THE UNIVERSITY OF MANITOBA

THE VOLENTI DEFENSE IN TORTS FOR EDUCATORS AND BOARDS

by

MIKE H. TKACHUK

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CONTENTS

ABSTRACT

This study was undertaken to determine whether a voluntary assumption of risk by a student in a school activity, sanctioned by the school, would provide a volenti defense which would absolve the teacher, administrator, or School Board from tort liability in the event the student became injured. Exploration was conducted on the basis of five major questions. The first question dealt with the essentials of actionable negligence and where the defense of voluntary assumption of risk fit into this principle. The second question concerned itself with significant factors that courts considered in a lawsuit where the volenti defense was a major issue. Specifically, the factors that were focused on included the activities that the injured parties were involved in when the accident occurred; the type of consent that courts consider necessary in this type of litigation--i.e. implied or express; the part that waiver of rights plays in this defense; the significance of mental and physical capabilities, special skills, experience, age, and gender in a voluntary assumption of risk case. The third question focused on specific school activities such as active and spectator sports as well as local and extended field trips. It also included on-the-job-training in trade shops, commercial establishments, and school laboratories. The final school activity to be researched for tort litigations

was smoking on the school premises. The fourth question explored the students' constitutional rights and educators' duty to restrict students from exercising some of these rights in order to avoid negligence suits. The fifth question analyzed the voluntary assumption of risk characteristics and compared them with contributory negligence, and volenti non fit injuria--two terms which are closely related and, at times, overlap the voluntary assumption of risk defenses. Finally, the factor of ordinary risk was explored to determine how it fit in with the voluntary assumption of risk defense.

Analysis of available cases and literature indicated that teachers, as professionals, are expected to provide a greater standard of care than a lay person, to the children they are supervising. Where inherently dangerous activities are undertaken by children, a greater degree of supervision is expected of the teachers.

The major finding in this study was that voluntary assumption of risk can be used successfully by teachers, educators, and/or school boards in a court of law, providing courts have not found the defendant negligent. If negligence is discovered, courts will generally either apportion the blame or hold the educator or school board liable for the injury.

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Grateful acknowledgement is made to Dr. P.J. Husby, my advisor, for his scholarly guidance throughout this thesis. His continual support, patience, and sacrifices provided the incentive to carry this study to completion.

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Chapter 1

NATURE OF STUDY

As society becomes more knowledgeable of its rights and the responsibilities of others, a greater demand is placed upon educators to provide a standard of care befitting their profession. Since our present day society has become quite litigation-conscious, and many tort liability suits have been brought to court, an area of potential liability of educators becomes tort liability.

Evidence of the ever-increasing demand on "duty of care" is manifest in the tremendous inflation of liability insurance premiums both in the United States and in Canada in recent years. In 1984, for example, Americans paid 9.1 billion dollars in liability insurance premiums. This was 60 percent higher than the figures for 1983.[1] In Canada, liability insurance premiums have also been a financial burden to the insured. In the five-year period ending 31st of December, 1985, claims increased by 328 percent, and premium income increased by 94 percent. The cause of this was attributed to the fact that:

> Insurers have had difficulty adjusting to 'social inflation' which is the general term we use to describe the phenomenon which caused claims to increase much more rapidly than the general rate of inflation. Symptoms of 'social inflation' are increased

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[1]George J. Church, "Sorry Your Policy is canceled" Time. March 24, 1986, vol. 127, no. 12, p.16.

> 'litigiousness' (the tendency of people to launch more lawsuits);(,) increased generosity of the courts, and the trend towards awarding damages even when negligence is not proved.[2]

In the past, teachers were provided instructions on how and what to teach. Very little, if any, information was provided to the teacher on legal matters and the effects of the law on the educational system. In view of the ever-increasing demands placed on the educator, more emphasis should be placed on availability and dispensation of legal information in order that educators are kept abreast of their legal rights and responsibilities. It is hoped that this thesis will provide some of this information to those who seek it.

This thesis, historical in nature, has addressed itself to tort litigations as they apply to voluntary assumption of risk on the part of the student, and the legal responsibilities of educators, principals and/or school boards who become involved in this type of litigation.

Purpose of Study

The primary purpose of this study was to determine whether voluntary assumption of risk by a student in a school activity, sanctioned by the school, can provide a volenti defense which would absolve the defendant from tort liability in the event the student became injured.

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[2]E.F. Belton, President of the Insurers' Advisory Organization of Canada, in an address to the Toronto Businessmen's Lunch, March 17, 1986. Permission to quote secured.

Exploration was conducted on the basis of the following questions:

(1) What are the essentials of actionable negligence and where does voluntary assumption of risk fit into this principle?

(2) What significant facts were considered in the lawsuits in which a volenti defense was used?

(a) What activities were the litigants involved in when the injury occurred?

(b) What type of consent, i.e., implied or express (written or oral), is considered in this type of litigation?

(c) Does a waiver of rights constitute assumption of risk?

(d) What mental capabilities do courts consider necessary for a student to possess or display in order for that student to fully appreciate the nature or extent of the risk involved in the activity he is to undertake?

(e) Must students possess any special skills, experience or physical capabilities in order to undertake an activity assumed to possess an inherent risk?

(f) At what chronological age is a student considered legally able to accept a risk for himself/herself in a school activity

sanctioned by the school?

(g) Are male students treated differently from female students in this type of litigation?

(3) Do the following school activities possess an inherent risk and, if so, can they therefore provide the defendant with a volenti defense in a court of law?

(a) Sports - active and spectator;

(b) Field trips - extended over several days or local one-day trips;

(c) Students working in trade shops at school or on-the-job training in commercial establishments;

(d) School laboratories - Chemistry, Physics, and Biology;

(e) Smoking in school-designated rooms on school premises.

(4) Is there a breach of the students' constitutional rights when a student is denied the liberty to voluntarily undertake an activity that is considered to possess an inherent risk?

(5) What factors, if any, distinguish assumption of risk from:

(a) Contributory Negligence?

(b) Volenti Non Fit Injuria?

(c) Ordinary Risk?

Importance of Study

Teachers, in the past, have tended to be held in high regard by society. Very rarely were their actions questioned by the parents. However, that view has undergone a metamorphosis and some parents are now seeking judicial remedies when their children become injured in school activities. Therefore, teachers, like everyone else, are expected to act as reasonable and prudent persons; if they do not, they are liable to civil and criminal prosecution.

In examining the most recent assumption of risk cases, some light may be shed on the current legal trends that are emerging. These trends can provide educators and school boards with a greater insight into what is expected of them while standing 'in loco parentis'.

Since there is a dearth of literature available on the subject of voluntary assumption of risk as applied to students, this thesis may tend to reduce that deficiency somewhat. Not only will it increase the amount of literature in this field, but it may also pose additional questions relating to this field that may stimulate further research.

This study may provide information to educators, administrators, school boards and anyone else who may wish to become better informed in this area of research. As this is not a frequently used defense in the courts, some legal

professionals who lack knowledge in this area may find some benefit from this study.

Methodology

From the historical aspect, the methods and procedures employed in this study were as follows: (a) the problem was clearly defined and stated; (b) research was done to determine if primary sources were available for the solution to the problem; and (c) relevance of the data was explored in the light of the problem under investigation.

Although this thesis is historical in nature, much of the information was obtained through legal research. As such, research was conducted by locating abstract information from the following reports: Western Weekly Report, The Dominion Law Reports, Canadian Abridgement, New Brunswick Report, King's Bench Division, The Canadian Bar Review, All England Law Report, Washington Reports 2nd Series, North Eastern Reporter 2nd Series, Pacific Reporter, Southern Reporter, California Reporter 2nd Series. When pertinent information was located in the abstracts which dealt with lawsuits filed against teachers, administrators and/or school boards, and others, in Canada, United States and Great Britain, on the volenti defense, then summaries of these cases were obtained from the respective law reports.

From the legal aspect of the study, the method used to analyze and appraise the relevant issues factually was the TARP[3] method. The acronym applies to the following:

T - Thing or subject matter,

A - Cause of action or ground of defense,

R - Relief sought,

P - Person or parties involved.

Thing or subject matter refers to the place or property involved in the problem that may be of significance. Cause of action refers to the claim that is asserted or the defense that is made. The relief sought relates to the reason or purpose of the lawsuit. The persons or parties involved refers to the factual and legal status of the people involved in the lawsuit, and their relationship to one another. The parties involved may consist of individuals or a group. This may be significant to the solution of the problem and the outcome of the lawsuit. It also looks into the age and mental stability of the people involved for this may also have a significant bearing on the outcome of the suit.

Any books, ERIC documents, periodicals, government documents and newspaper articles related to the problem were summarized and stored. Finally, when all relevant information that could be located was carefully read and the dependability of the data adequately established by tracing

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[3]J. Myron Jacobstein and Roy M. Mersky, Legal Research Illustrated, 3d ed. (Mineola, New York: The Foundation Press, Inc., 1985), p. 10.

the references to their primary sources, the information was recorded in this thesis.

This research was undertaken at the Faculty of Law Library at the University of Manitoba and the Law Library at the Court House in Minnedosa, Manitoba. A search was also conducted at the Education Libraries of Brandon University, The University of Manitoba and the Department of Education at 1181 Portage Avenue, in Winnipeg, Manitoba.

Limitations of Study

As there is a dearth of literature and cases available on voluntary assumption of risk, this thesis may lack sufficient data to be considered a definitive study.

The author of this thesis is not a qualified lawyer and any information provided herein should not be misconstrued as legal advice. The contents of this thesis are merely information that was gathered from various sources to better acquaint the reader with the topic under investigation.

Delimitations

Although references may include litigations in the United States, Canada, and Great Britain, the focus of the study was directed at the law as it applied to educators, administrators, and school boards in Canada.

This study concerned itself mainly with one area of tort law, viz., negligence, and the application of voluntary

assumption of risk as a possible defense for teachers, administrators, school officials, and boards.

This research dealt mainly with children of school age. However, some references were quoted outside this parameter to make a particular point.

Although no restrictions were placed on the dates of the cases, the cases which were used in this study are from the period 1912 to 1985 inclusive.

Definitions

The Canadian Law Dictionary[4] was utilized to facilitate the need for clarification of legal terms that may be confusing to those unfamiliar with some of the legal jargon.

Organization of Study

Chapter one covers the introduction and includes the purpose, nature, sources, limitations, delimitations and organization of the study.

Chapter two includes a thorough discussion of negligence law and the place where voluntary assumption of risk fits into this principle.

Chapter three looks primarily at a specific area of negligence, viz., voluntary assumption of risk. In the

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[4]R.S. Vasan, The Canadian Law Dictionary (Toronto: Datinder S. Sodhi Law and Business Publications (Canada) Inc., 1980).

exploration, an attempt was made to provide answers to all the posed questions.

Chapter four presents cases of lawsuits which were brought to court against educators or school boards in Canada, United States, and Great Britain, which were fought on the volenti defense.

Chapter five analyses the cases from the previous chapter and compares the findings with legal elements mentioned in chapter three to determine the congruency of the judgments with the literature on this topic.

The final chapter summarizes the overall findings from research and includes recommendations for teachers. There are also suggestions as to what areas might be looked at for future research.

Chapter 2

NEGLIGENCE

Introduction

In a society where money is constantly changing hands, and where millions of people are relating and reacting to each other in their daily rituals of living, there are times when, inadvertently or otherwise, loss of property, money, or health will occur by someone's careless conduct. Therefore, in order to maintain a just and an anarchy-free society, tort laws have evolved to protect the innocent from the wanton or unintentional carelessness of others.

These laws were brought about to serve several purposes. One purpose was the need to compensate accident victims for their losses.[5] Such provisions did not, however, include all accident victims for, as we are well aware, accidents can and do occur at the hands of the victim or by someone who does not owe a duty of care. The provisions were intended to compensate the victims who were injured by someone else's faulty conduct.

A second purpose for tort law was to deter and discourage continuance of wanton negligence by making

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[5]Allan M. Linden, Canadian Tort Law (Toronto: Butterworth & Company (Canada) Limited, 1977), p.79.

those who are negligent pay for the losses or injury they caused and it was hoped that it would compel others to conduct themselves in such a way as to avoid lawsuits.[6] However, as evidenced by the ever-increasing accumulation of cases on tort litigations and the inflation of liability insurance, the desirable effects have digressed on a negative course and the tort laws have not served this purpose adequately.

Finally, tort laws were intended to "furnish a peaceful substitute to those who might indulge in more violent forms of retribution in its absence."[7] That is to say, rather than having each injured party taking the law into his or her own hands, figuratively speaking, these laws were designed to prevent any such personal action by the individuals and allowed the courts to settle the disputes.

Definition of Tort

In the legal profession, many terms are used that are foreign to the general public. Therefore, it is important when doing a study of this type, that the legal terms are adequately defined to promote a better understanding of the subject to the lay person. One such term, in this study, is the word 'tort'. The word tort is derived from the Latin word *tortus*, which means crooked or twisted. Bargen

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[6]Ibid.

[7]P.F. Bargen, The Legal Status of the Canadian Public School Pupil (Toronto: The MacMillan Company of Canada Ltd., 1961), p. 134.

suggests that a satisfactory definition of the word has not been found and any of the definitions to date have been "really too broad and too vague to be sufficiently definitive."[8]

The Canadian Law Dictionary[9] defines tort as:

> a civil wrong, giving rise to a cause of action, independent of contract. It involves a right in the plaintiff with the corresponding legal duty on the part of the defendant, a breach of the duty by the defendant and the damages as a result of that breach. A tort may consist in a violation of a right in rem which the plaintiff has against all the world such as his right to be in possession of his property free from trespass by any person, his right to the security of his person, his goods and his chattels, etc. Or it may consist of a breach of the duty imposed by law on a person towards another person as where a physician is negligent and fails to exercise reasonable skill in treating his patient. Lastly, it may consist of cases where special damages caused to an individual by the breach of a duty to the public as where the defendant allows noxious fumes to emanate from his factory causing damage or injury to those living close to the factory. Although generally a tort is a civil wrong independent of contract, sometimes the distinction can become blurred as where the relationship of parties is originally traceable to a contract by the actual damages sustained by one of them arises out of breach of duty consequent upon the relationship.

Hence, from the definition, we can conclude that a tort is not a criminal offense nor is it a breach of contract, but rather a civil wrong which would render the person or party liable in a court of law.

Courts have established two types of tort laws, viz., intentional and unintentional. Intentional tort is one whereby the actor intends to cause harm, and the

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[8]Ibid.

[9]R.S. Vasan, op. cit., p. 381.

unintentional, which is often referred to as negligence, occurs when the actors should have foreseen that their actions could have caused someone some harm.[10] This study deals with unintentional tort, or negligence, a term that will be dealt with in the following section.

Definition of Negligence

Authors of various texts provide a variety of definitions of negligence. Percy proposes that in the strictest sense "negligence means more than carelessness in omission or commission of an act. It properly connotes the complex concept of duty, breach, and the damages thereby suffered by the person to whom the duty was owing,"[11] terms which are dealt with separately in this chapter.

Vasan[12] defines negligence as follows:

> Negligence is the omitting to do something that a reasonable man would do or doing of something which a reasonable man would not do so. It is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man would not do. Or, to put it another way, it is the failure, in certain circumstances, to exercise that degree of foresight which a court, in its aftersight, thinks ought to have been exercised. Implied in the doctrine of negligence is the idea that the defendant was under an obligation to exercise certain care or that he was under 'a duty of care', and that he breached that duty resulting damages to the plaintiff. Negligence is the breach of that duty to take care which the law requires either in regard to

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[10]A.Wayne MacKay, Education Law in Canada, (Edmond-Montgomery Publications Limited, 1984), p. 111.

[11]R.A. Percy, Charlesworth on Negligence, V (London: Sweet and Maxwell Limited, 1971), p. 7.

[12]R.S. Vasan, op. cit., p. 259.

> another's person or his property, or where contributory negligence is concerned, of a man's own person or property.

The task of providing a definitive meaning for either tort, negligence, or, as will be noted later, duty of care, has been so arduous, as noted by the authors on the subject, that it leaves one, initially, in a quandary as to whether our legal system has a base from which to operate. Yet, courts continually deal with tort litigations on a daily basis and judgments are passed. One may well ask, how do the legal professionals sort out all the stabilizing factors in order to present a case? Perhaps the answer may lie in shifting some of our dependability from the power of the word to the judgment of the adjudicators. We may have been looking to the wrong source of dependability. Ehrlich once wrote that "words are extremely imperfect tools and nobody has ever succeeded in mastering real things by means of mere words."[13] If, for example, one said that he really had a good time at the party last night, another might conjure up many interesting and pleasant visions to fit the words *good* and *party*, all of which may not convey the meaning which was originally intended. However, in order to communicate with others, we must still rely on the medium of words, regardless of how restrictive or imperfect we may deem words to be in conveying the intended meaning.

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[13]Leon Green, The Litigation Process in Tort Law, (New York: The Bobbs-Merril Company, Inc., 1977), p. 157.

Having covered the definitions of the two terms, tort and negligence, the next section will deal with what the law deems necessary for negligence to be actionable, or in other words, what factors must be present in negligence in order that lawyers can bring the perpetrator of the negligent act to court to gain compensation for the victim.

Essentials of Actionable Negligence

Along with several definitions that exist on negligence, authors of legal texts have provided a variety of divisions or elements which must be present for negligence to become actionable. The traditional English approach[14], and the one most commonly accepted, is known as the ABC rule. This rule considers three components of the tort laws of negligence, viz., (a) a duty of care exists; (b) there has been a breach of that duty; and (c) damage has resulted from the breach.

Some American scholars[15] propose four divisions in a cause of action for negligence. These scholars have added proximate cause to the English list for a more definitive meaning. Proximate cause refers to the degree of causal connection between the conduct and the resulting injury.[16] In other words, how closely related was the injury to the action that seemed to have caused that injury.

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[14]Allen M. Linden, op.cit., p. 80.

[15]Ibid.

[16]Ibid.

Linden[17] utilizes six components of negligence in order to cover the subject more adequately:

> (1) The defendant's conduct must be negligent, that is, in breach of the standard of care set by the law; (2) the claimant must suffer some damage; (3) the damage suffered must be caused by the negligent conduct of the defendant; (4) there must be a duty recognized by the law to avoid this damage; (5) the conduct of the defendant must be a proximate cause of the loss or, stated in another way, the damage should not be too remote a result of the defendant's conduct; (6) the conduct of the plaintiff should not be such as to bar his recovery, that is he must not be guilty of contributory negligence and he must not voluntarily assume the risk.

Often courts, in confusion, use some of the elements interchangeably. "A court sometimes handles proximate cause questions in terms of duty of remoteness, which leads to a blending of the first and the third elements. Similarly, a court sometimes confuses the first and second components."[18]

The number of elements in a cause of action is not particularly important because the divisions have been constructed by scholars "in order to clarify the different aspects of a negligence case."[19] However, it would be important to have some parameters outlined for all concerned in order to assure fairness and equality for all. Where cases are tried by a jury of inexperienced laymen, the need for such parameters would appear to be of paramount importance. As there is a lack of crystallized laws with respect to negligence, the reliance of a fair trial must

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[17]Ibid., p. 81.

[18]Ibid.

[19]Ibid.

rest upon the experience, personal interpretation, and temperament of the judges to provide an equitable and impartial ruling on each particular case. It might be argued that it is more important for judges to display wisdom and compassion than to constantly go by the book. King Solomon, the Biblical character in the Old Testament, needed no assistance from books to determine who the natural mother of the child really was. His wisdom and knowledge of human actions and reactions provided him with adequate tools to resolve the problem. However, all judges do not display the same wisdom or temperament for consistent judgments, nor does our present day society have to deal with problems that are quite as simple as during biblical times. However, Green[20] points out that, "the fear of many is that we are swinging beyond the point of safety the other way in allowing to judges what in effect amounts to 'free decisions'."

It is, then, understandable why lawyers of defendants sometimes try to assess the temperament and previous rulings of the judges and hope they will be fortunate in having their cases heard by the supposedly most lenient judge on the circuit.

The discussion on the essentials of actionable negligence has provided several other factors that must be explored for a better understanding of the issues. Duty of

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[20]Leon Green, loc.cit.

care was one such factor that was mentioned which will be dealt with in the following section.

Duty of Care

An extremely important element of actionable negligence is duty of care, and one that is most difficult to define in terms of "the relationship between parties that give rise to the duty."[21] In other words, who owes whom the duty? It is not, I presume, the intention of the courts to purposely darken the layman's understanding of the law by making the concepts vague. It seems to be a matter of preventing the courts from creating pitfalls or loopholes in the law. If one attempts to narrow down the definition of duty of care, it would immediately set parameters for the courts and would consequently restrict its use in the complete spectrum of torts. Therefore, "whether a duty of care exists or not is a matter of law and not of fact so that there are many different classes of situations where courts have held that duty of care was imposed by reason of such a relationship."[22] But, unless a duty of care is established, any action in negligence will fail because, "it is essential in English law that duty should be established."[23]

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[21]R.A. Percy, V. p.12.

[22]Ibid., p. 13.

[23]Ibid., p. 12.

But, it is also important for everyone to know when duty of care is owed, to whom and by whom. Perhaps the key lies partly hidden in the concept of foreseeability in any activity which is being undertaken. As aptly stated by Percy,[24] it rests entirely on how the courts categorize the litigants, and the foreseeability principle:

> In order to discover who owes a duty and, then, to whom that duty is owed, it is first essential to discover the categories of person, who are capable of being recognized by law as: (a) defendant and (b) as a plaintiff, so that the situation, where a duty to take care is imposed, can be completed. Next, the foresight principle is applied in order to determine whether or not liability can be fixed in the given circumstances of a particular case: i.e. (c) the foreseeable plaintiff.

In other words, once it has been established who the injured party is, and who contributed to the injury, the courts then decide whether the cause of the damage was or could have been foreseeable by the defendant.

Although duty of care is an important aspect of actionable negligence, courts also take into consideration the standard of care which must be provided by those who owe a duty of care. This topic will be covered in the following section to determine what degree of care is required by those who owe a duty of care.

Standard of Care

In regards to the status of teachers and school boards with respect to duty of care, it is generally accepted in law that "school authorities are under a duty to

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[24]Ibid., p. 41.

exercise the same standard of care over children as would be exercised by a good parent with a large family."[25]

Since teachers and school authorities provide a service to the public, there is a special duty of care imposed upon them by virtue of the nature of their work. These special duties are imposed on them by statutes of the Federal Criminal Code and the Provincial Civil Code, together with the Public Schools Act, the School Board Regulations, the regulations passed by the school, and common law as enunciated and applied by the various court decisions. These laws all determine the obligation or duty of care which the teachers owe their pupils.[26]

Although the legal responsibilities of teachers are primarily such as one would expect of a reasonable and prudent person, the degree of care, or standard of care provided by a *reasonable parent* seems to vary according to the circumstances and the risks that are involved. In Dziwenka et al. v. The Queen, the judge stated that, "in this instance being a school involved, the degree of care expected of the school and all the officials in it is that of a reasonably careful parent. The fact that this particular school deals with those that are handicapped through being deaf and dumb undoubtedly increases the degree of care that would be expected, because I am sure that a

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[25]Jeffery v. London County Council (1954), 52. L.G.R. 521.

[26]"Liability and the Teacher", Manitoba Teachers' Society Report (September, 1985), p. 3.

reasonably careful parent of a deaf and dumb child is going to have to be careful with respect of features that the parent of a child so unhampered would not have to be careful of."[27]

It should be noted that the *reasonable man* concept is a fictitious standard created by the courts to be used as a yardstick. The concept was meant to represent an ideal community person of "proper and reasonable behavior. He is a prudent man and a man of ordinary sense."[28]

In his text, Bargen[29] attempts to narrow down the definition of the *reasonable man* with Turner's summary of characteristics of the reasonable man:

> 1. The reasonable man will vary his conduct in keeping with the circumstances. 2. The reasonable man will be made to be identical with the actor in the matter of physical characteristics. The man who is blind, lame or deaf is not required to do the impossible by conforming to physical standards. 3. The reasonable man is accorded no allowance for lack of intelligence short of insanity. For a defendant to do the best he knows is not enough. 4. The reasonable man is considered to be an adult. Children, therefore, are not required to meet the same standards of conduct as that of the reasonable man. 5. The reasonable man will be accorded special abilities and skills and will be held responsible for them when the circumstances so warrant. In other words, the law will take knowledge of the fact that some people are of superior knowledge, skill and intelligence. 6. The reasonable man is required to maintain a higher degree of standard conduct when he has had time to reflect on his course of action than when he must act in an emergency. 7. The reasonable man, under many circumstances, will be charged with the duty of anticipating and guarding against the conduct of

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[27]Dziwenka et al. v. The Queen (1971) 1 W.W.R. 195 (C.A.).

[28]P.F. Bargen, op. cit., p. 137.

[29]Ibid., p. 137 - 138.

> others. For instance, where children are in the vicinity, greater caution and anticipation are required than if they were adults.
>
> In principle the law holds that an actor may not depart from this formula of doing what is required of the reasonable man.

As this definition recognizes the necessity for a duty of care and the degree of care imposed by that duty, it, therefore, provides a suitable definition of the *reasonable man*.

It should be noted that courts do not consider ignorance as an excuse for breaking the law, although Vasan[30] suggests that courts are generally lenient to those who show ignorance of a statute that is not commonly used. However, ignorance is not to be confused with errors of judgment. Ignorance, in most cases, is not excusable, but errors of judgment fall into a different category and, "a mere error of judgment does not yield tort damages."[31]

One would conclude, from Turner's summary of characteristics of the reasonable man, that professionals would be required to provide a higher degree of care to those under their supervision, than would be expected of a lay person. If teachers are considered professionals, a concept that has produced much controversy and prompted much discussion, the same degree of care would then be expected of them as of all other professionals in their respective callings. It is, therefore, expected that professional

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[30]R.S.Vasan, op. cit., p. 181.

[31]Allen M. Linden, op. cit., p. 118.

people would not be subject to "escape by performing merely up to the capacity of the ordinarily prudent lay person; more is expected of them and more should be demanded. After all, they hold themselves out as being possessed of extra skill and experience. That is why people consult them. That is why they are usually paid for their advice and service."[32]

When a teacher has been sued for negligence and the courts must decide whether the teacher has provided the care that a reasonable and careful parent would have to his own children, the courts usually take into consideration the number of children that are under a teacher's supervision and have a tendency to widen the terms of that standard of care for teachers.[33] Although the terms of *standard of care* have been widened for teachers, this concession is negated by the higher degree of care expected of professionals. However, MacKay[34] states that Canadian judges have been quite lenient with teachers in tort litigations, and only now are tougher standards being imposed.

Since a breach of duty could impose liability upon teachers, it is important for educators to know what constitutes a breach of duty. An effort will be made in the subsequent section to establish what factors constitute a breach of duty.

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[32]Ibid., p. 107.

[33]A. Wayne MacKay, loc. cit.

[34]Ibid., p. 107.

Breach of Duty

Teachers and school authorities have, by the very nature of their work, special duties placed upon them. They are entrusted with the care of many children and merely providing them with a quality education is an enormous responsibility. Yet, over and above this responsibility, there is thrust upon them additional duties imposed by statutes in the realm of maintenance and supervision. In most cases where there is an express breach of any statute, and damage occurs, the courts consider that an act of negligence. They will not, however, consider a breach of school rules as a negligent act, but it would become an important factor when dealing with a negligence suit.[35]

As noted earlier, in order for negligence to be to actionable, damage must result from a breach of duty. The next section will address itself to the topic of 'damage' to determine what constitutes damage in actionable negligence.

Damage

An important element that must be present before courts will recognize negligence as being actionable, is damage. Damage is a legal term used to denote injury, harm or loss of property. Obviously, if no damage was incurred to property or person, then no action would be forthcoming. A teacher may be as negligent as he or she can possibly be with the children under his/her care, but if no one gets

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[35]Ibid., p. 110.

hurt in any way as a result of that negligence, then there can be no liability.

At one time the law dealt solely with the physical injury that resulted in a particular case; these parameters were eventually widened to include "injury by shock sustained through the medium of the eye, or the ear, without direct contact."[36]

The final factor to be considered by the courts is the extent of damage. This must be done in order to adequately compensate the plaintiff.

Once the courts have decided on whom the duty of care rests and that there was a breach of duty, and damage had resulted, they must then struggle with the problem of determining how remote the damage was. Was the injury suffered by the plaintiff as a direct result of the defendant's negligence or had some "intervening agency broken the chain of causation?"[37] This relationship between the injury and the alleged actions that led to the injury is referred to as proximate cause and will be discussed in the next section.

Proximate Cause

Proximate cause and remoteness of damage appear to be, as was noted earlier, interchangeable and refer to a

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[36]R.A. Percy, V, op. cit., p. 35.

[37]R.A. Percy, VII, op. cit., p. 231.

direct or indirect cause of an accident.[38] They are, in fact, opposite sides of the same coin. For example, one could say that a bottle is half-empty, while another would say that the same bottle is half-full. So, too, proximate cause and remoteness of damage are related in a similar way.

Not all losses that are caused by negligence make the actor liable. In Segerman v. Jones[39], a grade-four classroom teacher had left the classroom during Physical Education classes and while she was out, one of the students accidentally was hit and injured by another. The courts concluded that "the accident would have occurred whether or not the teacher was there; thus, even if the teacher was negligent, there was no causal connection."

Now that it has been ascertained what constitutes actionable negligence and when a breach of duty can occur, the next important issue to consider is the standard of care required of teachers in carrying out their teaching duties. The following section briefly covers some guidelines for teachers to follow in order provide students with the necessary standard of care.

Accidents and Teacher Liability

In reviewing the cases at common law which dealt with negligence, it was noted that the majority of these cases

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[38]C.A. Wright and A.M. Linden, Canadian Tort Law 6th ed. (Toronto: Butterworth & Company (Canada) Ltd., 1975), p.354.

[39]Segerman v. Jones (1969) 259A 2d 794 (Md. ca).

were related to accidents that were caused outside the classroom, except for a few that happened during Shops, Physical Education and laboratories. Most of the accidents occurred on the playground, in the hallways, on field trips, or in sports. This would indicate that an important area of legal concern to teachers, administrators and boards is adequate supervision.

According to the Report on Liability prepared by the Manitoba Teachers' Society, guidelines have been established to determine what sufficient or *reasonable supervision* entails:

> (1) rules had been formulated for the guidance of the students; (2) the supervisor was competent and was also present; (3) there was good discipline with students carrying on in orderly fashion; (4) supervisory practices had been adopted generally and had been followed successfully in the past.

Any conduct that falls short of these criteria might constitute negligence.[40] Therefore, in order to avoid a lawsuit, a fairly reliable rule-of-thumb would be to act reasonably, plan carefully, try to anticipate potential danger and strive to circumvent it, and become familiarized with all the safety regulations for that activity.[41]

Should a teacher or a School Board find themselves in a predicament whereby a parent is bringing action against them for conduct which led to an injury of a student, the defendants may wish to consider contributory negligence or

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[40]Manitoba Teachers' Society Report, op. cit., p. 3.

[41]Ibid., p. 4.

voluntary assumption of risk as possible defenses for their case. Both of these defenses will be dealt with in the following chapter.

Summary

In order to assist accident victims to recover their losses, to deter others from negligent acts, and to furnish a peaceful solution to grievances, tort laws evolved.

A tort is a civil wrong, generated by an act or omission by a person who has a duty of care. Injury to health or property may result as a direct consequence of that breach of duty. There are two types of tort laws, viz., intentional and unintentional. The unintentional is more commonly known as negligence.

Authors of legal texts have attempted to isolate the essentials of actionable negligence. Although there are different views on what elements constitute actionable negligence, and some are more definitive than others, the number of elements in a cause of action are not that important because they have been constructed by scholars in order to clarify the different aspects of a negligence case. Because of the lack of crystallized laws of tort, the judgment on cases seems to rest on the experience, interpretation and temperament of the judge or the jury doing the adjudication.

Generally, duty of care is a legal obligation to provide care to another, as directed by statutes or cases in common law.

Standard of care is the degree of care one is obliged to provide another. In schools, authorities are under duty to provide a standard of care to the children that a reasonable and prudent parent would normally provide. Although a *reasonable man* is a fictitious character developed by the courts, it sets a standard by which all men are judged in tort cases. This standard may vary at times according to the circumstances. It is expected, for example, that professional people will provide a greater standard of care than ordinary lay people. In some cases the courts have a tendency to reduce the expected standard of care for teachers from that of a reasonable parent due to the number of children under the teacher's supervision.

Damage is another important element of negligence and it denotes physical injury, economic loss, or nervous shock. Damage must prevail for actionable negligence. Courts must determine the remoteness or proximate cause of the damage before rendering a decision on a particular case.

Supervision is an important element of teacher concern. Many accidents occur outside the classroom when teachers are on supervisory duty. The Manitoba Teachers' Society has provided some guidelines for teachers which outlines what reasonable supervision entails. In any activity, it is important to plan carefully, try to

anticipate any dangers that might possibly occur, try to avoid these dangers if possible, and become familiar with all the safety regulations of the activity one is going to undertake with the children.

There are several defenses that a defendant might avail himself of in actionable negligence. One such defense, although partial in nature, is contributory negligence, and the other is voluntary assumption of risk.

Chapter 3

VOLUNTARY ASSUMPTION OF RISK

Introduction

When parents send their children to an academic institution, they expect that the schools will provide their children with a quality education in a relatively safe environment. When teachers are actively engaged in their profession, many do so with the intention of providing their students with a quality education in such an environment. For teachers, an accident-free environment would not be difficult to maintain if students remained in a sedentary position throughout the school day, contending with their textbook lessons. However, intermingled with the academic aspect of a student's school day, is a hiatus of leisure time. During this time students become involved in Physical Education classes or games. As was noted in chapter 2, the majority of cases were related to accidents that were caused outside the classroom, except for a few that had happened during Shops, Physical Education, and laboratories. Most of the accidents occurred on the playground, in the hallways, in sports and some even on field trips. For the student, these are happy times--activity times which help to promote good health. Yet, with these happy times, there is also the risk of injury and subsequent tort litigations. It is these injuries and possible tort litigations which all

teachers seek to avoid. When injuries occur and teachers are sued for damages, there is an inherent fear of further litigations in those who find themselves in similar situations, and consequently, educators and administrators find themselves receding into a mode of over-caution. With this regression comes the abandonment of those activities which may expose the risk of lawsuits. It is imperative then, that both educators and students have an umbrella of protection over them to safeguard them from litigations in the former and injuries in the latter case.

Some courts have recognized the necessity for such activities and have been lenient with teachers in this area. In 1932, for example, the Utah Supreme Court stated that "these (extra-curricular) activities are useful and wholesome preventive measures which save children from delinquency and the State from additional expenses in connection with penal institutions."[42] A Canadian court judge in Myers v. Myers[43] also stated that, "It would be unfortunate if, through fear of legal liability, the spontaneity of the sport is removed or if undue restrictions occurs on programs and teaching systems." Therefore, courts are shouldered with the responsibility of performing a dual role in society. Courts must not only provide shields for

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[42]John L. Strope, School Activities and the Law (Reston, Virginia: The National Association of Secondary Principals, 1984), p. 3.

[43]Myers v. Myers, (1977) 2 C.C.L.T. 269, (Ont. H.C.) at p. 272.

responsible teachers from litigious parents, but they must also provide shields for children from irresponsible teachers. Two of these shields for teachers come in the form of contributory negligence and voluntary assumption of risk defenses, which will be discussed in the following sections.

Characteristic Components of Voluntary Assumption of Risk

Applicability of Voluntary Assumption of Risk to Negligence. An important question arises as to where the doctrine of voluntary assumption of risk is subsumed into, or included in, the spectrum of the negligence principle. As was previously discussed, in order that negligence become actionable, it is not sufficient merely to show that the defendant was negligent. The plaintiff must also show that there was a breach of a duty of care to himself. Courts have, on occasion, held the view that where there has been a voluntary assumption of risk, the one who is owed a duty of care absolves the other who owes that duty by voluntarily accepting the risk inherent in an activity. Fleming[44] points out that, "the basic idea is that the plaintiff, by agreeing to assume the risk himself, absolves the defendant from all responsibility for it. The latter's duty of care is suspended." Fleming qualifies his remarks by suggesting that, "while it would be bizarre to say that the plaintiff

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[44]John G. Fleming, The Law of Torts, 5th ed., (Sydney: The Law Book Company Ltd., 1977), p. 278.

agrees to the defendant being as careless as he likes, he does not agree to hold the defendant responsible even for any accident caused by the latter's negligence."

Linden[45] affirms that Canadian courts have on occasion used this approach of subsuming voluntary assumption of risk into the duty of care issue by ruling that the defendant had absolved the plaintiff of any duty of care whatsoever. This was evidenced in the cases of Halliday v. Essex[46] and Atwell v. Gertridge[47]. In the former case, the learned judge stated that, "to succeed on this issue, (voluntary assumption of risk) it would be incumbent on the defendant to establish, by preponderance of credible evidence, that special circumstances existed to displace the *prima facie* duty of care. The theory is of course that if the plaintiff voluntarily agreed to be a passenger in a vehicle driven by an operator who was obviously incompetent by reason of his intoxication, he is not entitled to expect the ordinary standard of care of a sober and normal driver." In the latter case, the judge expressed two views of the volenti non fit injuria doctrine. "One is that no duty of care is owed to a person who consents to a risk, from which it follows that there can be no negligence where a plaintiff (voluntarily assumes the risk) is volens. The other view

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[45]Allen M. Linden, op. cit., p. 425.

[46]Halliday v. Essex, (1971) 3 O.R. 621, at p. 623.

[47]Atwell v. Gertridge (1958) 12 D.L.R. (2d) 669, at p. 677 (N.S.).

is that no question of volens arises until it is established that the defendant was negligent." However, it appears that this approach of subsuming voluntary assumption of risk into the negligence principle has not met with unanimous approval by all Canadian courts, as evidenced in the case of Fink v. Greeniaus.[48] In this case the judge refers us to Linden's book on Canadian Negligence Law (1972) where Linden is of the opinion that "it is preferable to treat *volenti* as a defense", rather than subsume voluntary assumption of risk within the duty of care issue. This would appear to be a more logical and suitable approach since the former view lends itself to a contradiction of terms. This anomaly becomes evident when we say that 'duty of care has been absolved', and then we refer to one of the essentials of actionable negligence. The very essence of actionable negligence is a breach of duty of care. If no breach of duty of care occurs, there can be no actionable negligence when injury occurs. Still, the volenti defense is invoked when someone is negligent and wants to avoid liability. In most cases courts usually rely upon the contributory negligence defense when they find evidence of negligence, as was noted in Savard v. Urbano[49]. It is understandable then, why "the scope of the defense has been progressively curtailed since the end of the last century, so that at the

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[48]Fink v. Greeniaus (1973), 2 O. R. (2d) 541, at p. 552

[49]Savard v. Urbano (1978) D.L.R. (3d) 33.

present day it is allowed only when there is a positive agreement waiving the right of action."[50]

A prognosis of the volenti defense has been provided by Judge J.A. Cooper in Crossan v. Gillis et al.,[51] in his remark that, "one must concede that in view of the rather clear language ... it [the volenti defense] is scarcely alive, and the prognosis is not good. ... this is a result which I, as well as others, welcome."

Since the defense of voluntary assumption of risk is not a popular one in the legal profession and very few cases have been recorded in this area, it is important to review the concept of contributory negligence, a defense which is more often preferred than voluntary assumption of risk. Since many of the factors that are considered in contributory negligence are also considered in voluntary assumption of risk cases, some insight may be cast on this topic by studying the concept of contributory negligence discussed in the next section.

Voluntary Assumption of Risk Distinguished From Contributory Negligence

Prior to 1945, there was no distinction between contributory negligence and voluntary assumption of risk. In 1945, however, the courts began apportioning the blame in contributory negligence cases and consequently, it was

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[50]Glanville L. Williams, Joint Torts and Contributory Negligence, (London: Stevens & Sons Limited, 1951), p. 296.

[51]Crossan v. Gillis et al. (1979) 7 C.C.L.T. 269 (N.S.C.A.). at p. 270.

necessary to make some distinction between them, as the volenti defense still provided a total defense while contributory negligence did not.[52]

Yogis[53] differentiates between the two defenses by pointing out that voluntary assumption of risk is based fundamentally on consent, whereas contributory negligence arises when the plaintiff fails to exercise due care. If contributory negligence is to be used as a defense to prevent compensation for the plaintiff, it must be established "that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury."[54] In some instances, however, the two defenses have overlapped as in Savard v. Urbano[55] and Agar v. Canning[56]. In the latter case, a retaliatory blow struck by a hockey player while engaged in the sport of hockey, went beyond the principle of voluntary assumption of risk and amounted to actionable negligence. Consequently, the judge apportioned the blame to both parties involved. In the former case where parties who were of unequal age, experience, and skill were involved in a game of baseball and the minor was injured, the court was

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[52]R.A. Percy, V op. cit., p. 636.

[53]John A. Yogis, Canadian Law Dictionary (Toronto: Barron's Educational Series, Inc., 1983).

[54]R. A. Percy, V, op. cit., p. 608.

[55]Supra, note 49.

[56]Agar v. Canning (1965) 54 W.W.R. 302 (Man. Q.B.) Supra.

of the opinion that although the minor continued to assume the risk inherent in the sport, "the defendant acted so rashly as to be legally liable, first in playing with a professional baseball and then agreeing to allow the defendant to be the pitcher while he himself was the batter." The overlapping of the two defenses becomes quite evident when someone assumes a risk and is also negligent.[57] Normally, however, contributory negligence deals with the lack of knowledge of danger,[58] whereas voluntary assumption of risk implies that the "plaintiff freely and voluntarily, with full knowledge of the nature and the extent of the risk he ran, impliedly (implicitly) agreed to incur it."[59] Obviously, if no danger was probable, there would have been no need for consent.

Merely being aware of, or having knowledge of the risks involved in a particular activity, would be inadequate in a court of law, for other factors are also knitted into this principle. If, by merely being aware of a danger, constituted assumption of risk, then many of the insurance companies in Canada would amass a fortune overnight. A simple act such as crossing the street is dangerous and anyone who has ever been injured by doing so would have been barred from recovery on the basis that he or she knew that it was dangerous to cross the street. Therefore, the

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[57]John G. Fleming, loc. cit.

[58]R.A. Percy, V, op. cit., p. 637.

[59]Ibid., p. 640.

concept extends beyond the mere knowledge of an existing risk. It also implies that the person voluntarily assumed the known risk.

With respect to minors and the two defenses, some of the cases indicate that contributory negligence can be used in lawsuits involving children and young persons. In McEllistrum v. Etches,[60] the judge rejected the idea that no six-year-old could be guilty of contributory negligence and held that each case must be left for the jury to decide on the basis of the child's age, intelligence, experience, and the society's norm for a child of the age in question.

It would appear that, using the principles of contributory negligence and applying them to the voluntary assumption of risk, the voluntary assumption of risk defense can be used successfully where minors are concerned, only when there is no breach of duty of care. The judge in Murray and Another v. Harringay Arena Ld.,[61] allowed a volenti defense when a six-year-old boy was injured by a flying puck in a hockey arena. It was held that although it was unfortunate that a six-year-old was involved, but taking into consideration the liability under the terms of reasonable care, it would not be fair to widen the scope of the terms where minors are concerned. The implied term was 'taking reasonable care', and the judge could not find the

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[60]McEllistrum v. Etches (1954) O.R. 814, 1956, S.C.R. 787.

[61]Murray and Another v. Harringay Arena Ld., (1951), 2 K.B. 529.

defendant in breach of that duty. He went on to say that it was not the defendant's duty to protect anyone against a danger incidental to any entertainment which the spectator should obviously be aware of and for which he assumes the risk.

It has been suggested in the literature that in some courts the maxim of volenti non fit injuria and voluntary assumption of risk are equated. However, some cases indicate that they are slightly different. The following section will attempt to discover what, if any, differences do exist between these two terms.

Voluntary Assumption of Risk Distinguished From Volenti Non Fit Injuria

Canadian Law appears to equate the doctrine of voluntary assumption of risk with the maxim of volenti non fit injuria and consequently Linden[62] uses the terms interchangeably to express the same idea. Fleming[63] indicates that *voluntary assumption of risk* is a "plea of consent for intended harm," and the maxim, *volenti non fit injuria* means, "that wrong is done to no one who consents," and both are merely two different expressions of the same philosophy in British courts.

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[62]Allan M. Linden, op. cit., p. 424.

[63]John G. Fleming, loc. cit.

In American courts[64], the two principles vary to the extent that voluntary assumption of risk applies only to cases where adult master-servant relationships exist or where there is a contractual relationship involved. The maxim of volenti non fit injuria applies in proper cases independent of any contractual relationship. Presumably the distinction exists because in the former case a man cannot be considered truly 'voluntarily' assuming a risk if he is bound, by contract, to perform some dangerous duty for some form of compensation. In order to circumvent this problem, American courts apply the volenti non fit injuria maxim in such cases. Where children are concerned, the volenti non fit injuria term would apply.

In order to determine whether negligence was present in a tort litigation, courts must determine what type of risk the plaintiff encountered in the activity prior to, or at the time of, the injury. The next section deals with ordinary and extra-ordinary risk and their effect on the outcome of a negligence lawsuit.

Voluntary Assumption of Risk and its Application to Ordinary Risk

The Canadian Law Dictionary[65] defines 'ordinary' as normal, common, often recurring, or customary. As applied to risk, it would mean normal, or common risk inherent in

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[64]Kirby Lumber Corp. v. Murphy Tex. Civ. App., 271 S.W. (2d) 672, 678.

[65]R.S. Vasan, op. cit., p.269

any activity. Regardless of the activities that one undertakes, each possesses some inherent risk. Whether taking a shower, walking the dog, playing chess, or watching hockey in an arena, there is a chance, however slight, that some harm or injury may result. This type of risk would be considered ordinary risk according to the definition.

On the other side of the same coin, there is the concept of unreasonable risk of harm. The concept of unreasonable risk is important in considering the voluntary assumption of risk defense because, negligence, in a court of law, deals with this unreasonable risk which one must strive to avoid.[66] In the words of Chief Justice Cordoza in Murphy v. Steeplechase Amusement Co. Inc.,[67] "one who partakes in such a sport accepts the dangers that inhere in it so far they are obvious and necessary ... ." This would indicate that courts are ready to accept the reasonable risk that is inherent in an activity, but not the unreasonable risk which may lead to a finding of voluntary assumption of risk.

Some American courts[68] do not find ordinary risk properly applicable to assumption of risk because they view ordinary risk, in cases where adults are concerned, as that which comes with the contract of service, whereas, extra-

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[66]John G. Fleming, op. cit., p. 113.

[67]Murphy v. Steeplechase Amusement Co.,Inc., 1929, 250 N.Y. 479, 166 N.E. 173.

[68]Belevicze v. Platt Bro. & Co. 81 A. 339, 342, 84 Conn. 632.

ordinary risk implies that the servant has voluntarily waived the effect of the employees possible negligence. "Risks which ought not to exist and would not exist except for the master's negligence are not classed as *'ordinary risk'*, but as *'extra-ordinary risks'*. The word *'extra-ordinary'* is not used to denote magnitude or as a mark of degree. An *extra-ordinary risk* is one lying outside of the sphere of the normal, arising out of conditions not usual in the master's business; a risk which may be obviated by the exercise of reasonable care on the master's part."[69] In cases where students are concerned, the courts must decide whether a particular risk is of an 'ordinary nature' or an 'extra-ordinary nature' when a tort case is brought to court. It is ludicrous to suggest that one should sue the soap manufacturers or bathtub manufactures for injury caused to someone who slipped and fell in the bathtub while showering, as it is to suggest that a student should sue the school or division for an injury sustained by a student while playing hockey or football. This formula of extra-ordinary risk appears to be prevalent in Canadian courts as well, as indicated in Crossan v. Gillis et al[70]. In this case, the judge stated that "consent or acceptance of the risk is not enough; there must be an agreement and waiver.

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[69]Brazeale v. Piedmont Mfg. Co., 193 S.E. 39, 43, 184 S.C. 471.

[70]Supra, note 51.

What must also be shown is a waiver of liability for gross negligence, not ordinary negligence."

Once it has been established what type of risk was involved in the injury, the courts must determine whether there was any agreement made between the parties involved to waive any of the plaintiff's legal rights. The following section will deal with this topic, its implications and its parameters.

Waiver of Rights. An important element in a voluntary assumption of risk defense is the waiver of rights concept. Some Canadian courts have viewed this element of the volenti defense as a necessary component to a successful defense in certain circumstances. For example, as noted in the previous section, a waiver must be provided for a defense to conduct labeled 'gross negligence' and not 'ordinary negligence'. The waiver is binding "when the victim has freely and consciously, with full knowledge of the matter, consented to the risk or danger, the nature or extent of which he was perfectly capable of appreciating, and the results of which he also tacitly accepted in advance," as indicated in Savard v. Urbano.[71] It is therefore, not sufficient for the defendant to prove that the plaintiff had knowledge and was willing to take the risk of the activity, but there must be a waiver of legal rights before the defendant can be successful. In Crossan v.

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[71]Supra, note 49.

Gillis et al.[72] the trial judge stated that "Canadian law requires proof that a bilateral bargain was actually made, expressly or by necessary implication from the facts, with the onus on the defendant to advance such proof. Consent or acceptance of the risk is not enough; there must be an agreement and a waiver."

In Dyck v. Manitoba Snowmobile Association Inc.,[73] the plaintiff signed a form, to enter a race, absolving the association from any injuries that may occur to him while competing in the race. This contract, a part of the condition of participating, constituted a valid waiver. When the driver was seriously injured in the race due to the negligence of a race official, the waiver was held to be valid and the defendant was exonerated of blame.

American courts have viewed the waiver of rights concept in a similar manner. In Hendsey v. Southern New England Telephone Company[74], the judge ruled that "waiver is a voluntary relinquishment of a known right, and involves the idea of 'assent', which is an act of understanding, and this presupposes that person to be affected has knowledge of his rights but does not wish to assert them."

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[72]Supra, note 51.

[73]Dyck v. Manitoba Snowmobile Association, Inc., (1981), 17 C.C.L.T. 225 (Man. Q.B.), affirmed (1982) 4 W.W.R. 318 (C.A.).

[74]Hendsey v. Southern New England Telephone Company, 21A. (2d) 722, 724.

From the above discussion, it is evident that lack of knowledge and understanding of the legal risk involved would preclude any volenti defense. Where children are involved, the question arises as to what capabilities do children possess in order to have a clear understanding knowledge of the legal risk involved? This question will be dealt with in the following two sections of this chapter on consent.

Consent, Express and Implied. An element which bears notable significance in the voluntary assumption of risk defense is the factor of consent. In order that this defense can be applied successfully in court, "the plaintiff must agree expressly or impliedly, to waive any claims for that injury that may befall him ... "[75] Consent, therefore, may be implied or express and, although implied consent is at times difficult to prove, "it must be pleaded and proved by the defendant,"[76] in order to be successful in a court of law.

Examples of express consent are found in cases where a carefully prepared waiver is drawn up indicating exclusions for liability in the event of negligence. In Dyck v. Manitoba Snowmobile Association Inc.,[77] a duly signed agreement provided a successful *volenti* defense for

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[75]Allan M. Linden, op. cit., p. 427.

[76]Ibid., p. 424.

[77]Supra, note 73.

the defendant. It was held that "the waiver ... provided a defense to both defendants in this action."

Where implied consent is concerned, examples may be found in situations where operators of sports and recreation facilities inform participants or spectators of hazards which may occur by printing warnings on the back of tickets or on display cards. These printed warnings indicate that the establishment does not accept the responsibility for any accidents which may occur to the participants or spectators that frequent this establishment. Any participation would then constitute an implied consent. However, if the terms of liability are not brought to the attention of the purchaser of the ticket by the establishment, and the plaintiff neglected to read the warning, courts may rule in favor of the plaintiff.[78] Where implied agreements are concerned, "the chief difficulty is not the terms of the agreement, but whether any such agreement is to be inferred at all."[79]

Having established the necessity for consent in a voluntary assumption of risk defense, a second important issue to arise is whether children and young persons are legally capable of informed consent in order to waive their legal rights. The following section, which deals with the

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[78]John Barnes, Sports and the Law in Canada (Toronto: Butterworth & Co., (Canada) Ltd., 1983), p. 336.

[79]R.A. Percy, V, op. cit., p. 637.

legal age of consent, attempts to cast some light on the issue.

Legal Age of Consent. Before any discussion is attempted on the legal age of consent, some parameters must be established as to the categories of age of those who are below the age of majority. Bala and Lilles[80] categorize this class of citizens as children and young persons as it applies to the Young Offenders Act. In the Province of Manitoba, a child is considered to be anyone under 12 years of age, and a young person is one who is 12 years or more but under 18 years of age. The age of majority may vary in other provinces, for every province has its own statutes that designate the legal age of majority.[81] A third category has been established by the courts[82] who have designated that children six years of age and under are considered to be children of '*tender years*'.

In Henderson v. Southern New England Telephone Company,[83] it was indicated that before a person is capable of legal consent to any risk, he or she must have a clear knowledge and understanding of the nature of the risk involved. Where minors are concerned, the application of

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[80]Nicholas C. Bala and Heino Lilles (Don Mills, Ontario: Richard Dee Boo Publishers, 1984) p. 2-3.

[81]A. Wayne MacKay, op. cit., p. 174.

[82]Eyers v. Gillis & Warren Ltd., (1940) 4 D.L.R. 747 (Man. C.A.).

[83]Henderson v. Southern New England Telephone Company, 20A (2d) 722, 724, 128 Conn. 132.

this principle becomes more difficult. The ability of minors to give informed consent has been a difficult issue for courts to contend with and presumably one of the reasons why definite standards have not been established in all legal areas of human interaction. However, medically related issues have dealt with this problem from time to time, and therefore, a view from this angle may throw some light on the problem. Dranoff,[84] a lawyer who recently contributed an article on legal issues of women to Chatelaine, outlines some facts about legal consent of minors as it applies to medical issues. These age guidelines were expressed as follows:

> Generally speaking, parental consent is required for non emergency medical treatment of any child, but the law does not specify when a child under 16 may consent for herself, except in Quebec, where a child 14 or older may consent, and in New Brunswick, where a child under 16 may give consent if capable of informed consent in her best interest, and in Saskatchewan and Ontario, where laws permit a person under 16 to consent to hospital treatment if married. However, Ontario prohibits anyone under 16 from consenting to a hospital operation that ends the ability to become pregnant or inseminate, eg., sterilization.
>
> Aside from these exceptions, doctors are without a rule of thumb and must rely on their judgment of whether the individual patient is capable of informed consent -- whether she has the intelligence and maturity to understand the nature, consequences, benefits and risks of the medical procedure.

The Canadian Foundation for Children and the Law Incorporated recommends further guidelines on medical consent which are hereby reproduced in part:

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[84]Linda Silver Dranoff, "Free for the Asking" Chatelaine. February, 1986, vol. 59, no.2, p. 164.

> (2) (i) any person aged 16 years or more or emancipated shall be presumed to have the capacity to give an informed consent as if she/he had obtained the age of majority;
>
> (ii) the minor's own recognition of his health need;
>
> (iii) the minor's maturity;
>
> (iv) the minor's intellectual functioning ...
>
> (3) Where the minor has capacity to consent to treatment, no further consent should be required, except in circumstances in which 'major' surgery may be involved.[85]

In a recent case involving a 16-year-old girl from Medicine Hat, Alberta, (name unpublished) Mr. Justice L.D. MacLean quashed an injunction obtained by the girl's Mormon parents to prevent their daughter from having a therapeutic abortion duly approved by the therapeutic abortion committee at the Calgary General Hospital. MacLean stated that the issue involved was not whether abortion was morally right or wrong but "the issue is simply one of capacity of consent." In his ruling he found that the girl was mature enough to understand the implications of her actions.[86]

Since many of the issues which involve medical consent are geared towards the *benefit* of the young person, legislation can be enacted for such situations. However, where no benefits accrue to a child or young person, courts appear to be reluctant to establish specific guidelines, or favor the defendant in a voluntary assumption of risk defense.

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[85]Nicholas C. Bala and Kenneth L. Clarke, The Child and the Law. (Toronto: McGraw-Hill Ryerson Limited, 1981) p. 268.

[86]Brandon Sun [Brandon], December 31, 1986.

Generally, a voluntary assumption of risk defense is involved when a waiver of legal liability is present in the form of an express contractual agreement or an implied agreement. According to Bala/Clarke,[87] "an infant is handicapped in contractual law because he is deemed not to have the [legal] capacity," to enter into such an agreement. They further state that when, and if, a child does enter into such a contractual relationship and the obligations are so one-sided that they out-weigh the benefits, such a contract is null and void.[88]

Although society appears to deny children some of the privileges which adults possess, this is done in order to protect children from themselves and from those who would take advantage of them. The law goes beyond the scope of disallowing children to consent to the legal risk involved. Parents are also restricted in signing away a child's rights, and where such a situation prevails, the courts will step in and assist the child. In deKoning and deKoning v. Boychuk,[89] where the parent of the child signed an indemnity agreement and release of claim for injuries suffered by the child in a motor vehicle accident, the judge held that since "the defendant's negligence caused the

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[87]Nicholas C. Bala and Kenneth L. Clarke. op. cit., p. 223.

[88]Ibid.

[89]deKoning & deKoning v. Boychuk (1951) 2 W.W.R. (N.S.) 251 (Alta. S.C.).

accident, it follows that the infant can recover irrespective of the agreement signed by the parents."

The possible outcome of actions involving children under sixteen years of age is difficult to determine for lack of sufficient cases to draw on for a resolution to this issue. However, from the facts thus presented, it would appear that children and those in their tender years are incapable of consenting to any legal risk. When a person is beyond 14 or 16 years of age, uncertainty exists about their ability for such informed consent. They are, however, capable of accepting the physical risk, as was noted in Murray and Another v. Harringay Arena Ltd.[90]

Since it has not been explicitly established what the legal age of consent is, future cases may cast more light on this subject. Other factors of importance which should be considered in the voluntary assumption of risk defense are age, the gender of the student, intelligence, and physical requirements for the activity to be undertaken. The following section will address itself to these issues.

Age, Gender, Mental and Physical Characteristics of Plaintiff. Just as it is important that the plaintiff has knowledge of the risks involved in a particular undertaking, American courts find the factors of age, physical characteristics, gender of the child, and the training of the student of importance to the case. Strope states that

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[90]Supra, note 61.

"the same factors that the courts consider in determining the ability of the student to be contributorily negligent are considered with voluntary assumption of risk. Specially, the courts would consider age, physical characteristics, sex and training of the students involved."[91]

In Smiles v. Edmonton School Board,[92] where a teacher permitted a 16-year-old boy to use a rip-saw, which was never used by him previously, and by which he became injured, the judge ruled the defendant liable because the instructor "should have known that he [the boy] had absolutely none [experience], stood mutely by and allowed him [the boy] to undertake it [use a rip-saw]." In this case, experience played an important role in the judgment.

In Savard v. Urbano,[93] a similar situation arose where the age and experience were both considered in the judgment for the plaintiff because, as the judge stated, "while it is true, as the appellant suggests, that, in games of this kind, there is a tacit acceptance of the risk involved, a distinction must be made in cases where the parties are unequal in age, experience and skill," and the judge disallowed the volenti defense.

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[91]John L. Strope, Jnr., op. cit., p. 49.

[92]Smiles v. Edmonton School Board (1918) 41 D.L.R. 400.

[93]Supra, note 49.

Since every physical sport carries with it the possibility of injury, teachers may often have concerns about the risk of injury to students under their supervision and may feel ill at ease when supervising sports activities. The following section will deal with some of these issues in an effort to relieve any apprehension teachers and coaches may have about sport supervision.

Risks and the Litigants

Active Sports. Injuries often occur in both active and spectator sports, and parties could potentially bring an action for compensation in the event of an injury. In cases where school children are involved, in sports and gymnastics, a greater standard of care is necessary due to the inherent risk involved in some of these activities.

Some courts have viewed students as invitees and the school boards as invitors as opposed to licensees or trespassers. In Wade v. Winnipeg School District No.1,[94] the judge ruled that the relation of a pupil on the school premises to the education authority was that of invitee and invitor, and there was a common law of duty of supervision of such pupils imposed on the authority. However, in Boivin v. Glenavon School District,[95] the judge took a different

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[94]Wade v. Winnipeg School District No. 1 (1959) 28 W.W.R. 577, 19 D.L.R. (2d) 299, affirming 27 W.W.R. 546 (Man. C.A.).

[95]Boivin v. Glenavon School District (1937) 2 W.W.R. 170 (Sask. C.A,).

position. He ruled that students could hardly be described as invitees due to the fact that they are under statutory obligation to attend school by virtue of the School Attendance Act.

Bargen[96] has aptly provided a label of his own for students who are under compulsion to attend by referring to them as 'compulsees'. He contends that the standard of care for this class is greater than towards invitees because of the fact that they are forced by law to attend school.

In Manitoba, school authorities also felt that the invitor-invitee principle applied, for in 1952, an attempt was made to circumvent this obligation by passing the following legislation:[97]

> Where injury or death is caused to a pupil enrolled in or attending a school (a) during, or as a result of, a course of instruction carried on or under the jurisdiction of the school board; or (b) during, or as a result of, physical training, physical culture, gymnastic exercises or drill carried on in connection with he school activities; or (c) before or after school hours during recess on school premises, on field trips or excursions on school buses;
>
> no cause of action accrues to the pupil or to any other person for loss or damage suffered by reason of the bodily injury or death, against the school division or school district or any servant, agent or trustee thereof unless it is shown that the injury or death was caused by the negligence of the school division or school district or negligence on any of its employees or agents or of any one or more of the trustees.[98]

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[96]P.F. Bargen, op. cit., p. 145.

[97]Robert L. Lamb, Legal Liability of School Boards and Teachers for School Accidents (Ottawa: Canadian Teachers' Federation, 1959), p. 21.

[98]Manitoba Special Set School, S.M. 1980, c. 33, s. 86.

Basically, the statute reaffirms and covers that which the laws of tort intended to encase; viz., provisions for standard of care by teachers and boards to the students under their charge.

When civil action is brought against teachers as a result of student injuries in sports or gymnastics, courts will, on occasion, consider a volenti defense, but each case is judged on its own merits.[99] At other times, courts will combine the volenti defense with contributory negligence and apportion the blame, as in Savard v. Urbano.[100] In this case, Michele Savard, a 23-year-old male, and Louise Urbano, a 16-year-old female, along with two others, decided to play ball. When it was Urbano's turn to pitch and Savard was at bat, he connected the ball and hit Urbano in the mouth, causing injury. The courts ruled that, although in games of this kind, there is an implied acceptance of risk, some distinction must be made as to the age, experience, and skill of the people involved. It was held that the plaintiff could have stopped playing the game when she noticed from the beginning how dangerous it was to continue. However, she continued to assume the risk inherent in this type of sport. Consequently, the courts apportioned the liability to both the defendant and the plaintiff.

In the normal course of a game, courts will not usually consider any damages actionable in a legal sport

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[99]Robert L. Lamb, op. cit., p. 22.

[100]Supra, note 49.

because "the mere possibility of injury resulting from a game is not sufficient to establish a breach of duty, especially when it is not shown that supervision could have prevented injury to a child from another player's breach of rules."[101] This was also shown in King v. Redlich,[102] where a 32-year-old male was participating in a recreational game of hockey and, while so engaged, was severely injured by a ricocheting puck which was deflected off a goal-post during the time the plaintiff was engaged in a free skating exercise prior to the game. The trial judge found an implicit assumption of risk in this type of sport and favored the defendant.

When, however, actions of the parties goes beyond the normal conduct of the game, players may be liable to their adversaries for intentional injuries caused by assault. In Agar v. Canning[103], when a retaliatory blow was struck in anger due to some provocation by the plaintiff, the principle of volenti did not apply. The judge ruled that even though provocation was not a defense, the law was clear that in assessing damages, evidence of any provocation should be taken into consideration and the liability thereby reduced. In this case, the plaintiff was considered partly responsible due to the provocation, and damages were reduced

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[101]Gard v. Board of School Trustees of Duncan (1946) 2 D.L.R. 441, 62 B.C.R. 323.

[102]King v. Redlich (1985) 35 C.C.L.T. 201 (B.C.C.A.).

[103]Supra, note 56.

to one-third. The outcome of this case parallels Linden's[104] view that "volenti is not invoked unless someone is negligent ... But in these cases, when the courts find that there is negligence, they usually exclude the operation of volenti."

From a review of several of the cases that were cited, it appears that courts will consider a volenti defense in sports where express or implied consent is given to the assumption of the physical risk involved, but not to the legal risk. In other words, the participant of a sport agrees to accept the bumps and the bruises that he may incur in the course of the game, but he does not agree to accept the negligent act of another.

Having focused on active sports and the issues involved, some discussion must also be provided on spectator sports since accidents occasionally happen in this area of human interaction as well. The following section will attempt to cover the legal issues of spectator sports.

Spectator Sports. It may not seem likely that watching a ballgame or a hockey game could be considered even remotely dangerous. However, accidents do occur to spectators, as well as to players of the sport, as noted in some of the cases in common law. Where spectators are concerned, the same factors apply as those with participating sports. The spectator assumes the risk of the

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[104]Allen M. Linden, op. cit., p. 431.

physical harm but not the legal risk of someone's negligence. Barnes[105] notes that "the spectator at an event assumes the ordinary known risk associated with the playing of the sport where those risks are inevitable and incidental to the playing of the game."

If injuries result to a paying spectator, the principles of common law that would apply are as follows:

> (1) No absolute warranty is provided by the occupier of the establishment to the invitee that the premises are absolutely safe. He is only to see that reasonable care has been taken to make the premises safe from any reasonably assumed dangers;
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> (2) His establishment must be kept in the same condition as other similar establishments;
>
> (3) Spectators assume risks inherent in the sport but not to the negligence of the operator;
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> (4) A spectator elects the seat of his choice and if that seat is in a location where the danger is greater, he must accept the consequences, providing no negligence is exercised by the occupier;
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> (5) It must be proven by the defendant that there was actual consent on the part of the plaintiff.
>
> (6) The occupier must make his establishment reasonably safe from the foreseeable movement of the crowd;
>
> (7) When spectators become boisterous, there may be deliberate or accidental injuries to some. The operator is not held responsible unless there is not adequate supervision of the crowd. Where the conduct of the spectators cannot be foreseen, expected, or prevented, the operator is not liable.[106]

Where children are concerned, the British courts appear to follow the same *modus operandi*, or method of

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[105]John Barnes, op. cit., p. 298.

[106]Ibid., p. 306.

operation. In Murray and Another v. Harringay Arena Ld.,[107] a six-year-old boy was taken by his father to see a hockey game and was struck by flying puck. The injury caused by the puck resulted in impairing the boy's vision. The Court of Appeal judge held that "it was not proved to the satisfaction of the trial judge that the defendants were negligent or that they failed to do anything which they were under obligation to do--and there is nothing which would justify this court in interfering with that finding. The injury sustained by the boy resulted from a danger incidental to the game, of which spectators took the risk."

Although accidents in laboratories and industrial shops are not as common as with accidents in leisure time activities, as evidenced by the lack of cases on file, they do, however, happen. Educators and administrators who deal with these activities on a daily basis should have some knowledge of legal factors which may affect them when dealing with supervision or instruction in these areas.

Accidents in Laboratories and Industrial Shops. Although one might expect a profusion of cases in this area, surprisingly, that is not the case. No known cases were located where the defendant educator raised the volenti defense.

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[107]Supra, note 61.

The volenti defense has been incorporated in statute law[108], in Manitoba, in order to protect educators from liability suits:

> Any pupil attending any course in technical or vocational instruction as provided in 48(1)(k) or off the school premises programs as provided in subsection 78(4) shall be deemed to have accepted the risk incidental to the business, trade, industry in which he is being instructed or trained and if bodily injury or death is caused to any such pupil during or as a result of the course, no cause of action for loss or damages suffered by reason of the bodily injury or death accrues to the pupil or to any other person.
>
> (a) against the school board or any of the trustees, if it is shown that the school board believed, upon reasonable grounds, that the person with whom the pupil was placed was competent to give the instruction and that his plant and equipment were such as to provide reasonable safeguard against death and injury; or
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> (b) against the person giving the instruction or his servants or agents unless the bodily injury or death of the pupil resulted from the negligence of the person giving the instruction or his servant or agents.

Just as in sports, so too, in shops and laboratories, the statute seems unnecessary and redundant.

In Smiles v. Edmonton School Board[109], the court was also of the opinion that "a school board which conducts a technical school for instruction in the manual arts ... is not liable for damages for injuries to students ... if the equipment supplied was reasonably safe and suitable for the work for which it was being used."

In James et al v. River East School Division No. 9 and Peniuk,[110] where a an 18-year-old student was injured

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[108]Manitoba Special School Set, S.M. 1980 c.33, s.88.

[109]Supra, note 92.

[110]James et al v. River East School Division No. 9 and Peniuk (1975) 5 W.W.R. 135.

while conducting a chemical experiment in a chemistry laboratory, the courts found a teacher negligent when he failed to "instruct properly, to caution and to supervise and that an unfortunate and foreseeable accident occurred, and that it could have been avoided if the defendant had not been negligent and if Mr. Peniuk had not omitted to do what he should have done in the circumstances." Consequently, where negligence was found, the volenti defense was excluded.

In the United States, the reception of the volenti defense is similar to Canada. Kigin[111] observes that "most school districts operate within the framework of government immunity" and therefore there is no liability imposed upon them by common law to the pupils or parents. Public-school teachers have no special immunity because they are public employees, or by reason of their position. Moreover, they freely accept the personal responsibility of due care toward the pupils under their care and direction." But, in order for the teachers to continue with their teaching, it is important not to subject them to situations whereby they will be reluctant to make use of the machines and tools available to them for instructions. Therefore, it is important for teachers to understand that "it is damage

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[111]Denis J. Kigin, Teacher Liability in School-Shop Accidents (Ann Arbor, Michigan: Prakken Publications, Inc., (1963), p. 49.

caused by negligent action that subjects teachers to legal liability for damages."[112]

Field trips are a matter of concern for administrators, bus drivers, and teachers due to the often hazardous nature of the activity. School-bus accidents have been publicized by the media on several occasions in the past where school children have been injured or killed. The author can personally recall an experience when, on tour with several other classes to a local beach, a student nearly drowned when the supervising principal was distracted from his lifeguard duties for a brief moment. This incident created a few anxious moments for the teachers and the students. Since field trips can create anxiety for educators, the following section will deal with the topic of field trips in an effort to make the reader aware of the responsibilities that supervisors shoulder in this type of activity.

Field Trips - Local and Extended. The author has been unable to locate any Canadian cases concerning field trips and the volenti defense. However, given the state of the volenti defense for other activities,the writer would conclude that if a court were to find that there was negligence on the part of the teacher, driver or school board, there would be a cause for actionable negligence.

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[112]Ibid., p. 50.

It has become a practice in Manitoba schools to have parents sign a form absolving school authorities from accidents that may occur during these excursions. However, such forms are only beneficial in that they provide parents with pertinent information about destination, date and purpose of trip. As far as the law is concerned, the signature of the parents will not absolve the school authorities from liability due to negligence should injuries occur. Lamb[113] states that "the signed form would not eliminate the rights of the child nor would it preclude the parent from suing where negligence was prevalent."

In the following section the focus will be on smoking and how it might affect student-educator relationships in the future.

Smoking in Schools. In some high schools in Manitoba, and perhaps in other provinces as well, administrators have provided smoking rooms exclusively for students who wish to smoke. During recess and noon-hour breaks, these students file through the portals to their private smoke-filled domain to appease their nicotine craving . Their obvious unconcern for the consequences the habit may have on their health is astounding. Their rationale for perpetuating this habit is argued on the basis that it might be harmful to others but it isn't harmful to them.

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[113]Robert L. Lamb, op. cit., p. 23.

At present, the contentious issue is whether or not tobacco smoke does produce harmful effects on smokers. Battle lines have been drawn and various sectors of society have chosen their side of allegiance. On the one hand, there are anti-smoking crusaders attempting to discourage the habit for religious, financial or medical reasons. On the other hand, cigarette manufacturers are struggling for survival by avoiding liability on the basis of unknown danger.[114] Vendors, meanwhile, attracting a substantial flow of trade from this sector of commodities, wish to retain that continuous flow of trade. The users, caught between the escalating tobacco costs, death threats, and an unrelenting nicotine habit, have undoubtedly reached an impasse.

Recently, Health Minister Jake Epp, displaying much concern with the danger of tobacco smoke, gave the tobacco industry until the end of June, 1986, to devise a plan for controlling smoke pollution in public places before bringing in government legislation.[115] This action would indicate an acknowledgement by the Federal Government that tobacco smoke possesses some threat to the health of society.

In the United States, the government has pronounced that "smoking is the chief, single, avoidable cause of death

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[114]Teresa Sigmon, "Cigarette Smoking Injuries: A Theory for Recovery Against the Federal Government", Trial - The National Legal Magazine, January, 1983, vol. 19, no. 1, p. 64.

[115]Winnipeg Free Press [Winnipeg], May 25, 1986, vol. 114, no. 173.

in our society and the most important public health issue of our times."[116] In Great Britain, tobacco warnings printed on packages stipulate that "smoking causes cancer."[117] This fact further promotes the idea that smoking is injurious to one's health and as such, educators may be subjecting students to these very same hazards by allowing students to smoke on the school premises.

Sigmor[118] has suggested that "the continuous production and sale of tobacco and tobacco products after their potential harm had been scientifically established may itself constitute actionable negligence." However, at this point in time, this does not seem to be the case. In Oklahoma, for example, a federal jury rejected a woman's claim that the cause of her son's death from oral cancer was due to smokeless tobacco. Sean Marse died in 1984, at age 19, after using snuff for six years. The jury's verdict was a victory for the U.S. tobacco company.[119]

If, and when, actionable negligence can be established, there are many other factors which would come into play in determining what defense would be used to contest the law suit. The defense must decide whether contributory negligence or assumption of risk can be invoked in an action by an injured tobacco user. If an assumption

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[116]Teresa Sigmor, op. cit., p. 67.

[117]Winnipeg Free Press, loc. cit.

[118]Teresa Sigmor, op. cit., p. 66.

[119]Winnipeg Free Press, loc. cit.

of risk defense is to be used, one must consider whether the plaintiff freely and voluntarily assumed the known risk because one of the elements of the volenti defense is that it must be "free and voluntary."[120] However, when a student has smoked for some time, he has undoubtedly, by the very nature of the drug, become addicted to it. One, then, cannot say that the student was truly volens if addiction guided his decision to smoke.

In Crocker v. Winthrope Laboratories,[121] a similar view was expressed. On appeal, the Supreme Court held that "where the drug company positively and specifically represented its products to be free and safe from all dangers of addiction, and the treating physician relied upon the representation, the drug company was liable ... and the decedent's death resulted."

A second factor to be considered is proximate cause. Did the actual harm suffered happen at the time when the student was smoking on the school premises, did it occur elsewhere, or was it a cumulative result? If part of it was attributed to the school, what percentage of liability should the courts apportion the school?

A third and equally important factor is legal liability. On a purely speculative basis, if courts can prove negligence, then the plaintiff should be able to

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[120]Supra, note 49.

[121]Crocker v. Winthrope Laboratories, Div. of Sterling Drug, Inc., 514 S.W. (2d) 429 (Tex. 1974).

recover for damages from (a) the tobacco company for producing the product; (b) the Federal Government for allowing the sale of said product in Canada; (c) the vendor for selling it to minors; and (d) the school for allowing students to smoke on the premises. The school would be unable to invoke the volenti defense as courts generally reject it where negligence and children are concerned.

In spite of all the scientific testing and the positive results indicating a link between smoking and cancer, courts have refused to place liability upon the manufacturer. As there are still many questions about cancer that remain unanswered, and the many unknown factors that may possibly cause this disease, courts have found it difficult to deal with the issue. As a result, tobacco companies have been given the benefit of doubt with regards to negligence liability. When, and if, the courts begin to recognize the adverse relationship between tobacco and health, presumably schools will then begin to concern themselves with abolishing smoking facilities for students. Principals and school boards, in their effort to provide the students with some of the comforts of home, may eventually be called upon to account for their 'benevolence'.

The final topic to be discussed is the constitutional rights of students. This is an important factor in education because students do have certain rights, but the important question is whether teachers can override these

rights in order to protect students from injury and themselves from lawsuits.

Constitutional Rights of Students. The Charter of Rights and Freedoms in the Constitutional Act of 1982 guarantees everyone various rights and freedoms, one of which has become a concern to this study. The section that applies to this study deals with 'legal rights' and reads: "Everyone has the right to life, liberty and the security of the person and the right not to be deprived thereof except in accordance with the principle of fundamental justice."[122]

The portion of section seven that is significant is the concept of 'liberty', which to a student, or anyone for that matter, would mean to "generally enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness of free men."[123]

Until recently, students had many restrictions placed upon them which made it appear as though their constitutional rights were non-existent, or perhaps merely shed at the school entrance. However, with the U.S. Supreme Court decision in Tinker v. Des Moines Independent Community School District,[124] educators were forced to re-think and re-evaluate their role of the *in loco parentis* concept.

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[122]Andrew R. Hatherly, The Charter of Rights and Freedoms -- A Guide for Everyone. (Winnipeg: Citizenship Council of Manitoba, Inc., 1986), p. 19.

[123]Myers v. Nebraska (1923) 262 U.S. 390, 299.

[124]Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S. Ct. 733 (1969).

Courts have acknowledged the fact that school administrators and boards have the right to legislate suitable rules and regulations in order to promote safety and equality for all students, but they also felt that students must be recognized as 'persons' under the constitution.[125]

It is important, then, for school officials to maintain an equitable balance between the regulation of conduct of pupils on the one hand and the constitutional rights of students on the other hand. If the scales are allowed to tip in favor of permissiveness, it is doubtful whether teachers would be able to carry out their teaching responsibilities in an effective manner. If they are allowed to tip in favor of dictatorship, students may become belligerent and difficult to control.

This balance between control and permissiveness seems to be adequately achieved when "school authorities ... make reasonable rules and regulations governing the conduct of pupils under their control ... students."[126] Courts will only step in if any rule is considered "unreasonable, is arbitrary, or capricious, or violates a law of constitutional provision."

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[125]Nicholas Melnick and Jack W. Grosse, Rights of Students: A Review, Educational Horizons. Educational Resources Information Center, ERIC Document EJ 301002 v. 62, no. 4 (1984), p. 145-149.

[126]Ibid., p. 149.

In Canada, the guidelines may still be somewhat similar. Bargen[127] states that "if nothing unreasonable is demanded, he [the teacher] has the right to direct how and when each pupil shall demean himself." Since there are no cases on this issue, what Bargen said earlier may still apply. Therefore, both in Canada and in the United States, it has been recognized by the Courts that in order for the schools to operate effectively, they have the right and the responsibility to control the conduct of the students.

The question now arises whether teachers have the right to deny students the right to undertake an activity which possesses an inherent risk and, if they do, would that denial constitute a breach of the students' constitutional rights. Since there have been no reported cases in Canada concerned with this issue, it is impossible to obtain a source of reference. However, based on all the facts thus presented on negligence and voluntary assumption of risk, one would presume that when a teacher stands *in loco parentis*, he or she must weigh the consequences of the act to be executed. If, in the teacher's own mind, the chances of injury are great, the teacher must protect the student from harm and decline permission to proceed, a decision based on the foreseeability principle. This is what a reasonable and prudent person would do when his own child's safety is at issue.

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[127]P.F. Bargen, op. cit., p. 179.

Summary

The majority of accidents involving children are caused outside the classroom during play time. Teachers, as well as children need some protection. Children must be protected from irresponsible teachers and responsible teachers must be protected from litigious parents.

Most sports activities are inherently dangerous and could result in injuries. Often injuries lead to tort litigations. In order not to stifle the spontaneity of the game and in order to permit teachers to get more involved with the coaching of sports, American courts have been lenient with teachers when injuries occur in sports activities.

Some Canadian courts have included voluntary assumption of risk in the duty of care issue. Generally, courts have used voluntary assumption of risk as a defense in a court of law rather than subsuming it into the duty of care issue. The voluntary assumption of risk defense has not, however, been well received in Canadian courts.

Voluntary assumption of risk and contributory negligence are both defenses in a court of law. In the former case the defense is total, in the latter case it is only partial. Voluntary assumption of risk is based on consent, whereas contributory negligence arises when the plaintiff does not exercise due care.

The concept of contributory negligence has been applied to children, some as young as six years

old. American courts apply the same criteria to contributory negligence as they do to voluntary assumption of risk. Therefore, it is assumed that a six year old child can also be considered as assuming a risk. The risk in this instance is physical, not legal.

Voluntary assumption of risk and volenti non fit injuria are interchangeable terms in Canadian courts. In American courts, voluntary assumption of risk applies to cases where a master-servant relationship exists and volenti non fit injuria is applied to cases where no contractual obligation exists.

Risk that is obvious and necessary is considered ordinary risk.

An important feature of the voluntary assumption of risk defense is the waiver of rights. Canadian courts require proof that a contract was actually made to waive the legal rights of an individual. The legal age at which the law will allow such a waiver to be made has not been ascertained due to lack of cases on this issue.

The necessary consent for the voluntary assumption of risk defense may be both implied or expressed. However, implied consent is more tenuous. It must be pleaded and proved by the defendant.

Strope suggests that American courts find the factors of age, physical characteristics, mental characteristics, gender,and the training of a child, important in determining whether the child has been contributorily negligent.

Injuries often occur in both spectator and active sports. When injuries occur, courts have held that even children assume the ordinary risk of the sport. If courts are unable to find evidence of negligence, the case will be dismissed. This same rule also applies to activities in laboratories, and industrial shops.

Generally, teachers will not be held liable if someone is injured on a field trip, providing the teacher is not negligent. Forms which parents sign for field trips do not absolve the school authorities from liability due to negligence if injuries occur.

Some schools provide high school students a designated room for smoking on the school premises. An important issue at present with regards to smoking is whether smoking is harmful to the individual's health. The American government has conceded that smoking is the chief single cause of death in the United States. Great Britain has warnings printed on packages cautioning the public that smoking causes cancer. The Surgeon General of Canada has warnings printed on cigarette packages informing the public that smoking is harmful to one's health. However, when cases relating to injury from tobacco smoke are heard in court, the courts will not favor the plaintiff in their judgment. Many intervening factors appear to cloud the issue which preclude the courts from favoring the plaintiff in a law suit. When courts begin to recognize the adverse affects of tobacco on the public and decide to eradicate

this source of ill health, schools may then be forced to close down the portals of those smoke-filled cubicals.

The Charter of Rights and Freedoms guarantees everyone various rights and freedoms. Until recently, students had many restrictions placed upon them and it appeared as though their constitutional rights were non-existent. The Tinker case in the United States has caused educators to re-think and re-evaluate their role of *in loco parentis*. In order to maintain a congenial atmosphere in the school, administrators must try to establish and maintain an equitable balance between permissiveness and regulations. The focus on regulations must be directed toward making reasonable rules to govern the conduct of the pupils. To avoid law suits, educators and boards must strive to anticipate and avoid trouble.

Chapter 4

COURT CASES IN CANADA

This chapter presents court cases which are directly related to the voluntary assumption of risk defense. However, since very few cases were located that dealt directly with educators and students under their care in this realm of the law, some data may be lacking to provide a definitive study and a resolve to some of the questions which were posed at the the outset of this study.

In presenting the cases, the relevant issues were appraised on the basis of the TARP method as outlined in chapter one of this study.

MYERS AND MYERS V. PEEL COUNTY BOARD OF EDUCATION AND JOWETT[128]

This case was initially tried in the Ontario Supreme Court (High Court of Justice) by Judge J. O'Driscoll on the 25th of May, 1977.

In this case, the plaintiff, a 15-year-old grade eleven student, broke his neck and suffered quadriplegia, after falling onto two or three two-inch thick vinyl-covered compressed slab mats while attempting a straddle dismount from the rings. The student was an average gymnast in his

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[128]Myers and Myers v. Peel County Board of Education and Jowett (1977) 2 C.C.L.T. 269 (Ont. H.C.).

second year of work on the rings. He had received a fitness test at the beginning of grade eleven. The straddle was shown to be potentially dangerous and the most difficult maneuver in a series of higher level of exercises, but it was not an advanced dismount technique. (It was, in fact, an elementary gymnastic skill particular in this age group.) The plaintiff had not previously attempted a straddle dismount. The defendant instructor, who was found to be qualified and competent, had taught the dangers of the maneuver, had had it demonstrated, and had explained the need for the role of spotters. In grade ten, the use of spotters had also been taught. The evidence accepted by the court was that the plaintiff understood these instructions.

At the time of the accident, the defendant instructor was in charge of two classes in the gymnasium because of the absence of another Physical Education instructor. About ten students were working in the exercise room, one floor above the gymnasium. Activities in the separate exercise room could not be seen by someone in the gymnasium. The plaintiff had received permission from the defendant instructor to go to the exercise room, where no teacher was in attendance.

In analyzing the case, the first item under consideration was: THING OR SUBJECT MATTER. The subject matter in question was: (1) Was the maneuver suitable to the plaintiff's age and conditions (mental and physical)? (2) Was the plaintiff progressively trained and coached to

do the maneuver properly? (3) Was the equipment adequate and suitably arranged? (4) Was the maneuver, having regards to its inherently dangerous nature, properly supervised?

The second item under consideration was: CAUSE OF ACTION OR GROUND OF DEFENSE. In this case, the plaintiff instituted this cause of action, based on the negligence, against the school board and the Physical Education instructor who was in charge of the class.

The third item was: RELIEF SOUGHT. This case is a civil suit. The party bringing the suit is seeking monetary damages for an injury suffered.

The final item under consideration was: PERSONS OR PARTIES INVOLVED IN THE PROBLEM; THEIR FACTUAL AND LEGAL STATUS AND RELATIONSHIP TO EACH OTHER. In this case, the plaintiff, Gregory Jan Myers, then aged 15, was a grade eleven student at the Erindale Secondary School. The defendant Board of Education was responsible for and charged with the administration of the Erindale Secondary School. The defendant, Walter Jowett, was employed as a secondary school teacher by the board and was engaged as a Physical Education instructor in that school. Mr. Jowett had been on staff in that capacity since the school opened in 1961.

In determining the legal outcome of the case, several issues were considered. Although volenti non fit injuria was pleaded by the defendant, the court held that while the plaintiff had assumed the physical risk of a fall from the

rings, he was still entitled to expect that adequate safety matting would be provided. He had not waived the right to bring legal action. However, because the plaintiff had chosen to attempt a difficult maneuver while a spotter was not present, he was held to be contributorily negligent to the extent of 20 percent.

The finding of breach of duty, through failure to be present and to supervise, was the less controversial of the findings. It was held that the absence of a supervising teacher would not automatically bring liability, especially as in this case, where older pupils are involved. Furthermore, it is not generally a school's responsibility to supervise students constantly, but where a potentially dangerous activity, such as gymnastics, is engaged in, the duty of the instructor to be present increases almost to the point of being mandatory. The presence of a supervising instructor in the exercise room would have altered the plaintiff from attempting his dismount. The defendants were, therefore, negligent in failing to provide adequate supervision.

The court accepted the evidence that the plaintiff understood the instructions given by the coach, the maneuver was suitable to the plaintiff, and that proper training had been given.

An additional concern of the court was the protection that was provided to the gymnast while landing on the floor. Given the potential danger of ring exercises, the school's

practice of using compressed slab mats, stacked two or three high on a concrete floor, was held not to meet the requirements of safety and precaution on the following grounds: (1) the fact that the injury was sustained; (2) a statement by the plaintiff's classmate that he would use crash mats when attempting a new maneuver; (3) a statement of the defendant instructor that crash mats are sometimes used under rings when available; and (4) the statement of Mr. Tomislav Zivic, a well-qualified gymnast coach of York University called as an expert witness by the plaintiff, that he uses 1 1/2 inch mats plus crash mats.

In his remarks, the trial judge stated that "the mere occurrence of injury in the course of an activity is not evidence of negligence; the test is rather whether reasonable precautions have been taken to prevent injury."

ROBINSON V. BOARD OF TRUSTEES OF CALGARY SCHOOL DISTRICT NO. 19 AND FRANKLIN[129]

This case was tried in the Alberta Supreme Court in the Trial Division of the Judicial District of Calgary by Justice Moore, J., on July 11th, 1977.

In this case, Daniel Robinson, a fourteen year old boy from a special class for slow learners, was injured while sliding down a banister in the Victoria Elementary Junior School. As a result of the fall, he suffered injury

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[129]Robinson v. Board of Trustees of Calgary District No. 19 and Franklin, (1977) A.R. 430-35.

to the spleen, liver and kidney. He also sustained a collapsed lung and a fracture to the ilium.

The principal, as well as several other teachers, had warned Daniel on several occasions about sliding down the banister. However, Daniel would not heed their warnings but continued to slide down the banister.

The father admitted that even though the boy was in a school for slow learners, Daniel was a normal boy, both physically and mentally. His I.Q. was assessed to be around eighty.

The subject matter in question was: (1) Were the defendants negligent in not taking steps to protect Robinson from the danger which the plaintiffs say existed in the stairwell? (2) To what extent must the defendants supervise Danny from himself?

In this case, the plaintiff and his father instituted this cause of action based on the negligence of the defendants for not taking steps to protect Robinson from the existing dangers in the stairwell of the school.

The parties involved in this case were Daniel Robinson, his father, The Board of Trustees of Calgary School District No. 19 and the Principal of Victoria Elementary Junior School, Mr. Franklin.

This case is a civil suit. The party bringing the suit of action is seeking monetary damages for injuries suffered.

In determining the legal outcome of this case, Justice J. Moore dismissed the plaintiff's action on the grounds that the board was not liable for damages for the boy's injuries. Daniel had admitted that he did habitually slide down the banister and was, in fact, warned on several occasion not to do so. Because he chose to disobey these warning, he became injured as a result of his own acts.

With regards to the question of supervision, the court held that schools cannot provide minute by minute supervision to all children in school because this would be virtually impossible. The schoolmaster is required to take such care of the children as a careful father would and most certainly a father cannot supervise his children every minute of the day. Therefore, Judge Moore found that the defendants were not negligent and accordingly dismissed the action.

COURT CASES IN THE UNITED STATES

Black[130] defines common law as "that body of law which originated and developed in England and is in effect among those countries which were originally settled by or controlled by England. The California Civil Code, Section 22.2 provides that the common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this

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[130]Henry Campbell Black, Black's Law Dictionary, 5th ed. (St. Paul, Minnesota: West Publishing Co., 1979), p. 250-251.

state, is the rule of decision in all the courts of this State." Therefore, since the legal system in the United States is a part of the British common law, it seems appropriate to include court cases from the United States in this study to determine the judicial principles and outcomes of some of the cases which are relevant to this study.

KELLEY v. SCHOOL DISTRICT NO. 71 OF KING COUNTY[131]

This case was tried in the Supreme Court of Washington and subsequently appealed by the defendant. The appeal was then heard by Judge King Dykeman on May 10, 1918.

In the appeal it was brought out that a nine year old child was injured by the breaking of a swing while attending a public school at Kirkland. This school, which included the playground equipment on the school grounds, was maintained by the School District of King County.

In analyzing this case, the subject matter in question was: (1) Is the school district liable for an injury to a pupil of the school caused by the negligent maintenance of apparatus on the school grounds, although used, and installed to be used, by the pupils of the school for exercise and play? (2) Does the Legislature provide for recovery against a school district for accidents such as this one? (3) Is there proof of negligence on the part of the board in the maintenance of the swing? (4) Did the student exercise ordinary care and caution and inspect the

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[131]Kelley v. School District No. 71 of King County 102 Wash 343, 173 Pac 333(1918).

apparatus prior to its use? Had the worn ring been noticed, and did she continue swinging, thereby assuming the risk of swinging?

In this case, the plaintiff instituted this cause of action base on the negligence of the School Board.

The relief sought was monetary damages for injuries suffered.

The parties involved were the respondent, a nine year old elementary school student of Kirkland School, and Loretta B. Kelley, presumably the mother of the child. The appellant was the School District No. 71 of King County.

In determining the legal outcome of the appeal, the important issue under consideration was the controversy that there was no proof of negligence on the part of the board for maintenance. The argument was that the user of the swing caused the ring to move in the staple eye, creating a friction which gradually wore the eye down to the point of contact that caused the accident. However, the jury decided, after careful examination of the ring, that it was of considerable thickness when installed and of sufficient strength to sustain any weight that common prudence could reasonably expect to be placed on the swing. Since the school district installed the swing, they were charged with the duty of keeping it reasonably safe for the use for which it was intended. This involved the duty of inspection, and failure to perform the duty in an ordinarily prudent manner was negligence.

A second contention by the appellant was that the student, by exercising ordinary care, may have foreseen that the material of the swing was defective or worn and that by using it, an accident could happen. Consequently, she assumed the risk of swinging on it. However, the court held that the above statement would assume that the plaintiff owed a duty of inspecting the swing, but such is not the rule. She had a right to assume that the defendant had performed its duty and that the swing was reasonably safe for the uses for which it was constructed. Since she does not have the duty imposed upon her to inspect the swing, she cannot be charged with the risk of its breaking because she failed to examine it before using it. Also, the plaintiff was nine years old and it is doubtful whether a child of her tender years could be held to the doctrine of assumption of risk. Evidence showed that the child was using the swing in the manner it was intended, and consequently there is nothing upon which to base an instruction of assumption of risk. The judgment for the plaintiff was affirmed.

MALTZ et al. v. BOARD OF EDUCATION OF NEW YORK CITY[132]

This case was tried in the Supreme Court of Kings County by Judge J. Norton on June 27th, 1952.

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[132]Maltz et al. v. Board of Education of New York City 114 NYS(2d) 856 (SupCt 1952).

In this case, the plaintiff, a nineteen year old boy was injured when he ran into a door jamb on a brick wall two feet from the backboard and basket on a public school basket ball court. The plaintiff had played basketball on this same court a few times before the accident happened and knew the location of the basket and backboard in relation to the brick wall and door jamb. He was not a student at the school but a voluntary member of a team who played in basketball tournaments with other clubs.

The subject matter in this case was: (1) Is there evidence that there was anything in disrepair or any defective equipment on this basketball court? (2) Did the plaintiff assume the risk of danger inherent in the playing of a game of basketball on this court under the conditions existing at the time of the accident? Did he know of the existing conditions and, if so, did he also have the knowledge and appreciation of the danger produced by such conditions?

The plaintiff and his father instituted this cause of action based on negligence against the Board of Education who operated and controlled the Seth Low Junior High School.

The relief sought in this civil suit was monetary which amounted to the recovery for loss of services and medical expenses.

The parties involved were Albert Maltz, nineteen year old boy who was then considered an infant, and his father as the plaintiffs. The defendant was the Board of Education

of New York City who operated and controlled the premises known as the Seth Low Junior High School, the location where the plaintiff was injured.

In determining the legal outcome of the case, Justice Norton could find no evidence that there was anything in disrepair or that any defective condition existed on the basketball court in question. The basketball court was in the same condition on the day of the accident as it was on the numerous occasions that the plaintiff played on this court in the past four years.

With respect to the assumption of risk doctrine, the judge stated that "the plaintiff was no infant. He was a boy 19 years of age, who had played basketball on this court many times prior to the accident. The risk of the court and the door being open and the wall being near the end of the basketball court were risks that were obvious and necessary to the sport as played on this particular court. His prior experience made him aware of the very hazards and dangers of which he now complains. He was not only aware of these dangers but had experienced them before, and he voluntarily assumed them. He accepted them with foresight of the consequences. He not only knew of the existing conditions but had or should have had an appreciation of the dangers produced by the physical conditions existing. I therefore find as a fact that the plaintiff assumed the risks of engaging in the basketball game herein under the conditions existing which were known to him, and that he had or should

have had the knowledge and an apprehension of the dangers involved." He then directed judgment in favor of the defendant and dismissed the case.

JOHN BENNET, JNR., AND SR., v. THE BOARD OF EDUCATION OF THE CITY OF NEW YORK[133]

This case was a civil case tried by a jury in the Supreme Court of Kings County by Thomas E. Morrissey, Jr., Judge. It was later appealed and tried by the Supreme Court, Appellate Division, Second Department on April 2, 1962.

In this case, an infant suffered personal injuries as a result of his being struck by a stick that forcibly slipped out of the batter's hands during a stickball game in a public school yard, after school hours, while plaintiff was in the yard watching the game.

The subject matter in question was: (1) Are school boards bound by law to provide supervision over the playground users after school hours? (2) Is the defendant liable for damages for injuries caused by an intervening third party such as the batter in the stickball game?

The cause of action was instituted by the plaintiff, and his father for injuries due to lack of supervision of the playground users.

The relief sought was monetary for the amount of $35,000.00. This amount was awarded to the plaintiff at the

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[133]John Bennet, Jnr., an infant, by John Bennet, Snr., his guardian ad litum, v. The Board of Education of the City of New York 16 AppDiv (2d) 651, 226 NYS (2d) 593(1962).

first trial on May 4, 1959, upon a jury's verdict in his favor.

The persons involved were John Bennet, Jnr., an infant spectator at a stickball game, and the Board of Education of the City of New York, who owned the school playground where the plaintiff was injured.

In determining the legal outcome of this case, the Appellate Court judge stated that "in after-school-hour playground, no duty may be imposed upon defendant to provide supervision over the playground users. Nor may defendant be cast in damages for injuries caused by the act of an intervening third party such as the batter in the stickball game; the risks of the game were patent and were assumed by the plaintiff as a spectator." Several cases were cited for judgments on previously similar situations.

Judge Ughetta then reversed the decision of the previous court, which favored the plaintiff, and dismissed the case.

CARABBA V. ANACORTES SCHOOL DISTRICT NO. 103 WASHINGTON[134]

This case was tried in the Supreme Court of Washington by Judge Donworth on December 28, 1967.

In this case, the plaintiff, a senior at the Anacortes High School was involved in a varsity wrestling competition against Roger Anderson, a senior at the Oak

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[134]Carabba v. Anacortes School District No. 103 Washington 435 P. (2d) 936 (Wash. 1967).

Harbor High School. Both boys wrestled in the 145-pound division.

Near the end of the third round of the match, Anderson was attempting to pin Stephen Carabba's shoulders to the mat and thus score additional points for his team. In the course of this attempt, he was alternating half nelsons, first to one side and then the other, trying to roll Carabba into a pin position. This process had taken the boys to the northwest corner of the main mat near where small side mats were placed against the main mat. The referee, Mr. Erhart, noticed a separation between the main mat and the side mat, and moved to close the gap to protect the contestants, should they roll in that direction and off the main mat onto the bare floor. In doing so, his attention was diverted from the boys momentarily.

While the referee's attention was diverted, Anderson applied what appeared to many of the eyewitnesses to be a full nelson. The estimates made by the witnesses of the length of time during which the full nelson was applied varied from one to ten seconds.

Almost simultaneously the buzzer sounded the end of the round, the referee blew his whistle, and Anderson broke the hold on Carabba after a final lunge. Carabba slumped to the mat, unable to move due to the severance of a major portion of his spinal cord resulting in permanent paralysis of all voluntary functions below the level of his neck.

In analyzing the case, the subject matter in question was: (1) Was the referee negligent by failing to adequately supervise the contestants? (2) Was the referee negligent in allowing his attention to be diverted from the actions of the contestants? (3) Was the referee negligent in allowing an illegal and dangerous hold to be applied? (4) Was the referee negligent in failing to immediately cause the said hold to be broken? (5) Was there negligence on the referee's part by allowing the said hold to be prolonged for a substantial period of time? (6) Did the referee violate the provisions of the 1963 Official Wrestling Guide of the National Collegiate Athletic Association?

The cause of action was instituted on behalf of Stephen Carabba, a minor, by his guardian, against the school district acting through their agent, the referee.

The relief sought in this civil suit was monetary. The party bringing the suit was seeking monetary damages in the amount of $500,000.00 for injuries suffered.

The parties involved were the plaintiff, a minor and a senior at Anacortes High School. The defendant was The Anacortes School District No. 103 in the State of Washington.

In determining the legal issues, the trial court ruled out the affirmative defenses of volenti non fit injuria, assumption of risk, and failure to join an indispensable party to the action, and instructed the jury that the referee was the agent of respondents as a matter of

law. The jury, during deliberation, requested additional instructions regarding standard of care applicable to the referee. This requested instruction was then given to the jury stipulating that the standard of care to be applied was that of the ordinarily prudent referee. The jury thereafter returned a verdict for the defendant and an appeal followed. On appeal, judgment was reversed and the case was remanded for retrial in accordance with the following views: The respondents contended that "it was an error for the trial court to refuse to submit the issue of volenti non fit injuria to the jury, since appellant did volunteer to participate in this wrestling match with the knowledge that he could get injured. However, we must agree with the trial court that one is never held to 'assume the risk', of another's negligence or incompetence. The doctrine is inapplicable and the trial court did not err in refusing to submit the issue to the jury. Also, the trial court was not in error in instructing the jury that, if the referee was negligent, the school district must, as a matter of law, respond in damages. He goes further to outline the three forms of duty of protection. "First, a person may have a duty to protect another which can be performed either by exercising care personally in protecting the other or by exercising care in employment of an independent contractor to protect the other. Secondly, there may be a duty to protect at (from) all hazards, a duty which is not fulfilled unless the other is protected and which is not

satisfied by the use of care. This duty normally exists only when undertaken by contract. Thirdly, one may have a duty to see that due care is used in the protection of another, a duty which is not satisfied by using care to delegate its performance to another but is satisfied if, and only if, the person whom the work of protection is delegated is careful in giving the protection. In this third class, the duty of care is non-delegable. We feel that the duty owed the student participants in this wrestling match, under the facts of this case, is similar to that imposed upon the school districts while the students are in involuntary attendance during school hours, i.e. a duty to provide non-negligent supervision."

COURT CASES IN BRITAIN

Only one case was found in Great Britain which dealt with the doctrine of voluntary assumption of risk. This case involved an infant as a spectator at a hockey game.

MURRAY AND ANOTHER V. HARRINGAY ARENA LD.[135]

In this case, the judge of the initial trial was J. Ormerod. This case was originally tried in 1949 but was appealed and retried in June, 1951, by Cohen, Singleton and Morris, L.JJ.

A six year old boy, who was attending an ice-hockey match with his father in the defendant's arena, was struck

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[135]Supra,note 61.

by a flying puck, which was flipped out of the rink by a player. The puck struck the boy over the left eye and seriously impaired his vision in the injured eye.

The only seats available at the time the father and his boy arrived were those in the front row and over to one side. There were wooden barriers three feet high around the arena, and the ends had netting eight feet nine inches high, but this netting was not in front of the seats where the father and his boy were sitting.

The subject matter in question in this case was: (1) Did the defendant take reasonable care to do what he was under obligation to do? (2) Did the spectator assume the risk of injury by attending this game?

This case is a civil suit. The parties bringing the suit were seeking monetary damages for injuries suffered.

The parties involved were David Charles Murray, a boy aged six years, his father, and the owner of the Harringay Arena Ld. The plaintiff and his father instituted this cause of action, based on the negligence of the arena owner, for not guarding the spectators from every known risk.

In determining the legal outcome of this appeal, all three judges were in agreement that "the occupiers cannot guard against every known risk. There are some risks which every reasonable spectator foresees and of which he takes the risk. It may strike one as a little hard that this should apply in the case of a six-year-old boy, but in considering liability under an implied term in this contract

it would not be right to introduce a wider term because one of the parties is a youth. The implied term is to take reasonable care, and in measuring that one must have regard to the reasonable man (or spectator), and the duty arising under it does not involve an obligation to protect against danger incident to the entertainment which any reasonable spectator foresees and of which he takes the risk."

The appeal was dismissed on two grounds. First, it was not proved to the satisfaction of the trial judge that the defendants were negligent or that they failed to do anything which they were under obligation to do, and second, the injury sustained by the boy resulted from a danger incidental to the game, of which spectators took the risk.

Chapter 5

ANALYSIS OF CASES

This chapter analyzed the cases from the previous chapter and compared the findings with the views expressed in the literature on this topic. It should be noted that no cases were found to answer some of the questions posed at the outset of this thesis. However, the questions put forth were of major importance, and perhaps some of these questions may be answered in future court cases dealing with these issues.

In reviewing the Myers case, it was noted that the court was of the opinion that even though the plaintiff had assumed the inherent risk of falling from the gym rings, he did so with the understanding that adequate protection was being provided for him in case he did fall. However, since proper protection was not provided due to the lack of adequate matting, the board was held negligent and liability was apportioned. The judge in this case was of the opinion that the ultimate test for negligence was not the evidence of injury, but rather whether reasonable precautions were taken to avoid the injury. This coincides with Fleming's view that where the law is concerned, *negligence* dealt with the unreasonable risk which those who wish to avoid liability must strive to circumvent.

A second important item in the Myers case was responsibility for supervision. Although the court felt that the teachers could not supervise children constantly, yet when students are involved in a potentially dangerous activity, the duty of the instructor to be present is directly proportional to the degree of danger in the activity. This concept parallels the Manitoba Teachers' Society Report[136] which provides some guidelines on supervision. The rule of thumb as outlined by the Society in its report suggested that teachers try to anticipate potential danger and strive to avoid it.

Linden also noted that when someone is negligent, then the voluntary assumption of risk defense is invoked. When the courts find that there is negligence involved, they often exclude the voluntary assumption of risk defense in favor of the concept of contributory negligence. This action was applied to the Myers case when the judge found evidence of negligence and consequently apportioned the liability to both parties.

In the Robinson case where the student repeatedly neglected to heed the warnings to refrain from sliding down the banister, and consequently became injured because of this disobedience, the court found that this 14 year-old boy was injured as a result of his own doing. The judge stated that a minute by minute supervision was impossible to maintain with children in school. Therefore, finding no

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[136]Supra, note 40.

evidence of negligence on the part of the defendant school board, the judge dismissed the action.

Linden is of the opinion that courts prefer to treat voluntary assumption of risk as a defense rather than include it in the duty of care issue. The judge appeared to be of the same opinion in the Robinson case for, when he found no negligence on the part of the defendant, he dismissed the case.

Linden's views parallel the court's views in the Robinson case on a second issue. Linden suggests that the plaintiff has to agree expressly or impliedly to waive any claims for an injury that he may incur, and the implied or express consent must be proven by the defendant. This was done in the Robinson case where the plaintiff admitted that he was warned several times by the teacher not to slide down the banister.

Strope suggests that the same factors that courts consider in determining the ability of the student to be contributorily negligent are also considered in voluntary assumption of risk. Therefore, since the court in the Eyers case held that a six-year-old could be considered contributorily negligent, then the boy in the Robinson case who was fourteen years of age could also be old enough to assume the risk.

In the Kelley case where a nine year old child was injured by a swing which broke while in use, the judge held that since the apparatus was installed by the school, it was

their duty to see this swing was inspected regularly and kept in a reasonably safe condition for its intended use. The student did not assume the duty of inspecting the swing prior to its use. The judge also held that it was doubtful whether a child of her tender years could be held to the doctrine of assumption of risk.

The issue of informed consent, in this case, deviates from the Strope view when he suggests that the same factors apply to the voluntary assumption of risk as to contributory negligence and that a six-year-old can be held contributorily negligent.

In the Maltz case, the person sustaining the injury was a 19 year-old boy. Maltz was injured while playing basketball at a public school basketball court. The judge held that the plaintiff was not an infant. He had played on the court many times. The risks involved were obvious and necessary to the sport. His prior experience made him aware of the hazards and dangers involved. He had experienced these hazards previously and and had intentionally assumed them. Therefore, the judgment was in favor of the defendant.

In this case, several factors come into play. Strope suggests that American courts consider age, gender, mental and physical characteristics, and training as important factors to the case. In the Maltz case the judge did take into consideration the factors of experience, and age. The fact that the judge mentioned that the plaintiff was not an

infant, may suggest that the outcome of the case may have been reversed had the plaintiff been an infant.

A third factor involved the risk, which the judge stated was obvious and necessary to the sport. This view was also expressed by the judge in the Gard and King cases and by Fleming as indicated in the summary of the Myers case.

The Bennet case dealt with an infant who was struck with a bat which slipped out of the batter's hands during a stickball game. In determining the outcome of this case, the Appellate Court Judge ruled that no duty can be imposed on the board of educators or the school when students are using the school grounds as an after-school-hour playground. The risk of the game was assumed by the plaintiff as a spectator; therefore, the decision favoring the plaintiff was reversed by the Appellate Court and case was dismissed.

The Judge's views in the Bennet case coincide with the views of Barnes with regards to spectators at a sports gathering. Barnes is of the opinion that spectators assume the ordinary risk of the physical harm but not the legal risk of someone's negligence.

Once again, since no negligence was proven to exist on the part of the defendant, the case was dismissed. This opinion is also shared with Linden who suggests that if no negligence is proven in a voluntary assumption of risk case, the case will be dismissed.

The one case on voluntary assumption of risk found in England, the Murray case, dealt with spectator sports. A six-year-old boy was injured by a flying puck while a spectator at a hockey game. The resulting injury impaired the boy's vision in the injured eye. The court held that spectators are prone to foreseeable risks and thus assume them. Even though the judge was moved by the fact that the injured party was a six-year-old, he was unable to make an exception for the boy. Since no negligence was proven, the appeal was dismissed.

The judge's views in the Murray case coincides with Barnes' view that spectators assume the ordinary risk of the sport.

Chapter 6

SUMMARY, MAJOR FINDINGS, CONCLUSION AND RECOMMENDATIONS

Summary

The purpose of this study was to determine whether voluntary assumption of risk by a student in a school activity, sanctioned by the school, would provide a defense which would absolve the defendant from tort liability in the event the student became injured. This exploration was based on the postulation of five major research questions. The first question dealt with actionable negligence and the applicability of the voluntary assumption of risk doctrine to this actionable negligence. This topic was dealt with in chapter II of this study. The second question dealt with significant legal issues and facts which were considered in the lawsuits filed in Canada, United States of America, and Great Britain. The third question focused on specific activities which students were involved in where the concept of voluntary assumption of risk could be applied. The fourth question dealt with the students' constitutional rights and the denial of liberty to voluntarily assume the risk in an inherently dangerous activity. The final question dealt with the characteristic components of voluntary assumption of risk and the features which distinguish it from contributory negligence and volenti non

fit injuria. Each of these questions was addressed in chapter III of this study. Chapter IV presented court cases in Canada, U.S.A., and England which dealt with the defense of voluntary assumption of risk. Attention was focused on the judge's decisions and the legal reasoning for these decisions. Chapter V analyzed the cases and compared them to the legal elements mentioned in Chapter III to determine the congruency of the judgments with the literature on the topic. The time period 1918 - 1977 was selected as the period within which this study was to span. Cases were then drawn from various Canadian, American and English law reports.

Major Findings

Research on the topic at hand provides the author of this thesis with information to draw the following conclusions: Supervision of students is an extremely important element of a teacher's duty. Even though it is impossible for teachers to supervise students on a minute-to-minute basis, they must pay particular attention to activities that are potentially dangerous. The greater the degree of danger, the greater the demand for supervision of students.

A second conclusion to this study is that a child can voluntarily assume the physical risk of an activity which may be inherently dangerous, but the law disallows children to consent to the legal risk. If negligent conduct of the defendant is proven, and the plaintiff is contributorily

negligent, the courts will usually apportion the blame to both the plaintiff and the defendant.

Thirdly, some courts have been lenient with teachers who supervise sports for fear that undue restrictions may stifle the spontaneity of the sport or discourage teachers from choosing to become involved in these activities.

Many Canadian courts treat voluntary assumption of risk as a defense rather than including it in the duty of care issue.

Voluntary assumption of risk can be both implied or expressed. However, it must be stated in court and then proven by the defendant in order for the suit to be successful.

When students are a discipline problem, courts are likely to favor the defendant in cases where a disobedient student ignores the instructions of the teacher and becomes injured.

An infant has severe limitations in contractual law. When an infant enters into such an agreement and the obligations outweigh the benefits for the child, the contract may be voided.

Courts take into consideration the age, experience, gender, physical and mental characteristics of a student when determining what the standard of care owed to the student should be and whether there has been contributory negligence.

Injury to a person does not necessarily constitute negligence. It must be shown that reasonable precautions were taken to avoid the injury.

Students do not shed their constitutional rights at the school gate. Schools and boards have the right to legislate suitable rules and regulations to promote safety and equality for all students. An equitable balance must be achieved between permissiveness and control to maintain safety and equality for all.

Finally, parents are restricted in signing away a child's rights to compensate for injuries and courts are generally very reluctant to limit the child's right to sue.

Conclusions

The major questions that were posed in chapter I will now be dealt with on an individual basis.

1. What are the essentials of actionable negligence and where does voluntary assumption of risk fit into the principle?

The essentials of actionable negligence, as outlined in chapter II are: a duty of care must exist, there must also be a breach of that duty of care, some form of damage must have resulted from that breach, and finally, there must be a close connection between the event or series of events that took place and the resulting injury.

Although some courts have, on occasion, included the voluntary assumption of risk concept into the duty of

care issue, most courts generally use voluntary assumption of risk as a defense.

2. What significant factors were considered in lawsuits in which a volenti defense was used?

(a) What activities were the litigants involved in when the injury occurred?

The litigants in the cited lawsuits were involved in active and spectator sports, Physical Education, Recess and after-school play.

(b) What type of consent , i.e., implied or express (written or oral), is considered in this type of litigation?

Implied or express consent is acceptable in this type of litigation. It may be written or oral. However, the onus is on the defendant to prove that the consent was made prior to the injury.

(c) Does waiver of rights constitute assumption of risk?

Waiver of rights is an important element of the voluntary assumption of risk. Canadian courts have viewed this element as a necessary component to a successful volenti defense. Canadian law requires proof that a bilateral bargain was actually made to waive the legal rights, expressly or by necessary implication from the facts, with the onus on the defendant to provide such proof. Consent or acceptance of the risk is not enough; there must be an agreement and a waiver. This, however, does not apply to children. The legal age at which the law allows students

to waive their legal rights cannot be adequately ascertained at this point in time for no rule of thumb exists, in the courts of law, on this issue. Therefore, one can merely speculate, based on medical issues, as to what age the law will allow students to waive their legal rights.

(d) What mental capabilities do courts consider necessary for a student to possess or display in order for the student to fully appreciate the nature or extent of the risk involved in the activity he is to undertake?

American courts consider training of the student for the activity-at-hand of importance to the case. Courts generally decide this issue on the basis of the child's intelligence and the society's norms for the child of the age in question.

(e) Must students possess any special skills, experiences or physical capabilities in order to undertake an activity assumed to possess an inherent risk?

Courts generally decide each case with the child's experience and physical characteristics, as some of the important factors.

(f) At what chronological age is a student considered legally able to accept a risk himself/herself in a school activity sanctioned by the school?

It has been noted that a six-year-old could be guilty of contributory negligence. Since some courts apply the same standards to voluntary assumption of risk as they do to contributory negligence, the youngest person on record in

this thesis to have been held liable is a six-year-old child. However, it must be noted again that children can assume the physical risk and not the legal risk. Any proven negligence on the part of the defendant could very likely render the defendant liable.

(g) Are male students treated differently from female students in this type of litigation?

The American courts consider the gender of the child of importance to the case.

3. Do the following activities possess an inherent risk and, if so, can they, therefore, provide the defendant with a volenti defense in a court of law?

(a) Sports active and spectator;

(b) Field trips - extended over several days or local one-day trips;

(c) Students working in trade shops at school or on-the-job training in commercial establishments;

(d) School laboratories - Chemistry, Physics, and Biology.

Each of these activities do possess an inherent risk at times. Provided there is no negligence on the part of the teacher, he or she cannot be held liable.

(e) Smoking in school designated rooms on the school premises.

According to the Surgeon General, smoking is hazardous to the health. However, no cases have been recorded where the plaintiff was successful in legal action

against tobacco companies for ill health caused from cigarette smoking. Therefore, it appears unlikely that educators would be held liable.

4. Is there a breach of the students' constitutional rights when a student is denied the liberty to voluntarily undertake an activity that is considered to possess an inherent risk?

Students do not shed their constitutional rights at the school gate. Students must be recognized as 'persons' under the constitution. However, courts have acknowledged that school administrators and boards have the right to legislate suitable rules and regulations in order to promote safety and equality for all students. An important factor to remember is that an equitable balance should try to be maintained between permissiveness and control. This will provide a congenial atmosphere in which both teachers and students can work harmoniously with each other.

5. What factors, if any, distinguish voluntary assumption of risk from:

(a) Contributory negligence?

Voluntary assumption of risk and contributory negligence are both defenses in a court of law. However, voluntary assumption of risk is a total defense while contributory negligence is only a partial defense. Voluntary assumption of risk is based on consent, while contributory negligence arises when the plaintiff fails to exercise due care.

(b) Volenti non fit injuria?

Canadian law equates volenti non fit injuria with voluntary assumption of risk. However, American courts apply voluntary assumption of risk to cases where there is a master-servant relationship, where adults are involved, and the volenti non fit injuria maxim is applied to proper cases independent of contractual relationships.

(c) Ordinary risk?

Risk that is obvious and necessary in any activity is considered ordinary risk. Risks that should not exist except for the negligence of the defendant are not classified as ordinary risks.

Recommendations

This study provides factual evidence that teachers, educators, and boards are subject to litigations arising from school activities. Duty of care placed upon educators significantly increases the importance of familiarization with some legal aspects of education. This study has attempted to provide some factual information to the educators on a specific area of the law, viz., tort liability and voluntary assumption of risk. As a result of this study, several recommendations are hereby provided to help benefit those concerned.

1. When dealing with the public, it is important to familiarize oneself with the laws that will affect one's employment. The onus should be on the universities to provide adequate opportunities for all teachers to attain

the fundamental basic knowledge of legal aspects of education.

2. Teachers who are already employed should be given the opportunity to broaden their understanding of the legal aspects of education through in-services provided by the Department of Education. It should be mandatory for all teachers to attend at least one of these in-services.

3. More research should be directed by graduate students into the legal aspects of education in order to provide more information in this area.

4. A study should be done on contributory negligence, a defense that may someday replace the voluntary assumption of risk defense.

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