

LT1: Assignment 1

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Question 2 – The Slide features a court case involving two grade 2 students at Western Canada Elementary School. The two students, Dakota and Ellen, have a complicated history of social and physical altercations. In grade one, both students were separated due to multiple incidents of bullying that occurred during their previous year, with one particular incident resulting in a one-day suspension for Ellen after she purposefully scratched Dakota's arm.

The incident in question occurred while the Division 1 students were on the playground. Ellen saw Dakota in a vulnerable position and purposefully pushed her off of the play structure. She hit her head on the ground, and showed symptoms of a serious concussion. She was taken to the hospital and doctors discovered that she had developed a traumatic brain injury. Ms. Morgan was the only supervisor present during the incident, and was unaware of the history between Dakota and Ellen. Ms. Morgan took immediate action and sought proper medical care for Dakota.

Following this event, Dakota's parents sued the Board of Education and Ms. Morgan for violating the *Education Act* (R.S.O. 1990, c. E.2, *Occupiers Liability Act*, R.S.O. 1990, c. O2). The evidence to be examined includes the school handbook, duties and expectations of supervisors as outlined in the *Education Act*, the students' behaviour, and the outcomes of relevant cases. All evidence in this case will be thoroughly examined to determine potential liability for and against Ms. Morgan, the Cow Town School Board, and Dakota. The arguments and evidence will be presented and explained in the following sections.

The Case For and Against Ms. Morgan

According to the *Education Act* and the *Teaching Profession Act*, teachers must offer an appropriate duty of care for students according to the Canadian *Criminal Code*. In order to establish negligence for an educator, a plaintiff must suffer damages, those damages must be the result of actions or omissions of a defendant, the actions of the defendant must have fallen outside of reason for an individual acting with ordinary prudence, and the defendant must have a duty of care to the plaintiff. Dakota suffered damages while under the duty of care to Ms. Morgan but it cannot be proven beyond reasonable doubt that damage occurred due to the actions of Ms. Morgan, or that Ms. Morgan acted outside of ordinary prudence.

In *Patrick v St Clair Catholic District School Board*, 2013 ONSC 4025 (CanLII), similar circumstances aimed a lawsuit at Mrs. Walker who was unable to intervene during a school yard fight. Under the investigation of a specialist, “Mrs. Walker failed to carry out her supervisory responsibilities that day because she was not close to where grade 7 and 8 students were playing” [82]. The students in question were found to be “high risk” due to a known history of aggression which necessitated additional monitoring. However, Mrs. Walker abided by the established St. Clair Catholic District School Board supervision standard and the judge dismissed the case. There was no reasonable cause to predict that injury would befall the student and Mrs. Walker was preoccupied by the needs of other students during the incident. Additionally, the investigating specialist agreed that if a student breached the code of conduct, they could plan their actions for a time when it would be possible to get away with it under adequate supervision.

Since Ms. Morgan also abided by the Cowtown School Board supervision policy, *Patrick v St. Clair* establishes *Stare Decisis* which would find Ms. Morgan is innocent of negligence. Ms. Morgan was unaware of the “high risk” nature of Dakota and Emma’s relationship, having no

cause to keep a closer eye on both students. Ms. Morgan acted within the expected standard of care, even providing emergency first aid and we find no reason for her to assume liability in the case of *Dakota v Cowtown school board*.

The Case For and Against the Cow Town School Board

The primary factor of consideration in the liability of the school board, is the supervision standard of one supervising teacher per 15 students. As noted in the case of *Deo v. Vancouver School District* (2018), the number of supervision aides assigned to each school is determined by a formula set by the School Board. It is also mentioned in this case that “students in Grades 1 and 2 often require more attention on the school grounds, because they are less likely to appreciate a dangerous situation than older students.” When designing supervision regulation, the school must take into consideration the safety of students and the capacity of an individual teacher. There is a threat of allegation that inadequate supervision standards set by the school board, failed to ensure a proper standard of care for Dakota. Although Ms. Morgan abided by the established supervision standards, her supervision may have fallen below the accepted standard because the Cowtown school board failed to effectively communicate the history of bullying between Ellen and Dakota.

Even with additional supervision, the sudden and violent push Ellen gave to Dakota may not have been predictable. As per the *Patrick v St Clair Catholic District* (2013) case, the defendant found that the first child was punched “in the vanishing moment, suddenly and without warning. The punch would not likely have been prevented, even if one or two more teachers had been present in the schoolyard.” [242] However, in this case the outcome could

have been predicted. Emma and Dakota were not allowed in the same grade 2 class. By failing to warn the acting supervisor of the hazard posed by Ellen and Dakota's relationship, the School Board failed to meet its duty of care under the Act. The school was aware of violence between students and facilitated dangerous play by allowing them to be together at lunch time.

The School Board should have initially alerted teachers of the hazardous game of Grounders along with the design of the school's playground. The plaintiff in question was not the first to be diagnosed with a serious injury arising from Grounders. Two months prior there was an accident in Oilertown. The action of banning Grounders was taken only after Dakota developed her brain injury. *Deo v Vancouver School District's* (2018) case states that "The Occupiers Liability Act, R.S.B.C. 1996, c. 337, s. 3(1) provides that an "occupier" (school board) of premises owes a duty to take reasonable care to see that those who use or are present on the premises are reasonably safe. By virtue of s. 3(2) of the Act, the occupier's duty of care applies to (a) the condition of the premises, (b) the activities on the premises, and (c) the conduct of third parties on the premises." [93] This relates to the permission granted to play a dangerous game where students must have their eyes closed on outdated equipment. Additionally, the game is played within dangerous conditions (in this case, with a bully present and lack of supervision and communication). Although, as considered in *Deo v Vancouver School District* (2018), the standard is "one of reasonableness and not perfection", and the school board is "not an insurer against any possible risk of harm". [95] Even with this in mind, the Cow Town School Board failed to meet the standard of care for Dakota. Therefore we would hold the school board liable for this incident.

The Case For and Against Dakota

When looking at the contributory negligence that Dakota may be liable for in this case, an immediate question to consider is “why was Dakota playing with Ellen in the first place?” Knowing that Ellen has been suspended due to a previous incident, Dakota risked an altercation by deciding to play together. Drawing from *Deo v Vancouver School District* (2018), the plaintiff, though warned about the tree branch “to look out”[20, a)] by their peers still, engaged in the risky activity which resulted in a hospitalization and eye surgery.

Another factor to consider is the reckless style of play that Dakota was engaging in. A slide is not meant to be stood on as there is a total risk of falling. Dakota violates the student handbook in a direct way as it states “students shall keep the school safe, play safe, respect others and help create a positive school climate.” Additionally, “students shall not engage in bullying, violence and dangerous and reckless behaviour.” Though Dakota is the victim of another student who also breached the handbook, there is an argument to be made that Dakota engaged in “dangerous and reckless behaviour” as she was not playing “safe”. On the other hand, in the case of *Bain v. Calgary Board of Education* (2018), on the basis of contributory negligence it was found “Defendants point to the fact that Kevin Bain was over 19 years of age at the time of the accident, and should be held to the objective standard of a reasonable adult.”[58]. Paralleling this case, we must look at the age group of Dakota. Being in grade two there is reasonable expectation Dakota is not held to an objective standard to that of an adult, or even of an adolescent.

As a final note, it is important to acknowledge that these injuries were intentional. Ellen saw an opportunity to cause bodily harm to Dakota. In the case of *Patrick v. St Clair Catholic District School Board* (2013), “D.G. was charged and convicted of assault”[70] after pushing the plaintiff to the ground and punching him. The court decided to side with the victim despite both parties

violating rules within the student handbook. The actions of Ellen forcefully pushing Dakota off the playground displays direct intent to cause bodily harm, this is evident, but Dakota's actions must be considered. Considering grades one to three were participating in the most popular game to play is noted to be 'Grounders', Dakota does not consider the possibility that further altercations could arise from their interaction. The intention to cause bodily harm is where Dakota's contributory negligence deviates from total liability, though standing on slide breaches the handbook, she never accidentally fell off, she was intentionally pushed. If fellow students were unaware of the previous incident between Ellen and Dakota no one could have known there was a chance for an additional incident similar in *Hamilton v School District No 37* where the students did not see what was described by the plaintiff prior to the result of the incident.

Conclusion

In the lawsuit of Dakota v the Cowtown Board of education, it is the legal opinion of this team that:

1. Ms. Morgan will not be found negligent for her conduct as supervisor to Dakota's injury. Ms. Morgan acted in accordance with the established standard of care, abiding the Cowtown board of education policy on supervision and provided appropriate emergency care to Dakota. Common law established in *Patrick v St Clair* sets the precedent that an educator can not be expected to exceed supervision policy, even in the case of "high risk" students.
2. The Cowtown Board of Education will be held partially liable for injuries sustained by Dakota while under the protection of the education act. Inadequate supervision standards created an unsafe environment, which allowed high risk students to engage in violence despite the presence of an educator. The Cowtown Board of Education violated the

Occupiers Liability Act according to common law established in *Deo v Vancouver School district*.

3. Dakota will be found contributorily negligent in the injuries she sustained during the incident. Dakota chose to engage in dangerous play which put her at higher risk of injury and ultimately contributed to her damages. However, Dakota being a grade 2 student, can not be expected to act at the standard of an adolescent and the unsafe design of the slide could affect our decision upon further investigation.

References

Bain (Guardian ad litem of) v Calgary Board of Education, 1993 CanLII 7301

<http://canlii.ca/t/2brbx>, (Alta QB) at paras 1-60, [1994] 2 WWR 468.

Deo v Vancouver School District No 39, 2018 BCSC 133 (CanLII), <http://canlii.ca/t/hq2x2>

Education Law in Canada [“ELIC”], Chapter 4: Educator Rights and Duties.

<https://justis-vlex-com.ezproxy.lib.ucalgary.ca/#WW/vid/869421746>

Hamilton v School District No 37, 2010 BCSC 712 (CanLII), <http://canlii.ca/t/29v33>

MacCabe v Westlock Roman Catholic Separate School District No 110, 2001 ABCA 257

(CanLII), <http://canlii.ca/t/5rcq>, at paras 1-79.

Patrick v St Clair Catholic District School Board, 2013 ONSC 4025 (CanLII),

<http://canlii.ca/t/g2vjr>

MM v PM, 2000 BCSC 1597 (CanLII), <http://canlii.ca/t/1fmfr> at paras 1-7 and 31-71