.g., the *Negligence Act*, R.S.O. 1990, c. N.1, s.4 and the *Contributory Negligence Act*, R.S.A. 1980, c. C-23.
117. See *Eyres v. Gillis and Warren Ltd.* (1940), 4 D.L.R. 747 (Man. C.A.).
118. [1956] S.C.R. 785.
119. *Finbow v. Domino* (1957), 11 D.L.R. (2d) 493 (Man. Q.B.).
120. *Dao v. Sabatino and Bd. of Sch. Trustees (Vancouver)* (1996), 29 C.C.L.T. (2d) 62 (B.C.C.A.).
121. *Supra* note 21 at ¶ 67.
122. [1976] 2 W.W.R. 577 (Man. C.A.).
123. *Supra* note 105.
124. The fundamental consideration is whether an employer, under the terms of engagement, exercises sufficient control over how a hiree conducts his or her work. The more control, the more likelihood a court will construe the relationship to be one of master and servant, leading to vicarious liability. Even in cases where workers are found to be independent contractors, boards may still be directly liable for improperly delegating their supervisory function regarding student safety. Such issues regarding the legal status of contractors often arise in the context of student transportation by contracted carriers: see *Mattinson v. Wonnacott* (1975), 8 O.R. (2d) 654 (H.C.J.).
125. One of the few is *Beauparlant v. Board of Trustees of Sep. Sch. Section No. 1 of Appleby* (1955), 4 D.L.R. 558 (H.C.J.) where an Ontario court found a school board not responsible when a teacher, without seeking board approval, granted a half-day holiday to students to take them by truck to an adjoining town to attend a concert. En route several children

tumbled out of the truck injuring themselves.

126. *Supra* note 81 at 182, citing *Palsgraf v. Long Island R.R.* 248 N.Y. 339 at 352 (1928). While Fleming uses the term specifically to illustrate the difficulty of crafting and applying hard and fast rules to determine proximate cause, the concept also seems apt in a more general sense.
127. *Smith v. Smith*, 19 Mass. 621 (Mass.1824).